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**DIGEST**

OF ALL THE REPORTED DECISIONS OF

**THE SUPREME COURT**

OF THE

**STATE OF VERMONT,**

CONTAINED IN THE REPORTS OF N. CHIPMAN, TYLER, BRAYTON,  
D. CHIPMAN, AIKENS, AND IN FORTY EIGHT VOLUMES  
OF VERMONT REPORTS; ALSO, OF ALL  
THE DECISIONS OF THE

COURTS OF THE UNITED STATES FOR THE DISTRICT  
OF VERMONT

WHICH ARE FOUND IN THE VERMONT REPORTS.

0

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BY

**DANIEL ROBERTS.**

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BURLINGTON, VT.  
1878.



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## P R E F A C E.

This Digest has been prepared in compliance with a contract made with the Judges of the Supreme Court and the State Librarian, some years ago, under a joint resolution of the Legislature. I regret that I have been obliged to keep my professional brethren so long waiting its appearance;—a delay more annoying to myself, I may say, than harmful to them, since each year's delay has added to the work the substance of a new volume of Reports. It has cost me much labor, and, whether it be the better or the worse on this account, it is my own without assistance, except in the making up of the Table of Cases and in the proof-readings. The work has involved the careful reading of every case reported in fifty-six volumes of Reports, and the attempt to extract from each case what is in it, omitting nothing important to the decision, and to arrange in orderly form the principles of the decisions, with such illustrations as the facts of each particular case afford. It would have been much easier, by use of scissors and paste-brush, to make up this Digest of clippings of the head notes of the cases, as reported, but this would have made the work too voluminous, and, besides, these head notes are not in all cases trustworthy. I have sought to bring together, or in connection, the cases which confirm, qualify, distinguish, or in some way illustrate each other, and, by reference to future citations of the same case, have sought to give its judicial history and show its worth as an authority, and in this way to exhibit the present "form and pressure" of Vermont decisions. Still, this is meant to be a digest, not a treatise, which last it could not be to much extent of completeness, though aimed in that direction. Another advantage of this reference to later citations of a case will be appreciated by the student of his cases, since, he will be apt to find associated with the case, as later cited, other authorities bearing upon the question of his study. A reference to the following cases, as cited in the Digest, among many others, may be taken as illustrations: *Arlington v. Hinds*, p. 106; *Olcott v. Dunclee*, p. 144; *Kettle v. Harvey*, p. 162; *Tyson v. Doe*, p. 167; *Barnard v. Flanders*, p. 296; *Adams v. Adams*, p. 323; *Buck v. Pickwell*, p. 338; *Wheeler v. Lewis*, p. 354; *Slocum v. Catlin*, p. 459; *Allen v. Ogden*, p. 527; *Hunt v. Fay*, p. 569; *Yale v. Seely*, p. 612.

Great pains have been taken to secure accuracy in citation and in the Table of Cases. The discovered errors of the print are so few and unimportant, being, for the most part, such as suggest their own correction, that I have not deemed author or printer deserving the discredit of a table of *errata*.

To save space, I have cited the cases by single names of the parties. I have omitted to digest or cite a very few decisions, principally in the earlier reports, being such as by change of statutes, or otherwise, have become obsolete, or seemed wholly unimportant; but the names of these may be found in the Table of Cases, for the benefit of the antiquary, or the curious.

I could wish this were a better book, but, as it is, I commend it to the favorable consideration of my professional brethren, to whom I am sure it will prove, if not an authority, a convenience and a help, pointing them to the authoritative oracles of Vermont law, and serving as a concordance of its scriptures.

DANIEL ROBERTS.

*Burlington, Vt., April, 1878.*



# LIST OF JUDGES

## OF THE

### SUPREME COURT OF VERMONT

FROM THE YEAR 1778 TO THE YEAR 1878.

The names of those who have been CHIEF JUSTICES are indicated by the use of small capitals.

FROM		TO	DIED.
1778, ) 1785, )	MOSES ROBINSON, - - - - -	(1784, (1789,	May 26, 1813.
1778,	John Shepardson, - - - - -	1780,	1798.
1778,	John Fassett, - - - - -	1786,	Not ascertained.
1778,	Thomas Chandler, - - - - -	1779,	"
1778,	John Throop, - - - - -	1782,	"
1779,	PAUL SPOONER, - - - - -	1789,	"
1780,	Increase Mosceley, - - - - -	1781,	May 2, 1785.
1781,	ELISHA PAYNE, - - - - -	1782,	Not ascertained.
1781,	Simcon Olcott, - - - - -	1782,	March, 1815.
1781,	Jonas Fay, - - - - -	1783,	March 6, 1818.
1782,	Peter Olcott, - - - - -	1785,	Sept., 1808.
1783,	Thomas Porter, - - - - -	1786,	Aug., 1833.
1784,	Nathaniel Niles, - - - - -	1788,	Oct. 31, 1828.
1786, ) 1789, ) 1796, ) 1813, )	NATHANIEL CHIPMAN, - - - - -	(1787, (1791, (1797, (1815,	Feb. 15, 1843.
1786,	Luke Knoulton, - - - - -	1787,	Dec. 12, 1810.
1788,	Stephen R. Bradley, - - - - -	1789,	Dec. 16, 1830.
1789, ) 1796, )	Noah Smith, - - - - -	(1791, (1801,	Dec. 25, 1812.
1789,	SAMUEL KNIGHT, - - - - -	1794,	Not ascertained.
1791,	Elijah Paine, - - - - -	1794,	April 28, 1842.
1791,	ISAAC TICHENOR, - - - - -	1796,	Dec. 11, 1838.
1794,	Lott Hall, - - - - -	1801,	May 17, 1809.
1794,	ENOCH WOODBRIDGE, - - - - -	1801,	July 14, 1803.
1797,	ISRAEL SMITH, - - - - -	1798,	Dec. 2, 1810.
1801,	JONATHAN ROBINSON, - - - - -	1807,	Nov. 3, 1819.
1801,	ROYAL TYLER, - - - - -	1813,	Aug. 16, 1826.
1801,	Stephen Jacob, - - - - -	1803,	Jan. 27, 1817.
1803,	Theophilus Harrington, - - - - -	1813,	Nov. 17, 1813.
1807,	Jonas Galusha, - - - - -	1809,	Sept. 24, 1834.
1809,	David Fay, - - - - -	1813,	June 5, 1827.

## LIST OF JUDGES.

FROM		TO	DIED.
1813,	Daniel Farrand, - - - - -	1815,	Not ascertained.
1813,	Jonathan H. Hubbard, - - - - -	1815,	Sept. 20, 1849.
1815,	ASA ALDIS, - - - - -	1816,	Oct. 16, 1847.
1815,) 1823,)	RICHARD SKINNER, - - - - -	(1817, (1829,	May 23, 1833.
1815,	James Fisk, - - - - -	1817,	Dec. 1, 1844.
1816,	William A. Palmer, - - - - -	1817,	Dec. 3, 1860.
1817,	DUDLEY CHASE, - - - - -	1821,	Feb. 23, 1846.
1817,	Joel Doolittle, - - - - -	1823,	March 9, 1841.
1817,	William Brayton, - - - - -	1822,	Not ascertained.
1821,	CORNELIUS P. VAN NESS, - - - - -	1823,	Dec. 15, 1852.
1822,) 1829,)	CHARLES K. WILLIAMS, - - - - -	(1824, (1846,	March 9, 1853.
1823,	Asa Aikens, - - - - -	1825,	July 12, 1863.
1825,	SAMUEL PRENTISS, - - - - -	1830,	Jan. 15, 1857.
1825,	TITUS HUTCHINSON, - - - - -	1834,	Aug. 24, 1857.
1825,) 1829,)	STEPHEN ROYCE, - - - - -	(1827, (1852,	Nov. 11, 1868.
1827,	Bates Turner, - - - - -	1829,	April 30, 1847.
1828,	Ephraim Paddock, - - - - -	1831,	July 27, 1859.
1830,	John C. Thompson, - - - - -	1831,	June 27, 1831.
1831,	Nicholas Baylies, - - - - -	1834,	Aug. 17, 1847.
1831,	Samuel S. Phelps, - - - - -	1838,	March 25, 1855.
1834,	Jacob Collamer, - - - - -	1842,	Nov. 9, 1865.
1834,	John Mattocks, - - - - -	1835,	Aug. 14, 1847.
1835,	ISAAC F. REDFIELD, - - - - -	1860,	March 23, 1876.
1838,) 1852,)	Milo L. Bennett, - - - - -	(1850, (1859,	July 7, 1868.
1842,) 1844,)	William Hebard, - - - - -	(1843, (1845,	Oct. 22, 1875.
1843,) 1845,)	Daniel Kellogg, - - - - -	(1844, (1851,	May 10, 1875.
1846,	Hiland Hall, - - - - -	1850,	
1846,	Charles Davis, - - - - -	1848,	Nov. 21, 1863.
1848,) 1857,)	LUKE P. POLAND, - - - - -	(1850, (1865,	
1851,	Pierpoint Isham, - - - - -	1857,	May 8, 1872.
1857,	Asa O. Aldis, - - - - -	1865,	
1857,	JOHN PIERPOINT, - - - - -		
1857,	James Barrett, - - - - -		
1859,	Loyal C. Kellogg, - - - - -	1867,	Nov. 26, 1872.
1860,	Asahel Peck, - - - - -	1874,	
1865,	William C. Wilson, - - - - -	1870,	
1865,	Benjamin H. Steele, - - - - -	1870,	July 13, 1873.
1867,	John Prout, - - - - -	1869,	
1869,	Hoyt H. Wheeler, - - - - -	Resigned March 31, 1877,	
1870,	Homer E. Royce, - - - - -		
1870,	Timothy P. Redfield, - - - - -		
1870,	Jonathan Ross, - - - - -		
1874,	H. Henry Powers, - - - - -		
1877,	Walter C. Dunton, appointed in place of Hoyt H. Wheeler, resigned.		

## REPORTS COMPRISED IN THIS DIGEST.

Nathaniel Chipman's Reports, . . . . .	1 Vol., cited N. Chip.
Tyler's Reports, . . . . .	2 Vols., " 1-2 Tyl.
Brayton's Reports, . . . . .	1 Vol., " Brayt.
Daniel Chipman's Reports, . . . . .	2 Vols., " 1-2 D. Chip.
Aikens' Reports, . . . . .	2 Vols., " 1-2 Aik.
Vermont Reports, . . . . .	48 Vols., " 1-48 Vt.

The citation *Slade's Stat.* denotes a reference to the compilation of the Statutes of 1824; *R. S.* to the "Revised Statutes" of 1839; *C. S.* to the "Compiled Statutes" of 1850; and *G. S.* to the "General Statutes" of 1862.

Decisions of the Circuit and District Courts of the United States for the District of Vermont, as reported by HON. SAMUEL PRENTISS, District Judge, contained in Vols. 20 to 25, inclusive, of Vermont Reports :—

### IN THE CIRCUIT COURT.

Bank of United States *v.* Lyman *et al.*, 20 Vt. 666.  
 Boody *et al.* *v.* Rutland & Burlington R. Co., 24 Vt. 660.  
 Bradley *et al.* *v.* Richardson *et al.*, 23 Vt. 720.  
 Byam *et al.* *v.* Eddy, 24 Vt. 666.  
 Hatfield *v.* Bushnell, 22 Vt. 659.  
 Hubbard *et al.* *v.* Northern Railroad Co., 25 Vt. 715.  
 Marvin *v.* Dennison *et al.*, 20 Vt. 662.

### IN THE DISTRICT COURT.

Chase, *in re*, 22 Vt. 649.  
 Comstock, *in re*, 22 Vt. 642.  
 Downer *et al.* *v.* Brackett *et al.*, 21 Vt. 599.  
 Gassett *et al.* *v.* Morse *et al.*, 21 Vt. 627.  
 Moore *v.* Jones *et al.*, 23 Vt. 739.  
 Pearce, *in re*, 21 Vt. 611.  
 Reed, *in re*, 21 Vt. 635.  
 Rowell, *in re*, 21 Vt. 620.  
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# VERMONT DIGEST.

## A.

### ACCORD AND SATISFACTION.

1. **Accord.** After a simple contract is broken and damage thereby has accrued, it cannot be discharged by parol without satisfaction or some consideration, though it may be before. But if there be a new agreement upon good consideration, which covers all claim under the first, and such new agreement be performed, it is a satisfaction and a defense, though the first was written and the last verbal. *Cutler v. Smith*, 43 Vt. 577.
2. An admission, with or without writing, given voluntarily and without consideration, that the party is perfectly satisfied and shall make no claim, does not amount to an accord and satisfaction. *French v. Raymond*, 39 Vt. 623.
3. C purchased the defendant's goods and, in part consideration thereof, agreed to pay the defendant's debt to the plaintiff. C thereupon wrote the plaintiff that her husband *proposed* to give his note at six months for said debt, and the plaintiff replied, *accepting the proposition*. The note was never given, but C made remittances to the plaintiff from time to time to apply on the debt. *Held*, a mere accord, and that the defendant was not thereby discharged from the balance of the debt. *Rising v. Cummings*, 47 Vt. 345.
4. It is no defense to an action against a sheriff for neglect to levy and return an execution, that, after the sheriff had become liable, it was agreed between the plaintiff and the execution debtor that the balance due on the execution should be charged to the debtor on the plaintiff's books, and be adjusted with their other deal, and that this should be in discharge of all other liabilities and remedies, without proof that such balance had been actually paid or so adjusted—this being but an executory agreement, and without consideration. *Nye v. Kellam*, 19 Vt. 548.
5. The defendants, A and S, contracted with the plaintiff and several others jointly interested with him in building certain masonry, to quarry and furnish for them the necessary stone; and at the same time the plaintiff and B, his then partner in the selling of goods, since deceased, and an associate in the masonry job, agreed with the defendants that the account which had before accrued against A, and whatever account should thereafter accrue against A, or against both defendants, for goods from the store, should apply on the stone contract, and be paid for in stone to be furnished under it. The defendants entered upon the performance of the stone contract, but failed to complete it, without fault on their part, but in consequence of a breach of it by the other parties. *Held*, that the plaintiff could not recover the account for goods had by A, or by both defendants, upon the faith of said contract, after the making of it; but that he might recover for the account which had accrued before—that, as to this, the agreement was only an accord without satisfaction. *Gleason v. Allen*, 27 Vt. 364.
6. —**and satisfaction.** Where the plaintiff had a small valid claim against the defendant, but told the defendant he would "give it in," to satisfy a claim which the defendant made on him, and neither party made any charge or claim against the other for some years, nor until after a controversy had arisen between them, this was *held* to be an accord and satisfaction of the plaintiff's claim, although he was under no legal or moral obligation in fact to pay the defendant's claim. *Abbott v. Wilmot*, 22 Vt. 437.
7. —**by new agreement performed.** Where the agreement was, that if the defendant would do a certain service and other things, the plaintiff would deliver up to the defendant, to be satisfied, a certain judgment and execution thereon which the plaintiff had against the defendant and another, and the defendant fully

performed the agreement on his part,—*Held*, that the agreement performed became an accord executed and accepted in satisfaction of the judgment, and a bar to an action thereon. *Cobb v. Cordery*, 40 Vt. 25.

8. —**by substituted security.** An agreement upon sufficient consideration, fully executed, and understood as a full satisfaction and settlement of a pre-existing contract or account, is a good accord and satisfaction and settlement, whether the new contract be ever paid, or not. *Babcock v. Hawkins*, 23 Vt. 561. *Flagg v. Mann*, 30 Vt. 573. *Cobb v. Cordery*.

9. There is no want of consideration, in any such case, where one contract is substituted for another. *Ib.*

10. The accord is sufficiently executed, when all is done which the party agrees to accept in satisfaction, in the present tense, of the pre-existing obligation. *Ib.*

11. In every case of an accord and satisfaction by the substitution of one security, or contract, for another, whether of the same or a higher grade, the action, in case of failure to perform, must be upon the substituted contract. *Babcock v. Hawkins*. *Bryant v. Gale*, 5 Vt. 416.

12. **Account stated.** An account stated is no bar to a recovery upon the original account, whether for money, or labor, or other thing, and whether payable in specific articles, or not. *Cross v. Moore*, 23 Vt. 482.

13. **Statute of frauds.** *Held*, that an agreement by parol between the plaintiff, the defendant and C, that C will make and the plaintiff will receive payment of the defendant's debt to the plaintiff in certain bonds, does not, of itself, amount to a substitution of one obligation for the other, nor to an accord and satisfaction; and although C may remain willing to pay the bonds, yet, not being paid, the defendant remains liable upon his original indebtedness. *Buchanan v. Paddleford*, 43 Vt. 64.

14. Waiver of a mere naked promise to pay the debt of another, which promise is also within the statute of frauds, does not discharge the original debtor,—there being no executed substitution. *Rising v. Cummings*, 47 Vt. 345.

15. **Conditional agreement.** The plaintiff agreed to take a certain sum in compromise of a claim for breach of contract, if the defendant would pay it without suit or further trouble, and the defendant agreed to pay it. The defendant afterwards denied the agreement and refused to pay. *Held*, that here was no such settlement as prevented an action upon the original contract. *Piper v. Kingsbury*, 48 Vt. 480.

16. **Agreement revoked.** An agreement to take back in satisfaction of the trespass, property wrongfully taken, may be revoked before delivery, and in such case the delivery

would only go in mitigation of damages. *Smith v. McCall*, 48 Vt. 422.

17. **Tender with condition.** To constitute an accord and satisfaction, where money is offered and received upon a claim, it is necessary that the money should be offered in satisfaction of the claim, and the offer be accompanied with such acts and declarations as amount to a condition, that if the money is accepted it is accepted in satisfaction; and such that the party to whom it is offered is bound to understand therefrom, that if he takes it, he takes it subject to that condition. *Pierpoint, J.*, in *Preston v. Grant*, 34 Vt. 203; *Brigham v. Dana*, 29 Vt. 1.

18. If money is tendered "for all that is due," or "for what the defendant owes the plaintiff," and it is taken, it must always be a question of fact, whether it was, by way of compromise, received in full satisfaction, though the plaintiff on trial should establish his claim for a greater sum. *Bennett, J.*, in *Miller v. Holden*, 18 Vt. 340.

19. The defendant offered the plaintiff money, saying he tendered it for what he owed the plaintiff. The plaintiff offered to receive it in part payment. The defendant said he would not have it so. The witness to the tender then suggested, that it would make no difference if the damages and costs on trial should prove to be more than the sum tendered, and thereupon the plaintiff received the money. The auditor reported that there was a larger sum due the plaintiff. *Held*, that the plaintiff could recover the sum due above the tender—that the minds of the parties did not meet in an agreement that the sum tendered should be received in full. *Ib.* 337.

20. After suit commenced, the defendant tendered the plaintiff a sum of money "in full of all his legal claims and for costs of suit." The plaintiff said the tender was not enough, but that he would take it and give credit for it, and did so. Nothing more was said. *Held*, not a bar to the plaintiff's recovery of the balance due. (*Quere*—Is it not to be inferred, that the defendant assented that the plaintiff might receive the money, giving credit for it. *Kellogg, J.*) *Gassett v. Andover*, 21 Vt. 342.

21. Where the defendant, upon an account presented to the plaintiff, claimed a certain sum as the balance of book accounts between them, and the plaintiff, after suit brought against him therefor, tendered to the defendant that sum "for his debt," and a certain sum for costs, which the defendant accepted;—*Held*, that this was conclusive upon the parties as the true balance, so that the plaintiff could not thereafter recover for an item of his account not embraced in such balance, which, before such tender was made, was understood to be and was matter of dispute between the parties, and was not re-



served by the plaintiff when he made such tender. *Draper v. Pierce*, 29 Vt. 250.

22. Where a party makes an offer of a certain sum to settle a claim, where the sum in controversy is open and unliquidated, and attaches to his offer a condition that the same, if taken at all, must be received in full, or in satisfaction of the claim in dispute, if the other party receive the money, he takes it clogged with the condition which the party offering has attached to his offer, and is bound to its fulfillment. This will operate as a full accord and satisfaction, though the party receiving the money declares at the time, that he will not receive the money in that way, but only to account for upon the claim on which it is offered,—the party offering the money not waiving the condition. *McDaniels v. Lapham*, 21 Vt. 222. *McGlynn v. Billings*, 16 Vt. 329. *Cole v. Champlain Transp. Co.*, 26 Vt. 87. See *Foster v. Drew*, 39 Vt. 51. *Towles v. Healy*, *Id.* 522.

23. During a term of court in which this suit was then pending, the defendant tendered to the plaintiff \$55, saying—"I tender fifty-five dollars in full for the debt and costs of suit," and asked the plaintiff if he would receive the money. The plaintiff replied—"Yes, and twenty dollars more." He took and used the money so tendered, claiming more to be due him. *Held*, that the plaintiff's claim was thereby cancelled, notwithstanding his declaration that he wanted or claimed more. *Towles v. Healy*.

24. When a tender or offer is thus made, the party to whom it is made has no alternative but to refuse it, or accept it on such condition. If he takes it, his claim is cancelled, and no protest, declaration or denial of his, so long as the condition is insisted on, can vary the result. *Pierpoint, J.*, in *Preston v. Grant*, 34 Vt. 203.

25. This rule is the same in equity, as at law. *McDaniels v. Bank of Rutland*, 29 Vt. 280.

26. The law is well settled in this State, that if there is a claim in dispute between parties, whether in suit or not, and one offers to the other a specific sum in full settlement or satisfaction of such claim, and the other receives the sum, though he protest never so stoutly that he receives it only in part satisfaction, such receipt of the money is an accord and satisfaction of the claim. *Bromley v. School District*, 47 Vt. 381.

## ACTION.

- I. WHEN MAINTAINABLE.
- II. COMMENCEMENT.
- III. VENUE.
- IV. DISCONTINUANCE.

## V. ABATEMENT BY PENDENCY OF FORMER SUIT.

## VI. SURVIVAL.

## VII. PARTIES.

### 1. Plaintiffs.

### 2. Defendants.

## VIII. WHEN NOT MAINTAINABLE.

### I. WHEN MAINTAINABLE.

1. **Instances.** Where the guardian of a minor paid to the purchaser of the minor's land, at a tax sale under an act of Congress, a sum of money exceeding the tax and interest for a conveyance to the minor, in consequence of the guardian's mistake or ignorance of the provision in the law which allowed the minor to redeem within two years after arriving at age;—*Held*, that the guardian could recover the sum so paid, as money paid by mistake, notwithstanding the maxim: *Ignorantia juris non excusat*. *Brown v. Sawyer*, 1 Aik. 130.

2. In consideration that the plaintiff, a creditor of C, would release an attachment made, the defendant, also a creditor of C, promised the plaintiff not to sue C for one year. *Held*, that for a breach of this agreement the plaintiff could recover such damages as he had sustained thereby. *Boardman v. Wood*, 3 Vt. 570.

3. The general owner of property, attached by his creditors, can maintain a suit against the attaching officer for damage done to it through his negligence, although that suit is still pending and the attachment is still in force. The rights of the officer and of the creditor can be protected by proper orders as to the execution, &c. *Briggs v. Taylor*, 35 Vt. 57.

4. **Concurrent actions.** The plaintiff received of the defendant a good note against a third person, as a pledge or collateral security for a debt due the plaintiff, and of larger amount than such debt, and sued the note and attached personal property. *Held*, that this was no bar or suspension of the plaintiff's right of action upon the original demand, although he did not offer to return the note pledged. *Chapman v. Clough*, 6 Vt. 123, and see *Bank of Rutland v. Woodruff*, 34 Vt. 89.

5. **Successive.** The defendant promised the plaintiff to pay and save him harmless from three several notes of the plaintiff outstanding, and to fall due in three successive years. After all the notes had become due, the plaintiff was sued upon the first and compelled to pay it, whereupon he sued the defendant for indemnity as to that. The same thing afterwards occurred as to the second note, whereupon the plaintiff brought a second suit for indemnity as to that. *Held*, that successive actions lay upon the contract, and that the judgment in the first was not a bar to the second. *Hosford v. Foote*, 3 Vt. 891.

6. When part of the whole sum due upon a sealed agreement was made payable in cash at stated times, and the balance, a fifth part of the whole, in goods on demand:—*Held*, that covenant would lie for the cash instalments before demand of the goods. *Stevens v. Chamberlin*, 1 Vt. 25.

7. **Gratuitous undertaking.** A consideration is necessary in order to make a mere refusal to execute a trust a ground of action; but if one enter upon a mere gratuitous undertaking, and then neglect it, he is liable as for a fraud, or gross neglect. *Hyde v. Moffat*, 16 Vt. 271.

## II. COMMENCEMENT.

8. It is no objection to a suit that the plaintiff's right of action was not perfected before the issuing of the writ, if it became so before service. In such case, the service is regarded as the commencement of the suit. *Hall v. Peck*, 10 Vt. 474. 22 Vt. 254. *McDaniels v. Reed*, 17 Vt. 674. *Hawley v. Soper*, 18 Vt. 320.

9. To save the statute of limitations the taking out of the writ, if duly prosecuted, is regarded as the commencement of the action. *Allen v. Mann*, 1 D. Chip. 94. *Day v. Lamb*, 7 Vt. 426.

10. The presentation of a claim against a deceased person's estate to the commissioners for adjudication is the commencement of a suit, or action, and all future proceedings, on regular appeal, or on appeal allowed on petition to the supreme court, are only a continuation of the original proceeding, and it remains the same suit or action pending. *Calderwood v. Calderwood*, 38 Vt. 171. *Kimball v. Baxter*, 27 Vt. 628. *Pierce v. Paine*, 32 Vt. 229. *Graham v. Chandler*, 38 Vt. 559.

## III. VENUE.

11. The common law, as to certain actions being *local*, has been superseded by our statute regulating the places in which actions shall be brought; and none are local unless made so by statute. *University of Vt. v. Joslyn*, 21 Vt. 52. *Hunt v. Pownal*, 9 Vt. 411. *June v. Conant*, 17 Vt. 656.

12. Under the statute requiring *scire facias* against sheriff's bail to be brought in the county where the default, or neglect sued for, happens;—*Held*, that the action was well brought in Windsor county by the State Treasurer, residing and having his office there, for the default of the sheriff of Caledonia county in not serving and returning certain extents for State taxes. *State Treasurer v. Kelsey*, 4 Vt. 871.

13. An action of trespass on the freehold before a justice must, like other actions, be

brought in the town in which one of the parties resides. *June v. Conant*, 17 Vt. 656.

14. The act of Oct. 29, 1811 (C. S. c. 29, s. 36; G. S. c. 31, s. 33), does not apply to a single act of selling on a particular occasion, by one who did not use or follow the trade of vending goods, &c., or, if he did, was only transiently in the town in which the sale was made, and had no established business or place of business there. *Wainwright v. Berry*, 3 Vt. 423. *Stone v. Hazen*, 25 Vt. 178.

15. But it does apply to sales made by a peddler in the usual course of his business, while peddling in a town other than his own or the purchaser's residence. *Richardson v. Stevens*, 41 Vt. 120.

## IV. DISCONTINUANCE.

16. **Causes.** The non-attendance of the justice within the two hours given by statute for appearance after the hour set for trial, operates as a discontinuance. *Brown v. Stacy*, 9 Vt. 118. *Phelps v. Birge*, 11 Vt. 161. *Crawford v. Cheney*, 12 Vt. 567.

17. So also the absence of the parties. *Pike v. Hill*, 15 Vt. 183.

18. So also an unauthorized continuance with appearance of the defendant. *Puddleford v. Bancroft*, 22 Vt. 529. See *Aldrich v. Bonett*, 33 Vt. 202.

19. It is not the death of a party, but the appointment of commissioners for the adjustment of claims, which works a discontinuance of a pending suit under G. S. c. 53, s. 16. *Miller v. Williams*, 30 Vt. 386.

20. The non-entry of an appeal operates as a discontinuance of the action. *Bates v. Kimball*, 2 D. Chip. 83. *Love v. Estes*, 6 Vt. 286. *Probate Court v. Gleed*, 35 Vt. 24. (Changed by statute, as to justice's judgments.)

21. **After entry.** After the entry of a suit upon the docket, it is under the control of the court until the actual entry of discontinuance by direction of the plaintiff. *Conn. & Pass. R. R. Co. v. Newell*, 31 Vt. 364.

22. **Waiver of irregularity.** A subsequent assent to an irregular continuance of a suit is sufficient to prevent a discontinuance. *Collins v. Merriam*, 31 Vt. 622.

23. In a suit returnable before a justice, the plaintiff died before the return day. The case was twice continued because of the inability of the justice to attend, and three times on the request of the defendant, when the administrator entered to prosecute—it not appearing but that this was on the next court day after his appointment. Up to this time the plaintiff's death had not been suggested upon the record. *Held*, that the action was not discontinued. *Babcock v. Culver*, 46 Vt. 715.

24. Where a justice suit is discontinued by

the non-attendance of the justice with the writ at the time set for trial, the lost jurisdiction can be regained only by some voluntary, positive, affirmative act of the defendant, evincing a willingness or consent that the court proceed to hear and determine the case notwithstanding the irregularity. Where such objection was duly raised and insisted upon, but overruled by the justice, and terms were imposed upon the plaintiff, which the defendant took, and two trials were had:—*Held*, nevertheless, that the objection was not waived. *Pinney v. Petty*, 47 Vt. 616.

**25. Notice of discontinuance.** After an action has been entered in court, and costs have been incurred by the defendant, a notice of discontinuance given out of court cannot have the effect, without the consent of the other party, of at once discontinuing the suit;—not even where, also, a tender of the defendant's costs has been made, but not accepted. *Jenney v. Glynn*, 12 Vt. 480. 31 Vt. 370.

**26.** A suit commenced by defective process may be discontinued by a verbal notice, so as to allow the bringing of a new suit immediately for the same cause of action, without abatement; and, in the absence of proof to the contrary, the discontinuance will be presumed to have been made on account of such defect. *Hill v. Dunlap*, 15 Vt. 645.

**27.** Notice of discontinuance need not be in writing to avoid the effect of a plea in abatement; but must be in writing to deprive the defendant of his claim for costs. *Id. Ballou v. Ballou*, 26 Vt. 673. But see *Fullam v. Ives*, 37 Vt. 659, as to last point.

#### V. ABATEMENT BY PENDENCY OF FORMER SUIT.

**28. Both pending at the same time.** The plaintiff had caused his writ to be served upon the defendant, but before the return day sued out another writ for the same cause of action, and gave it to an officer for service, who lodged a copy of it with a return of the attachment of property thereon in the town clerk's office. The officer then delivered to the defendant a written notice from the plaintiff of the discontinuance of the first suit, and afterwards delivered him a copy of the second writ and attachment.—*Held*, that the second suit was not abated by the first, for that both were not pending at the same time—the first having been discontinued before any such service of the second writ as called upon the defendant to answer thereto. Whether the plaintiff had good cause, or any cause, for discontinuing the first suit is not a material inquiry. *Kirby v. Jackson*, 42 Vt. 552.

**29.** A defective suit had been entered in court and the defect pleaded in abatement. The

plaintiff thereupon gave the defendant a written notice of discontinuance, and immediately brought a second suit for the same cause of action and had his writ served, and afterwards, at the same term, had an entry of discontinuance of the first suit made upon the docket.—*Held*, that the second suit was not vexatious, and was not abated by the pendency of the first. *Downer v. Garland*, 21 Vt. 362.

**30.** If two writs be sued out at the same time, the one first served abates the other; but not *e converso*. *Morton v. Webb*, 7 Vt. 123.

**31. Identity of parties and cause of action.** In order that the pendency of a former suit should abate a later one, it is essential, not only that the cause of action be the same in both suits, but that they be in favor of the same plaintiff. *Held*, that a pending suit in favor of the payee of a promissory note, brought before indorsement, did not abate a suit afterwards brought in favor of an indorsee of the same note. *Thomas v. Freelove*, 17 Vt. 138.

**32.** The pendency of a former suit, for part only of the matters embraced in a second suit, will not abate the second suit, either in whole or in part. *Ballou v. Ballou*, 26 Vt. 673.

**33. Suit in another State.** A suit will not abate by reason of the pendency of a previous suit, between the same parties for the same cause of action, in another State of the United States. *McGillivray v. Avery*, 30 Vt. 538. See *Stoughton v. Mott*, 13 Vt. 175.

**34. —in equity.** The pendency of a prior suit in equity for the same matter cannot be pleaded in abatement of a suit at law; the remedy is by injunction in chancery. *Blanchard v. Stone*, 16 Vt. 234.

#### VI. SURVIVAL.

**35. Action for penalty.** A prosecution *qui tam* for usury abates by the death of the defendant; and if he dies after verdict and during the pendency of a motion in arrest, the court will not thereafter render judgment *nunc pro tunc*. *Benson v. Edgerton*, Brayt. 21.

**36.** Two joint creditors commence an action *qui tam* to recover the penalty against fraudulent conveyances, and one dies. *Held*, that the action survives to the other. *Wright v. Eldred*, 2 D. Chip. 37.

**37. Statute provision.** Under G. S., c. 52, ss. 10–12, providing for the survival of actions "for damages done to real or personal estate," the action does not survive when the tortious act affects the estate only indirectly,—as in *Barrett v. Copeland*, 20 Vt. 244. *Winhall v. Sawyer*, 45 Vt. 466; but when it affects the estate directly, though it be not done to any specific property, the action survives;—as in *Dana v. Lull*, 21 Vt. 383. *Bellows v. Allen*, 22 Vt. 108.

38. An action in favor of a town to recover damages under G. S., c. 20, s. 31, for bringing a pauper into such town, does not survive against the defendant's estate. *Winhall v. Sawyer*.

39. At common law, an action in the name of husband and wife, for injuries to the wife, does not survive to the husband, nor to her administrator; but by our statute such action survives to her administrator. *Earl v. Tupper*, 45 Vt. 275.

40. An action to recover damages for an unlawful arrest and imprisonment survives to the administrator of the party injured, as for a "bodily hurt or injury," under G. S. c. 52, s. 11. *Whitcomb v. Cook*, 38 Vt. 477.

41. This statute makes all actions survive, when the cause of action was for a physical injury to the person caused in any unlawful manner. *Poland, C. J., Ib.* 482.

42. Under G. S. c. 52, a wrongful act, neglect or default, causing death to another, affords two distinct causes of action; one, by survivorship, in favor of the estate of the decedent to recover such damages as he sustained in his lifetime, which recovery becomes general assets (Secs. 10, 11, 12 and 13); the other for the pecuniary injury resulting from such death to the widow and next of kin, to be prosecuted in form by the administrator, but only as trustee for their use. *Needham v. Grand Trunk R. Co.*, 38 Vt. 294.

## VII. PARTIES.

### 1. Plaintiffs.

43. **No such person.** That there is no such person in existence as the plaintiff, may be pleaded in abatement, or in bar, whether the action be professedly in the name of a corporation, or of a natural person. *Boston Type Foundry v. Spooner*, 5 Vt. 93.

44. A suit was brought in the name of "Gray, Drew & Co." The defendant pleaded in abatement that there was no such person in existence. Replication, that Gray, Drew & Co. were the plaintiffs, Dan Gray, John Drew and John Boardman.—*Held*, on demurrer, that Dan Gray, &c., were not and could not become parties to the record, and the plea was held sufficient;—but *held*, also, that the defendant could take no judgment for costs against Dan Gray, &c. *Gray v. Parker*, 16 Vt. 652.

45. **Proprietors.** The statute authorizing suits in the name of the "Proprietors" of towns, does not authorize a suit in the name of "Proprietors of the undivided land" of a certain tract in a particular town. *Proprietors, &c., v. Bishop*, 3 Vt. 92.

46. **The State.** In the absence of legal regulations to the contrary, a suit may, upon

common principles, be brought in the name of the State, when the legal interest is in the State,—as trespass *qua. clau.* for entry upon the State-house grounds and taking away the State's chattels. *State v. Bradish*, 34 Vt. 419.

47. **State treasurer.** In an action of debt commenced before the passage of G. S. c. 85, s. 16, upon the official bond of the State treasurer executed to "Benjamin W. Dean, Secretary of the State of Vermont, and to his successors in office in behalf of the State of Vermont;"—*Held*, that such action could not be brought in the name of the State.—*Held*, also, that such action must be brought in the name of the obligee named, or, if he was out of office, then in the name of his successor in that office, the power to sue being treated as incident to the office, on the principle that, *pro tanto*, the Secretary of State is indueed with a corporate capacity. *State v. Bates*, 36 Vt. 387.

48. **Same person both plaintiff and defendant.** An action at law cannot be sustained, either upon common law principles, or under any statute of this State, when the same person is one of the plaintiffs and also one of the defendants. *Green v. Chapman*, 27 Vt. 236. *Estes v. Whipple*, 12 Vt. 373.

49. **Legal interest.** The right of action to recover for property sold is in him who has the legal interest in the property, not in him who has the equitable interest only. *Heald v. Warren*, 22 Vt. 409.

50. **Instances.** A purchased goods professedly for B, and took a bill of sale in the name of B, but in reality for himself, and paid for them himself. A afterwards sold the goods conditionally to C and procured C to give a receipt acknowledging that he had received the goods of B, and to remain B's until paid for. This receipt A afterwards assigned to D. C sold the goods to F and F to the defendant. The goods not having been paid for—*Held*, that after demand and refusal to deliver them, trover lay in the name of B therefor. *Lord v. Bishop*, 18 Vt. 141.

51. In a suit of A against B, the court imposed terms upon A as a condition for a continuance. A's solicitor thereupon promised B's solicitor to pay the amercement, if he would inform the court that the terms were complied with. He did so inform the court, and the entry was made on the docket, "terms complied with," and the cause was continued. In an action by B against the solicitor of A on such promise,—*Held*, (1), that the promise was on good consideration; (2), that it was not within the statute of frauds, for that the amercement created no debt against A; (3), that the suit was well brought in the name of B, the party for whose benefit the promise was made. *Lampson v. Swift*, 11 Vt. 315.

52. The plaintiff's partner, H, purchased a horse of one K, with an agreement to let the plaintiff have the horse at the same price, if the plaintiff wished. The horse was put, kept and fed with other horses of the firm and used in the partnership business for eight or ten days, when the plaintiff, without ever having expressed his intent to take the horse, exchanged him with the defendant for another horse and \$50, boot money, to be paid. By a subsequent arrangement between the plaintiff and H, the second horse was sent to market and sold on joint account. *Held*, that the property in the first horse became vested in the plaintiff, individually, and that he could recover the boot money in his own name, in an action on book. *Hatch v. Foster*, 27 Vt. 515.

53. The plaintiff made a parol contract with the defendant, by which she agreed to give the defendant all her property, real and personal, and he agreed to support her through life and pay all her debts. At the time the contract was made, she stated that she had some money and notes which she wished to keep, so as not to be obliged to call upon him every time she needed small necessities, but that she considered the money and notes to be his just the same. To this he assented, and immediately took possession of all the property, except said money and notes which were retained by her, and fulfilled his part of the contract by paying her debts and supporting her for nearly three years, when she left his house, refusing to live with him longer, leaving the money and notes in question locked up in her trunk in the room she had occupied in his house. The defendant shortly after broke open the room and trunk and took possession of the money and notes. In an action of trover therefor—*Held*, that even if the defendant should be regarded as the general owner of such money and notes, and not merely as having inchoate rights under a contract executory, the plaintiff had, under the contract, such powers, coupled with an interest, viz., a right of possession and to expend the property for her necessities, as that she could maintain the action. *Lamb v. Clark*, 30 Vt. 347.

54. **Joint interests.** By contract between the plaintiffs, one furnished a boat and the other ran it for transportation of merchandise, they sharing equally the profit and loss of the business. *Held*, that for a loss of the boat by the negligence of the defendant in towing it, a joint action lay for the value of the boat, it being in the joint use of the plaintiffs. *White v. Bascom*, 28 Vt. 268.

55. *Held*, that where two have a joint interest in the damages caused by the destruction of buildings by fire, they may maintain a joint action to recover therefor against the person by whose fault such destruction was caused, although the legal title to the buildings was in

but one of the plaintiffs. *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449.

56. **Non-joinder.** The non-joinder of one who ought to have been made a plaintiff may be pleaded in abatement, or may be taken advantage of on trial. *Hilliker v. Loop*, 5 Vt. 116.

## 2. Defendants.

57. **Not participating.** B hired a sloop on his own account and took on board others, some as working hands and others as passengers. *Held*, that none except B were answerable for the act or neglect of B whereby the vessel was damaged. *King v. Bevins*, 1 D. Chip. 178.

58. The defendant purchased land, then in the possession of a third person, who retained the exclusive possession, no rent being claimed or paid, and built a dam on the land which set back the water upon the plaintiff's land. This was done without the knowledge or consent of the defendant. *Held*, that the defendant was not liable therefor, not being a privy to the wrong either in fact or in law. *Pettibone v. Burton*, 20 Vt. 302.

59. The defendant and one W jointly purchased a lot of land, with an arrangement between them that the defendant should have the land and W the cedar timber upon it. There was a dispute as to the true division line between this lot and the plaintiff's lot adjoining, and the defendant, having knowledge of it, supposed and claimed that a former lawsuit had settled the line against the plaintiff's claim, and so told W, who went on and cut the timber on the land between the two lines, which turned out to belong to the plaintiff. The defendant took no part, nor advised, aided or assisted W in cutting the timber, except that he let his hired man assist W and charged W therefor. *Held*, that the defendant was not liable as a participator in the trespass of W. *Langdon v. Bruce*, 27 Vt. 657.

60. The defendant, by invitation of A, rode with him from Barton to Newport with the plaintiff's team, which A had hired to go only to Barton, and this was known to the defendant, but he exercised no control over the team. In an action of trespass,—*Held*, that the defendant was not liable. *Hubbard v. Hunt*, 41 Vt. 370.

61. The assignor of a note not negotiable is not liable for the misuse of process in a suit on such note in his name, where he has no interest or participation in the suit, or the wrong complained of. *Ross v. Fuller* 12 Vt. 265. 17 Vt. 165.

62. Otherwise where he does so participate. *Tichout v. Cilley*, 3 Vt. 415.

63. For the irregularity of an officer in exe-

cuting a valid process, or for any acts of his beyond the authority which the process confers, the party suing it out is not responsible, unless the officer acts under his orders or direction. *Barnard v. Stevens*, 2 Aik. 429.

64. As a general rule, when an officer in the performance of an official service (as serving an attachment or execution) commits a trespass through a mistake of fact, and the party for whom he acts, knowing all the facts, takes the avails of the act of the officer, or counsels the very act which creates the liability of the officer, he is implicated to the same extent as the officer. But where he does not direct nor control the course of the officer, but requires him to proceed at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser, even by relation, the party is not affected by it, even when he receives the money which is the result of such irregularity, and although he was aware of the course pursued by the officer. This does not amount to a consent to nor adoption of the officer's course, and, without this, the party is not liable. *Hyde v. Cooper*, 26 Vt. 552. *Abbott v. Kimball*, 19 Vt. 551. 21 Vt. 152.

65. The mere expression of an opinion by the creditor to an officer employed by him, that the course taken by the officer was legal, does not make him liable for such act of the officer, if it turn out to be illegal, although he take the benefit of the act. *Hyde v. Cooper*.

66. A party who sues out a search warrant is not liable in trespass for the act of the officer who serves it, by entering the open door of the plaintiff's dwelling house and making search, doing no unnecessary damage, although the goods are not found; and whether the party would, in like case, be liable if the officer, admittance being denied, had forcibly broken open the outer door—*quare*. Clearly the officer would not, although the goods were not found. *Chipman v. Bates*, 15 Vt. 51.

67. **Not contracting.** Where one requests a physician to render professional services for another for whom he is not legally bound to provide,—as, for his servant, or for his insane brother,—and there is no express promise to pay, his liability to pay depends upon whether it may fairly be inferred from the evidence, that it was the intention of both parties that he would pay for the services. *Clark v. Waterman*, 7 Vt. 76. *Smith v. Watson*, 14 Vt. 332. 28 Vt. 236.

68. A engaged B to do certain freighting for him, and B engaged C to do it. A paid B therefor without knowing that it was done by C. It did not appear that C did the work on the credit of A. *Held*, that A was not liable to C therefor. *Tobias v. Blin*, 21 Vt. 544.

69. **Joinder of defendants.** A river was divided by an island, and different parties, hav-

ing distinct interests, at different times built dams across the several channels. The plaintiff brought a joint action against the two for setting back the water upon his land by means of the two dams, and verdict passed against one and in favor of the other. *Held*, no cause for setting aside the verdict. *Wright v. Cooper*, 1 Tyl. 425.

70. To warrant a judgment against two or more defendants, the liability must be joint; and the recovery must be limited to the extent that the liability is joint as to all. *Smith v. Kellogg*, 46 Vt. 560.

71. In an action on the case against two, setting forth a joint contract to manufacture and adjust the machinery of a mill properly, but that they had spoiled the work in their attempt;—*Held*, (1), that such action would lie; but (2), that as the liability grew out of a contract it must be proved as laid, viz., as a joint contract,—and, verdict being for one defendant, that the plaintiff could not take judgment against the other. *Wright v. Geer*, 6 Vt. 151. (Changed by G. S. c. 30, s. 78.)

72. In an action against two or more upon a joint contract, there can be but one judgment. If one suffer default, and the other stand trial, the judgment as to the first is suspended until the result of the trial is ascertained. If an appeal be taken, the judgment as to all the defendants is vacated, and the entire case is removed into the county court, with all the parties. *Fletcher v. Blair*, 20 Vt. 124. (Since modified by statutes.)

73. **Authority of one defendant to act for another.** In actions *ex contractu*, one co-defendant may, in the absence of instructions to the contrary, employ counsel, enter appearance, agree to a continuance, plead and defend fully for all. *Scott v. Larkin*, 13 Vt. 112. 18 Vt. 218. This limited to a case where the other defendant has been duly served with process and is before the court. *Whitney v. Silver*, 22 Vt. 634. 44 Vt. 551.

74. **Effect of non-joinder.** The non-joinder of a joint promissor is only matter of abatement. *Nash v. Skinner*, 12 Vt. 219. *Ives v. Hulet*, *Ib.* 314.

75. In an action upon any written contract, whether of record or not, the non-joinder of a joint contractor as defendant can be taken advantage of only by plea in abatement, unless such omission appears upon the record,—that is, the very record of the very suit upon trial. *McGregor v. Balch*, 17 Vt. 562.

76. Thus, in an action against two, declaring upon a joint recognizance of the two, an issue joined upon the plea of *nul tiel record*, the record produced showed that two others, the principals, were co-recognizors. *Held*, that the record supported the declaration; that the non-joinder could be taken advantage of only by

plea in abatement, inasmuch as this did not appear in the declaration; or, the defendant might have brought it into the record by craving oyer of the recognizance and setting it out, and could then have taken advantage of the non-joinder by demurrer. *Ib.*

77. In actions upon joint recognizances, joint judgments and other matters of record, if it appears from the declaration, or other pleadings of the plaintiff, that there is another joint debtor who is not sued, the non-joinder may be taken advantage of by demurrer, or motion in arrest. The same is true of actions upon joint bonds, *provided* it appears from the declaration or other pleadings of the plaintiff that the obligor, not joined, is *still living*. But unless this does so appear, the non-joinder can be taken advantage of only by plea in abatement. *Needham v. Heath*, 17 Vt. 223. ("This, I apprehend, is to be presumed, for at least seven years, unless the contrary appear." *Redfield, J.*, in *McGregor v. Balch*, 17 Vt. 567.) ●

78. **Misjoinder.** *Seire facias* against one of two joint recognizers and the administrators of the other. On demurrer,—*held* a misjoinder. *State Treas. v. Friott*, 24 Vt. 134.

#### VIII. WHEN NOT MAINTAINABLE.

79. **Oppression.** The defendant made a settlement with the plaintiff, and received in satisfaction of a judgment against him a deed of certain land, upon the plaintiff's paying in addition certain costs not taxable. *Held*, that the money so paid could not be recovered back as oppressively taken. *Chace v. May*, Brayt. 25.

80. **Unavoidable accident.** No action lies for an injury which is the result of unavoidable accident, where there is no want of prudence or care on the part of the defendant—(applied to a case where the defendant with his sulky ran over the plaintiff in the highway). *Vincent v. Stinchour*, 7 Vt. 62.

81. **Motive in the exercise of a legal right.** One's motive can never alter the character of his lawful act. Whatever a man has a legal right to do, he may do with impunity, regardless of his motive. *Humphrey v. Douglass*, 11 Vt. 22.

82. The defendant finding the plaintiff's horses wrongfully trespassing upon the defendant's land [as where they escaped through a defect of a division fence which it was equally the duty of each party to repair] turned them into the highway, without notice to the plaintiff, whereby the horses were lost:—*Held*, that the defendant was not liable therefor; that the act was lawful, and was not rendered unlawful because of any improper motives,—as malice. *Humphrey v. Douglass*, 10 Vt. 71. S. C. 11 Vt. 22, and see *Woodcock v. Bolater*, 35 Vt. 632.

83. An act legal in itself, violating no right, cannot be made actionable by reason of the motive which induced it. *S. Royalton Bank v. Suffolk Bank*, 27 Vt. 505. *Chatfield v. Wilson*, 28 Vt. 49. 41 Vt. 345.

84. The plaintiffs, a banking corporation, brought suit declaring that the defendants, maliciously, corruptly and wickedly intending to injure, break down and destroy the plaintiffs, and bring their bills into discredit and prevent their circulation, had bought up, taken and kept out of circulation a large amount of such bills and notes, and refused to exchange them for other funds, but demanded and compelled the plaintiffs to pay the specie thereon, whereby the plaintiffs were injured, and deprived of great profits, &c. *Held*, on demurrer, that the declaration did not disclose any legal cause of action. *S. Royalton Bank v. Suffolk Bank*.

85. So where the defendant, by digging down near the margin of his own land, cut off an underground water supply to the plaintiff upon his land;—*Held*, that this was not actionable, though done "solely with the purpose of injuring the plaintiff and not with any purpose of usefulness to himself." *Chatfield v. Wilson*, 28 Vt. 49. 41 Vt. 345.

86. A party is not precluded from standing upon and exercising a legal right, because he is prompted to do so by an improper or unworthy motive. *In re Foster*, 44 Vt. 570.

87. **No legal duty owing to the plaintiff.** The plaintiff took from the defendant's premises without his knowledge or permission a bar, or pole, belonging to the defendant, and used the same in supporting a staging set up for the purpose of shingling the plaintiff's barn. The defendant, in the plaintiff's absence and without his knowledge, retook and removed the bar, doing no more damage to the staging than was necessary to repossess himself of the bar. The plaintiff, without knowing that the bar had been removed, went upon the staging, and, by reason of its being weakened by the removal of the bar, it fell, and the plaintiff was injured thereby. In an action therefor;—*Held*, that the defendant was justified in retaking his property, and that no legal duty was imposed upon him to give notice of the removal, or to have used diligence to give notice, and that the plaintiff could not recover for his misfortune. *White v. Twitchell*, 25 Vt. 620.

88. The plaintiff owed the defendant bank, and his agent, by his direction, sent to the bank a certain sum of money to be applied on such debt. The money was received and so applied. The plaintiff afterwards inquired at the bank, and was told by the teller, but by mistake and in good faith, that the sum so received was less than the true sum, whereupon the plaintiff set about looking up and securing

the supposed deficiency, and therein incurred expenses. In an action to recover therefor—*Held*, that as there was neither fraud nor an implied warranty, this was a case of *damnum absque injuria*, and the plaintiff could not recover. *Herrin v. Franklin Co. Bank*, 32 Vt. 274.

**89. Procuring a wrong judgment.** An action was *held* not to lie, charging that the defendant by false testimony as a witness had procured a wrongful judgment against the plaintiff; nor for procuring, by commissioners of an estate, the allowance of a note which the defendant had forged. *Cunningham v. Brown*, 18 Vt. 123.

**90. Incidental damage in guarding against plaintiff's wrong.** The surface water flowed naturally from the plaintiff's land upon the land of the defendant. The plaintiff was in the habit of throwing out filthy water from his kitchen, when it would run down on the defendant's land, and so injured the defendant's well. To prevent this the defendant put up an obstruction, which not only kept back the filthy water but caused the surface water to turn off into the plaintiff's well to its injury. The court charged the jury, that if such an obstruction was actually necessary in order to prevent injury to the defendant from the filthy water, he would not be liable, although it did have the effect to stop some of the surface water from running off the plaintiff's land upon the defendant's. *Held* correct, and that if the means employed did produce some incidental hurt or damage to the plaintiff he has no right to complain. *Beard v. Murphy*, 37 Vt. 99.

**91. Counterfeiting materials.** Where a large number of pieces of German silver, of the precise size and thickness of Mexican dollars, and made in that form for the purpose of being stamped and milled into counterfeit coin of that description, were taken by the sheriff from a person who was at the time carrying them to a place of manufacture for the purpose of having them finished, so that he could put them in circulation as genuine coin, and they were detained by the sheriff under the direction of the State's Attorney, to be used as evidence on the trial of such person who was then under indictment, and also to prevent their being put in circulation:—*Held*, that the owner of the pieces, in the absence of evidence that they were put in their present form without his knowledge, or against his consent, could not sustain trover against the sheriff therefor. *Spalding v. Preston*, 21 Vt. 9.

**92. Voluntary service and payment.** W requested F to hand a certain note to H in payment of an execution which H held against W, but gave no further authority. H refused to receive the note, whereupon S at the request of F signed with him a note to H which he re-

ceived in satisfaction of the execution, and S afterwards paid this note. *Held*, that S could not maintain an action against W for money paid, for want of privity between them arising from any request of W. *Huntington v. Wilder*, 6 Vt. 334.

**93. Election—Refusing a vote.** Whether the presiding officer at an election who, by mere error in judgment, refuses to receive a legal vote, is liable therefor in an action—*quære*. *Temple v. Mead*, 4 Vt. 535.

For particular actions, see the several titles, as ACCOUNT, EJECTMENT, etc.

## ACTION OF ACCOUNT.

- I. IN WHAT CASES THE ACTION LIES.
- II. PROCEDURE.

### I. IN WHAT CASES THE ACTION LIES.

**1. Defendant bailiff—Liability.** A bailiff is not liable, in the action of account, to account for the property he received, but which he has not turned into profits, unless he has so disposed of it, or appropriated it to his own use, that he has consumed or wasted it as if it were his own. That he has converted it to his own use so as to be liable for it in an action of trover, may not be a sufficient appropriation of it to make him liable in account. *Gibbs v. Sleeper*, 45 Vt. 409.

**2. Locus of estate.** An action of account was *held* to lie in this State, although both parties resided in New Hampshire, and the locks and canals, of the profits of which an account was claimed, were there situate. *Whitmore v. Orcutt*, Brayt. 22.

**3. Promissory notes.** An action for account was *held* to lie against the defendant, as bailiff, for certain promissory notes (with their proceeds), which the defendant had taken payable to himself, but for the benefit of the plaintiff, then a married woman, but discovered before demand and suit. *Smith v. Woods*, 3 Vt. 485. *S. C.* 4 Vt. 400.

**4. Guardian.** So in behalf of a ward against his former guardian, who continued the management of the estate after the termination of the guardianship, and he may recover not only for the time the defendant held the estate as bailiff, but also while he held it as guardian. *Harris v. Harris*, 44 Vt. 320. *Field v. Torrey*, 7 Vt. 372.

**5. Letting land on shares.** The action of account (*not* book account) is the appropriate action for the settlement of accounts growing out of the letting of a farm "upon shares, or at the halves." *Albee v. Fairbanks*, 10 Vt. 314. *Ganaway v. Miller*, 15 Vt. 152. *Sledman v.*



*Gassett*, 18 Vt. 346. *Aiken v. Smith*, 21 Vt. 172. *Cilley v. Tenny*, 31 Vt. 401.

6. Under a contract for joint occupancy of land for one year, and division of profits, an action of account will not lie before the expiration of the year. (In this case, the plaintiff quit without license, before the expiration of the term.) *Ganaway v. Miller*.

7. Although the action of account is the proper remedy for the adjustment of controversies growing out of the letting of land upon shares, yet breaches of contract on either part, whereby the making of profits has been prevented merely, though they may be brought into the account, need not necessarily be, but may be sued for independently, and damages recovered. *La Point v. Scott*, 36 Vt. 603.

8. **Equitable title.** The action of account will not lie upon a merely equitable title of tenancy in common, or joint tenancy, to recover for rents and profits, or the avails of land by sale. The remedy is in equity. *Cearnes v. Irving*, 31 Vt. 604.

9. **Tenancy in common.** The plaintiff let the defendant have a quantity of cucumbers, to be pickled by the defendant at the halves. The defendant pickled them, but did not return one-half the pickles to the plaintiff. *Held*, that an action of account, as between tenants in common, would lie therefor, and that, under G. S., c. 41, s. 18, the claim might be adjusted with other items in the book account action. *Gates v. Lockwood*, 27 Vt. 286.

10. A sum found due to one tenant in common, on settlement of accounts between them, may be charged as an item in a new account, and be so adjusted in a subsequent action of account. *Kidder v. Rixford*, 16 Vt. 169.

11. The interest of a tenant in common of growing crops is assignable. The assignee takes the place of the assignor, and may maintain the action of account against his co-tenant, after severance, for his just share of the crops. *Aiken v. Smith*, 21 Vt. 172.

12. **Co-partners.** The action of account lies between partners to recover the balance due upon the settlement of the partnership; and not to recover a specific sum of money, received by one of the partners for the use and benefit of the concern. *Wood v. Merrow*, 25 Vt. 340.

13. *Held*, that an action of account did not lie in favor of one who was the active partner and received the whole property and avails of the co-partnership against the other, who had received nothing, to recover the balance of losses. *Spear v. Newell*, 13 Vt. 288.

14. The action of account between partners exists at common law, and survives to the administrator, without the aid of the statute of 1852. (G. S. c. 41, s. 13.) Our statutes on the subject of the action of account were not passed

for the purpose of limiting the action to the cases enumerated, but to extend the action in certain cases where it did not lie at common law. *Newell v. Humphrey*, 37 Vt. 265.

15. A and D were co-partners in trade. They dissolved, and D assigned to A all the property and debts to collect, pay partnership debts and account for the surplus. D being indebted to T afterwards assigned to him his interest in the property, to pay such debt and account for the balance; and afterwards A assigned all his interest to T, to pay his and the partnership indebtedness to T, and to account for the balance. *Held*, that T was not the bailiff of A and D jointly, but of each severally. *Allen v. Thrall*, 10 Vt. 234.

16. **Co-executors.** The action of account between co-executors, or co-administrators, does not lie at common law. An administrator *de bonis non* cannot maintain such action against a former executor, to recover a balance in his hands. It is not within the statute. (G. S. c. 41, s. 1.) The remedy is by proceedings in the probate court. *Curtis v. Curtis*, 13 Vt. 517. 26 Vt. 568.

17. **Limited to two parties.** Account does not lie between more than two parties, having several rights. *May v. Williams*, 3 Vt. 239.

18. When there are more than three parties, an action of account at common law cannot be maintained to settle the partnership. *Wood v. Merrow*, 25 Vt. 340.

19. Aside from G. S. c. 41, ss. 13-14, an action of account cannot be maintained which involves an accounting between more than two parties, with each a several interest. *LaPoint v. Scott*, 36 Vt. 633. *Winnell v. Wilkins*, 4 Vt. 137. 9 Vt. 36. *Smith v. Woods*, 3 Vt. 485.

20. Nor under that statute has a justice jurisdiction in such case. *LaPoint v. Scott*.

21. But in the case of a joint interest represented by several defendants and constituting them one party (and the same as to plaintiffs), account will lie, without the aid of that statute. *Ib. Winnell v. Wilkins*, 4 Vt. 137.

22. **Book account matters.** Counts in account and book account cannot be joined. *May v. Williams*, 3 Vt. 239.

23. In an action of account, items of book account cannot be adjusted. *Cilley v. Tenny*, 31 Vt. 401.

24. But if such items are brought in and submitted without objection and are adjusted, the auditor will be regarded as acting by consent of the parties, as arbitrator or referee, and the court will not disturb the adjustment. *Aiken v. Smith*, 21 Vt. 172.

## II. PROCEDURE.

25. **Demand requisite.** A demand to ac-

count, or something tantamount to it, is necessary to perfect the cause of action in this action. But as to a particular item of the account, where the whole action does not depend upon that, a demand after suit brought, but before the audit, is sufficient. *Gates v. Lockwood*, 27 Vt. 286. (*Chadwick v. Divol*, 12 Vt. 499.)

**26. What sufficient.** Where a division of crops between lessor and lessee is the mode of accounting provided for, a demand for such division after the crops are gathered and stored, although before the expiration of the lease, is a sufficient demand on which to base an action of account. The lessor, in such case, is not bound to wait until the crops are consumed or disposed of, and then renew his demand for a different accounting. *Stedman v. Gassett*, 18 Vt. 346.

**27.** In an action of account by one tenant in common against his co-tenant, as bailiff and receiver of the common property, the defendant pleaded that the plaintiff did not before suit brought demand the rendering of an account. *Held*, that a demand by the plaintiff that the defendant return the property or pay for it, or the plaintiff would sue him, accompanied by a denial by the defendant that the plaintiff had any right in the property, was a sufficient demand. *Aiken v. Smith*, 21 Vt. 172.

**28. Demand superseded.** Where an issue is joined upon the defendant's plea that he was never bailiff, the plaintiff is not required to prove a demand, before suit, that the defendant render an account. *Chadwick v. Divol*, 12 Vt. 499.

**29. Declaration.** In an action of account to recover money received by the defendant for which he ought to account, he should be charged as receiver, not as a bailiff, simply. *Wood v. Merrow*, 25 Vt. 340.

**30.** A count against one as receiver merely, must allege what money was received and from whom;—a count nearly obsolete, since assumpsit for money had and received as well lies. *May v. Williams*, 3 Vt. 239.

**31.** In the action of account at common law, charging the defendant as receiver, where the privity between the parties is created by the receipt of the money, the declaration must state by whose hands it was received; but where the privity arises from the relation of the parties, as in case of partners, this is not necessary, but the relation must be stated. *Moore v. Wilson*, 2 D. Chip. 91. *Robinson v. Wright*, Brayt. 22. *Squire v. Allen*, Brayt. 190.

**32.** Where the privity which exists between the parties arises from their connection as partners, this connection should be stated in the declaration. *Wood v. Merrow*, 25 Vt. 340.

**33.** The declaration in this action need not specify all the items, nor the subject matter of each item, but only the transaction, the con-

tract or relation out of which the account is claimed; and before the auditor, all items which are connected and consistent with that contract or relation, may be adjusted. *Joy v. Walker*, 29 Vt. 257. (*Dictum contra in Ganaway v. Miller*, 15 Vt. 154, denied. *Ib.* 282.)

**34.** In an action of account to compel an adjustment of the rights of the parties to the rents, use and occupation, or products of land, or the avails of a sale, as between joint owners or tenants in common, the declaration must set forth and define the interest and proportionate share of each party, and that the defendant has received more than his just share. *Brinsmaid v. Mayo*, 9 Vt. 31. *Ganaway v. Miller*, 15 Vt. 152. 19 Vt. 197. *Cearnes v. Irving*, 31 Vt. 604.

**35.** A declaration, imperfect in these respects, was held good after verdict. *Strong v. Richardson*, 19 Vt. 194.

**36.** The action of account between tenants in common, or joint tenants, under G. S. c. 41, depends upon privity of estate, and not of contract. In order to entitle the plaintiff to the benefit of the statute, he must allege specifically in his declaration the facts necessary to bring the case within it, viz: The joint tenancy, or tenancy in common, of the parties, the proportions in which they hold, and that the defendant has received more than his just share or proportion. Difference between account at common law between tenants in common, and under the statute, noted. *Hayden v. Merrill*, 44 Vt. 336.

**37. Plea and issue.** In an action of account between partners, demanding an account of money received by the defendant arising from the profits of the business more than his just share, the defendant pleaded that he had fully accounted. *Held*, that an agreement signed by the plaintiff, reciting that the defendant had relinquished to him all claims to the demands due the firm and to the stock of the company, and that the plaintiff promised to pay all debts due from the firm, and to indemnify the defendant against them, did not tend to support the plea. *Woodward v. Francis*, 19 Vt. 434.

**38.** Action of account, charging the defendant as bailiff and receiver. Plea that the defendant was never bailiff and receiver—and issue joined. *Held*, that it was not error to receive evidence which proved the averments of the declaration, and to determine the issue upon it, irrespective of the sufficiency of the declaration; and (by *Williams, C. J.*) the County Court would not have been justified in testing the sufficiency of the declaration, on the trial of the issue formed. *Onion v. Fullerton*, 17 Vt. 359; and see *Wheelock v. Wheelock*, 5 Vt. 493.

**39. Rules of pleading.** Rules of pleading in actions of account, given by *Redfield, J.*,

in *Bishop v. Baldwin*, 14 Vt. 145; as in *Godfrey v. Saunders*, 3 Wilson 94.

40. In an action of account between partners, the defendant cannot plead in bar of the judgment to account, that he has accounted as to part of the account, but must show this in evidence before the auditor; nor can he plead that he does not owe the plaintiff. *Morgan v. Adams*, 37 Vt. 233.

41. **Effect of judgment to account.** The judgment to account conclusively settles the contract or relation upon which the plaintiff, in his declaration, claims the account. *Redfield, J.*, in *Albee v. Fairbanks*, 10 Vt. 317.

42. What may be pleaded in bar of the action must be so pleaded; and all defenses which might be pleaded in bar, if not so pleaded, are considered as waived. *Pickett v. Pearsons*, 17 Vt. 470. *Baxter v. Thompson*, 26 Vt. 559.

43. There can be no revision of the merits of the judgment to account on the hearing before the auditor, nor on the hearing upon his report. *Porter v. Wheeler*, 37 Vt. 281. *Newell v. Humphrey*, 37 Vt. 269. 48 Vt. 309.

44. The judgment to account conclusively fixes the relation upon which the account is claimed [as that the defendant was a partner], and determines all the facts stated in the declaration, except that the defendant is in arrear. *Bishop v. Baldwin*, 14 Vt. 145.

45. **Proceedings before auditors—Extent of recovery.** In an action of account between partners, declaring in common form, the plaintiff can recover only for the balance due him on the adjustment of all their partnership dealings. *Warren v. Wheelock*, 21 Vt. 323.

46. In an action of account between partners, under G. S. c. 41, s. 13, where the defendant had purchased the interest of a third partner and represented two-thirds of the concern, and the plaintiff one-third:—*Held*, that the plaintiff could recover of the defendant two-thirds of the sum which the plaintiff had paid upon a partnership debt. *Kendrick v. Tarbell*, 27 Vt. 512.

47. In an action of account between landlord and a tenant on shares, a neglect of the tenant to keep up the fences and to hoe the corn, as provided in the lease, whereby the joint profits were reduced, is proper matter for allowance and adjustment. *Cilley v. Tenny*, 31 Vt. 401. 36 Vt. 609.

48. So the expense of keeping a team and of providing tools and seed may be recovered. *Ganaway v. Miller*, 15 Vt. 152.

49. And so of all items that are connected with the carrying on of the farm for the joint benefit of the parties, and which are necessary to be taken into account in determining the profits, and whether the defendant has given an account of what he received "more than his

just share." *Joy v. Walker*, 29 Vt. 257. 31 Vt. 406.

50. **Accounts to be adjusted to time of audit.** Appeal from the Probate Court on the allowance of a guardian's account.—Referred to a commissioner who adjusted the accounts to the time of the hearing, embracing charges for services, &c., of the guardian during his guardianship, but accruing after the appeal. *Held* correct. *Harwood v. Boardman*, 38 Vt. 554.

51. On an appeal from the disallowance by commissioners of a claim against an estate, where the case was referred by consent, the referee allowed against the administrator claims for money paid for the benefit of the estate, which accrued after the death of the intestate:—*Held*, not erroneous. [There was a stipulation to this effect entered into before the referee.] *McDaniels v. McDaniels*, 40 Vt. 340.

52. **Amendment.** The declaration in an action of account cannot be amended so as to introduce a new and distinct claim, after the coming in of the auditor's report, unless the report is first set aside. If amended, the defendant would be entitled to plead anew to the amended count. *Joy v. Walker*, 28 Vt. 442.

## ACTION ON THE CASE.

### 1. When the action lies—In general.

An action of trespass on the case lies, in general, where one sustains an injury by the misconduct of another, for which the law has provided no other adequate remedy. *Griffin v. Farrell*, 20 Vt. 151.

2. An action on the case does not lie, charging the defendant with being a party to a fraudulent purchase or judgment for the purpose of defrauding the plaintiff of his debt; nor for a fraudulent combination and conspiracy of the defendant with the plaintiff's debtor to secrete the debtor's property and prevent the plaintiff from obtaining security or payment of his debt. The law has provided other remedies. *Hall v. Eaton*, 25 Vt. 458.

3. The selectmen of a town executed certain promissory notes, in their official capacity, in behalf of the town, which the defendant, one of the selectmen, took to get discounted. He afterwards pretended that he had destroyed one of them, but in fact fraudulently negotiated it to a third person, and got the money on it, which he appropriated to his own use. The town paid and took up the note. *Held*, that the defendant was liable to the town in an action on the case, and could not urge in defense that the town was not liable upon the note and that such payment was voluntary; that the money received upon the note belonged to his principal, the town. *Troy v. Aiken*, 46 Vt. 55.

**4. Distinction between trespass and case.** In regard to injuries to the person or to personal property, where the injury is directly inflicted by a forcible act, as where a blow is given to a person, or an act of violence committed upon his beast, or other property, causing injury, the party aggrieved has generally no choice of actions and trespass is his only remedy; but the necessity of suing in trespass extends no further, though the injury may have followed the forcible act without the intervention of any voluntary and responsible agency—as where the party has sustained a forcible injury, effected by means flowing from the act of the defendant, but not operating by the very force and impulse of that act. In this latter case he may sue in trespass, constructively treating those means as attached to and forming a part of the defendant's act, and thus bringing that act into immediate connection with the injury; or, waiving all artificial views of the matter, he may adopt the other form of action, and treat the injury as consequential. *Royce, J.*, in *Waterman v. Hall*, 17 Vt. 128.

**5.** Where the defendants "set upon the plaintiff's mare with stones and clubs, and chased and frightened said mare, and drove her upon a certain log fence, whereby she was injured"—*Held*, that the plaintiff might, at his election, bring case, or trespass; and an action on the case was sustained. *Ib.*

**6.** If the injury be wilful, and be committed by the defendant himself, and the injury immediate, the action must be trespass. So, too, if the injury is immediate, and the defendant positively does any act producing or increasing the injury, trespass is the appropriate remedy. But where the only fault of the defendant consists in negligence, is a mere non-feasance, although the injury is immediate, the appropriate remedy is case. *Cluflin v. Wilcox*, 18 Vt. 605.

**7.** Case was sustained for a collision with the plaintiff's team upon a highway, where the defendant's team was driven by himself; the declaration averring that "the defendant so carelessly drove, governed and directed his horse and sleigh that by and through the carelessness, negligence and improper conduct of the defendant, the defendant's sleigh struck with great force and violence against the plaintiff's horse and thereby wounded and killed him,"—the proof corresponding. *Ib.*

**8.** Where the injury to the plaintiff results from the immediate force of the defendant, and is caused by his carelessness and negligence, and is not wilful, the plaintiff can maintain either trespass or case. Trespass was sustained in such case. *Howard v. Tyler*, 46 Vt. 683.

**9.** Where the plaintiffs, by permission of a school district, occupied the school house for the purpose of a private school for the time being merely, and not inconsistent with the rights

of the district, and the defendant, the prudential committee of the district, wrongfully disturbed them in the occupation of the house;—*Held*, that the defendant was liable therefor in an action on the case, and not in trespass.

*Chaplin v. Hill*, 24 Vt. 528, and see *Bakersfield Society v. Barker*, 15 Vt. 119. *Kellogg v. Dickinson*, 18 Vt. 266. *Perrin v. Granger*, 33 Vt. 101.

**10. Abuse of process.** Case, and not trespass, is the appropriate action to recover for a mere abuse of regular process. *Pierson v. Gale*, 8 Vt. 509. 28 Vt. 17; also for a mere non-feasance—as for the refusal of the officer to take bail. *Churchill v. Churchill*, 12 Vt. 661; or for neglect to take proper care of property attached. *Abbott v. Kimball*, 19 Vt. 551. *Hale v. Huntley*, 21 Vt. 147.

**11. Joinder.** Trespass and case for the same cause of action may be joined, by G. S. c. 33, s. 16.

**12. Matter growing out of contract.** Count in "case" against a carrier for neglect to deliver goods, and a loss. It was claimed that the count was in *assumpsit*, because, after setting up the business of the defendant, the count did not expressly aver the defendant's duty resulting therefrom to carry and deliver. *Held*, that this was not necessary, it being a legal inference; that, in such cases, what especially distinguishes case from *assumpsit*, is the omission in the former of the consideration, and the averment of negligence. *Wright v. McKee*, 37 Vt. 161.

**13.** The defendant contracted for the privilege of floating logs through the plaintiff's mill-dam and bulkhead at a stipulated price, agreeing to repair and pay all damages in consequence. *Held*, that an action on the case, *ex delicto*, lay for damages occasioned to the dam and bulkhead, by the faulty negligence of the defendant in doing what he was entitled to do under his contract. *Dean v. McLean*, 48 Vt. 412.

**14. Declaration.** In an action on the case for negligence, the most general statement of the cause of action, if sufficient to put the defendant on his defense, seems sufficient after verdict. *Taylor v. Day*, 16 Vt. 566, and see *Cutler v. Adams*, 15 Vt. 237.

**15.** The form of declaration for false warranty in sale of personal property (*warrantizando vendidit*) is adapted to case for deceit in the sale of real estate. *Harlow v. Green*, 34 Vt. 379.

**16. Plea and evidence.** In case, anything is admissible in evidence, without special plea or notice, which shows the defendant not guilty of anything actionable in respect to the matters charged in the declaration. *Jerome v. Smith*, 48 Vt. 230.

**17.** Or, which destroys the right of action,—as, a former recovery for the same cause of action. *Whitney v. Clarendon*, 18 Vt. 252.

18. In such action for an injury to the plaintiff's reversionary interest in land:—*Held*, that, under the general issue, the defendants might justify by evidence that what they did was done by them in their official capacity as selectmen in building a highway, which had been laid out by their predecessors in office. *Kidder v. Jennison*, 21 Vt. 108. 40 Vt. 289.

19. In actions of tort, the plaintiff is not bound to prove his whole declaration, but only enough to make a good cause of action. He must prove the very injury of which he complains, but need not to the full extent. *Hutchinson v. Granger*, 13 Vt. 386.

20. In an action on the case for deceit, it is not necessary for the plaintiff to prove all that he has alleged in his declaration as to the means and arts practised by the defendant, provided less than all is sufficient to give a cause of action, and so much is proved. *Somers v. Richards*, 46 Vt. 170.

For the *subject matter* of this action see the several titles, as NEGLIGENCE, FRAUD, etc.

4

### ACTION ON STATUTE.

1. **New right created.** Where a statute creates a new liability and provides a remedy, that is the sole remedy; but where a new liability is created and no remedy provided, a resort may be had to a common law remedy. *Windham Prov. Inst. v. Sprague*, 43 Vt. 502; *Dauchy v. Brown*, 24 Vt. 197. See *Newman v. Waite*, 43 Vt. 587. *Brattleboro v. Wait*, 44 Vt. 459.

2. Where a statute creates a right and prescribes the mode of enforcing it, that mode alone can be resorted to. *Thayer v. Partridge*, 47 Vt. 423.

3. **Declaration.** In prosecutions or actions upon statutes, every circumstance in the description of the offense, contained in the body of the clause which creates it and gives the penalty or forfeiture, must be set forth, so as to bring the defendant within the statute. *Ellis v. Hull*, 2 Aik. 41.

4. In a penal action nothing can be taken by implication, or be aided by intendment, but the plaintiff must show clearly that the penalty has accrued, and how it accrued. *Everts v. Allen*, 1 D. Chip. 116.

5. A count in trespass for cutting a tree on the plaintiff's land, in common form for trespass, *qua. clau.* but concluding by counting upon a statute and claiming *treble* damages under it, was *held* (by a majority) to be a penal action, and not trespass at common law. *Keyes v. Prescott*, 32 Vt. 86. 45 Vt. 81.

6. A declaration in trespass for the worrying, &c., of the plaintiff's sheep by the defend-

ant's dog, concluding to his damage and contrary to the form, &c., of s. 9. of c. 104 of G. S., was *held* to be a declaration on the statute to the extent of recovering single damages. *Ronne v. Bird*, 48 Vt. 578.

7. In an action of debt against a justice of the peace to recover the penalty prescribed by C. S. c. 66, s. 16, for solemnizing the marriage of the plaintiff's minor daughter without his consent, the declaration failed to charge the offense as *against the form of the statute*, &c. *Held*, sufficient on motion in arrest, following the precedent in *Ellis v. Hull*, 2 Aik. 41; but limiting the decision to actions on this particular statute. *Burnell v. Dodge*, 33 Vt. 462.

8. **Remedial statute.** When a statute gives the aggrieved party a right to recover cumulative damages (as double damages and costs), it is treated as a remedial and not a penal statute:—So *held*, in an action of trespass under G. S. c. 104, s. 9, for the worrying, &c., of the plaintiff's sheep by the defendant's dog. *Burnett v. Ward*, 42 Vt. 80. (See *Newman v. Waite*, 43 Vt. 587.)

9. In such case, the rule of evidence applicable to criminal prosecutions and strictly penal actions (as that the jury must be satisfied beyond reasonable doubt) does not apply. *Ib.*

10. In an action to recover the forfeiture given by a penal statute to the party aggrieved, or to such party and the State, no minute of the true day, &c., of the exhibition of the writ is necessary. *Denton v. Crook*, Brayt. 188. *Hall v. Adams*, 1 Aik. 68 (1826).

11. **Penal—Minute.** An action to recover treble damages given by sec. 1 of the statute to prevent trespass, &c. (Slade's Stat. 280), requires a minute on the process of the time of exhibiting it. *Bowen v. Fuller*, 2 Tyl. 85.

12. The statute which requires a true minute of the day, month and year to be entered upon a writ "when the same was signed" (G. S. c. 62, s. 9), is not satisfied by such minute of the day, &c., when the writ was *exhibited*. Such minute cannot be afterwards made, nor can be amended. *Pollard v. Wilder*, 17 Vt. 48. *Montpelier v. Andrews*, 16 Vt. 604. *Wheelock v. Sears*, 19 Vt. 559. *School District v. Austin*, 46 Vt. 90.

13. The statute subjecting an officer receiving illegal fees to the payment to the party aggrieved of ten dollars for each dollar of excess of fees so received (G. S. c. 125, s. 17) is a penal statute; and a true minute of the day, month and year when the writ is signed, in an action to recover such penalty, is required. *Wheelock v. Sears*.

14. A *qui tam* suit to recover of a highway surveyor the penalty provided in section 8 of the act of March 3, 1797 (C. S., p. 430), for not clearing a highway of obstructions, where one moiety goes to the town treasurer and the

other to any person who shall prosecute, requires a minute of the day, month and year when the writ issues. *Dassance v. Gates*, 13 Vt. 255.

**15. Measure of proof.** In actions upon penal statutes full proof, as in criminal cases, is required to warrant a recovery. *Barnet v. Ray*, 33 Vt. 205. *Brooks v. Clays*, 10 Vt. 37.

**16.** In an action upon the statute authorizing the recovery of double the value of the effects of a deceased person embezzled or alienated before administration granted (G. S., c. 51, s. 10.),—*Held*, (1), that, in order to subject the defendant to the penalty, he must have acted from a wrong motive, and *mala fide*; (2), that the plaintiff must make out what is called *full proof*, and cannot recover on merely a preponderance of testimony. *Roy v. Roy*, 13 Vt. 543.

**17. Qui tam—Civil action.** A *qui tam* action is a civil action. *Waters v. Day*, 10 Vt. 487.

**18.** So is an action of debt by a town to recover certain penalties under the listing act. *Putney v. Bellores*, 8 Vt. 272.

**19. Survivorship.** A prosecution *qui tam* for usury abates by death of the defendant. Nor if he dies after verdict and before the law term, where judgment is respited by motion in arrest, will judgment be rendered *nunc pro tunc*. *Benson v. Egerton*, Brayt. 21.

**20.** Two joint creditors bring their action *qui tam* to recover the penalty given by statute for a fraudulent conveyance, and one of them dies:—*Held*, that the action survives to the other. *Wright v. Eldred*, 2 D. Chip. 37.

**21. Judgment, &c., as a bar.** Where the amount of a penalty was fixed by statute, the record of a conviction before a justice on voluntary confession, and payment of the full penalty, were *held* a bar to a subsequent action *qui tam*:—decision limited to the special case. *Hamilton v. Williams*, 1 Tyl. 15.

**22. Trespass Act.** In the act to prevent certain trespasses (Slade's stat. 281, s. 5) the word "wilfully" is not synonymous with *voluntarily*, but implies a tort, or wrong. *Savage v. Tullar*, Brayt. 223.

**23. Inspection Act.** Under stat. 1850, No. 28, giving to "the person injured" an action to recover a penalty for the selling of flour not inspected:—*Held*, that the public at large, the dealers in flour, and not flour inspectors, were intended to be protected by the statute; that the injury to the inspector was but indirect and remote, and that he could not maintain an action for the penalty. *Hatch v. Robinson*, 26 Vt. 787.

See FRAUDULENT CONVEYANCE.

## AGENT.

### I. PROOF OF AGENCY.

### II. AUTHORITY OF AGENT; RATIFICATION AND REVOCATION; PARTICULAR AGENTS; NOTICE OF TERMINATION OF AGENCY; MODE OF CONTRACTING.

### III. DUTIES, LIABILITIES AND RIGHTS OF AGENT.

#### 1. As to his principal.

#### 2. As to third person.

### IV. ACTS AND DECLARATIONS OF AGENT.

#### 1. As binding his principal.

#### 2. As enuring to the benefit of his principal.

### I. PROOF OF AGENCY.

1. In a case where an agency could be created without writing, the question was whether the plaintiff's wife was his agent to settle a certain demand. *Held*, that the defendant could prove this by the plaintiff's admission that he had given his wife "a power of attorney" to settle the demand, without notice to produce a written power. *Curtis v. Ingham*, 2 Vt. 287.

2. When one has conveyed land with warranty, and afterwards puts a third person in possession which may enure to the benefit of his grantee, this affords ground for the presumption that he acted therein as agent for his grantee. *Warner v. Page*, 4 Vt. 291.

3. Where a writing is necessary to the creation of an agency, the writing should be produced in order to prove the agency. In other cases, the agency may be proved either by direct evidence, or by the habit and course of dealings of the parties, or by recognition. *Walsh v. Pierce*, 12 Vt. 130.

4. Certain facts stated as constituting an agency. *Alexander v. Bank of Rutland*, 24 Vt. 222.

5. In a suit against a sheriff for not collecting and returning an execution in favor of the plaintiff town, the defense was that the town, by its town agent, controlled the execution:—*Held*, (1), that evidence that the town agent agreed at different times to control the execution and look to the debtor for payment, had no tendency to prove the issue; (2), that evidence that the town agent had admitted, at different times and to different persons, that he had controlled the execution, was not admissible. *Barnard v. Henry*, 25 Vt. 289.

6. One is, at common law, competent as a witness, either for or against his principal, to prove his agency and his acts done and contracts made, as agent, whether verbal or written—as, in this case, to prove his authority to execute a note in the name of his principal. *Lytle v. Bond*, 40 Vt. 618.

## II. AUTHORITY OF AGENT.

7. **General agency.** A discharge of certain parties to a subscription paper, though without payment, by an agent clothed with "full powers to close the subscription in such manner as he should deem for the best interests of the college" was held valid. *Middlebury College v. Loomis*, 1 Vt. 189.

8. A power of attorney under seal authorized the attorney to sell lands at the best prices, either by public auction or private contract, as he might think most advantageous, and upon sale thereof "to sign, seal and execute all or any such contracts, agreements, conveyances and assurances, and to do and perform all such acts and things for perfecting such sale or sales \* \* as shall be requisite and necessary in that behalf." Held, that the power authorized the attorney, on sale, to convey by deed containing the usual covenants of warranty, and that his principal was bound by such covenants. *Peters v. Farnsworth*, 15 Vt. 155.

9. A, the plaintiff's head millwright, on behalf of the plaintiff, made a contract with the defendant to fit up his mill upon terms differing from the plaintiff's established price lists. A had been directed by the plaintiff not to vary from these lists. Held, nevertheless, in the special circumstances of this case, that the plaintiff was bound by the contract of A. *Williams v. Colby*, 44 Vt. 40.

10. The defendants carried on a country store, which was managed by R as their general agent in that business. He was instructed not to pay cash for butter, but to take in so much, on debts and in exchange for goods, as might be necessary to supply customers according to such custom of country merchants. He was at the same time agent for another person for the purchase of butter for cash, and contracted with the plaintiff for all the butter he should make until June following, to be delivered at the defendants' store, and to pay the cash therefor. The plaintiff supposed that the butter was for the defendants and had no notice to the contrary, nor of any instructions to R not to pay cash. It did not appear that the defendants knew that the plaintiff supposed he was selling the butter to them. The plaintiff delivered on the contract eight tubs of butter, but the defendants derived no benefit therefrom. Held, that the defendants were not liable therefor. *Cochran v. Richardson*, 33 Vt. 169.

11. A general agent for the leasing of the principal's farm and managing his business, but not his universal agent, cannot lease the principal's farm jointly with his own, so as to make the principal jointly liable with himself upon the stipulations in the lease in reference to his own property, as well as the principal's. *La Point v. Scott*, 36 Vt. 603.

12. **Limited.** The defendant, by a contract with S, delivered him wool to card and cloth to dress. S was then or soon after employed by the plaintiff by the month in the plaintiff's carding and clothing works, which was generally known, and the defendant's wool was there carded and his cloth dressed. Before the services were performed, and before the defendant had paid S therefor, he knew that S was in the employ of the plaintiff and that the work was done at his shop. Held, that any payments thereafter made to S should not apply on the plaintiff's account. *Tuttle v. Green*, 10 Vt. 62.

13. The authority of an agent to sell goods does not ordinarily extend to the collection of the notes taken on such sales by the prosecution of suits upon them, and imposing upon his principal a liability for the costs and expenses of such suits. And this will not be implied on the ground of necessity, where no pressure of circumstances appears. *Soule v. Dougherty*, 24 Vt. 92.

14. A hired man upon a farm who has had authority to lend the farming tools, does not retain that authority, even so far as relates to his employer, after the attachment of the property and while it is in the custody of the officer. *Briggs v. Taylor*, 35 Vt. 57.

15. **Special.** The plaintiff sent his son to the defendant to demand a specific sum as payment for the use of a horse. The defendant tendered the son a less sum, which was refused. Held, that this was not a tender to the plaintiff. *Chipman v. Bates*, 5 Vt. 143.

16. The defendant authorized his agent to purchase onehalf the plaintiff's hay on the defendant's account, and no more. The agent represented to the plaintiff that he was authorized to purchase the whole on the defendant's account, and the plaintiff, relying upon this representation as true, sold the whole, of which onehalf only came to the defendant's use, and the agent took to himself the other half. Held, that the defendant was liable for only onehalf. It is a case of *want of authority* in the agent, and not of a departure from his instructions as to a matter within the scope of his authority. *Hurlburt v. Kneeland*, 32 Vt. 316.

17. The defendant offered to sell the plaintiff, at a price named, certain cheese, to be taken and paid for by the plaintiff on the week following, or as soon thereafter as the plaintiff could attend to it, provided the plaintiff should notify him the next day of his acceptance of the offer. On the next day the plaintiff sent L to the defendant for the purpose, and no other, of notifying the defendant that he would take the cheese on the terms proposed and to pay the defendant \$10 as part of the price. L gave the notice and offered the money, which the defendant refused to take unless it was understood that the plaintiff should take and pay for the cheese by the

middle of the week following. L said the plaintiff would do so, and, if not, that the \$10 paid would be forfeited and belong to the defendant, whereupon the defendant took the money. The plaintiff, as soon as he could attend to it, but later than the middle of the following week, called for and offered to take and pay for the cheese. The defendant refused to deliver the cheese because not called for by the middle of the week, and refused to pay back the \$10. In an action for refusal to deliver, and on the money counts;—*Held*, that the plaintiff could not recover for the refusal to deliver, but could recover the \$10 retained—L having no authority to make a new bargain, nor to pay the \$10, except upon the terms of the plaintiff's acceptance of the defendant's original offer, which the defendant had legally repudiated. *Sprague v. Train*, 34 Vt. 150.

18. In a case where a special demand is necessary in order to lay the foundation for an action upon a contract, a demand different from what the contract calls for is nugatory. In such case, where a demand was made by an agent different from what the contract called for, and his authority was limited to the making of a demand in that form;—*Held*, that a refusal to comply with such demand, or to do anything about the matter, was not a waiver of the agent's want of authority, nor a waiver of a legal demand. *Groot v. Story*, 41 Vt. 533.

19. The plaintiff authorized L to sell a building for him at a price named. L sold it to the defendants at that price, with the mutual understanding that they might immediately take possession and remove it, and should pay for it at their convenience after such removal. While the defendants were removing the building, the plaintiff forbade them from meddling with it. The defendants persisted and the plaintiff brought trespass therefor. The court charged the jury, that the authority given to L to sell, authorized him to surrender the possession of the building without payment, upon the defendants' promise to pay after its removal at their convenience. *Held* erroneous:—that, as a special agent, L had no authority to sell on a credit; that this was a sale upon a credit; nor could he waive the plaintiff's lien for the price. *Riley v. Wheeler*, 44 Vt. 189.

20. A special agent to sell a horse has authority to warrant, unless directed otherwise by his principal. *Deming v. Chase*, 48 Vt. 382.

21. A writing directed to the plaintiff, authorizing a special agent of the defendants to sell in their store with their goods whatever goods the plaintiff might sell or consign to such agent, and that he might draw out the avails of all said goods sold, was *held* not to authorize such agent to purchase goods of the plaintiff in the name of the defendants; and where he did so, the fact alone that the goods so purchased were re-

ceived into the defendants' store and sold with their goods, was not a ratification of the purchase in their name, and that the plaintiff could not recover of them as for goods sold, but must look to the proceeds, as provided in the writing. *Town v. Hendee*, 27 Vt. 258.

22. An agent was appointed at a meeting of a fire district "to purchase whatever of fire apparatus the district may vote to buy." The district then voted, (1), "that \$500 be appropriated to defray the expenses and preparation of suitable fire apparatus for the use of the district;" and (2), "that the agent be instructed to expend a sum not to exceed \$1,000, which shall include fire apparatus and reservoirs, and all things necessary for the protection of the district from fire." The agent purchased of the plaintiff, who had a copy of these votes, a fire engine, &c., at the price of \$738. *Held* (*Peck*, J, dissenting), that the agent did not exceed his authority under these votes. *Hunneiman v. Fire District*, 37 Vt. 40.

23. The defendant was employed by the plaintiff to assist him in selling some horses, taken from Vermont to Baltimore, Maryland; was there directed to take them to Richmond, Va., and if not there sold to take them for sale to Petersburg, Va. The defendant did so, but not succeeding in selling the horses at either place, he, without communicating with the plaintiff, took the horses into North Carolina, South Carolina and Georgia, and finally succeeded, by swapping off the horses, in converting them into money. The defendant acted throughout in good faith, for what he supposed was for the best interests of the plaintiff. *Held*, that he had no authority to go beyond Petersburg, and that he was not entitled to be allowed, as against the proceeds of the sale, his expenses and charges after leaving Petersburg. *Fuller v. Ellis*, 39 Vt. 345.

24. Baldwin, the agent of an express company, employed the defendant to receive express packages in Baldwin's absence, giving the company's receipts therefor, and to deliver packages. The general agent of the company knew of this arrangement, made no objection, and permitted the business to be so done. The plaintiff delivered a package of money to the defendant to be forwarded by express, believing him to be the agent of the company. The defendant received the package, and gave a receipt therefor in the usual form of the company's receipts, signed "J. B. Baldwin, agent, by S. W. Proctor," (defendant). The package was not entered on the books of the company and never reached the consignee. The plaintiff, after demand of the money of the defendant, brought this action of assumpsit in the common counts therefor. *Held*, that in this transaction the defendant was the agent of the express company and that his acts bound the



company; and therefore he was not liable in this action. *Landon v. Proctor*, 39 Vt. 78.

25. Construction of a writing creating a limited agency. *Spooner v. Thompson*, 48 Vt. 259.

26. Risk of dealing with agent. Whoever deals with an agent, having only a special or limited authority, is bound at his peril to know the extent of the authority. *White v. Langdon*, 30 Vt. 599. *Sprague v. Train*, 34 Vt. 150. *Goodrich v. Tracy*, 43 Vt. 314.

27. A contract cannot be implied against a principal which his agent had no authority to make, and when such want of authority was known to the other party. (Applied to a transaction with an overseer of the poor where the town was sought to be charged.) *Aldrich v. Londonderry*, 5 Vt. 441.

28. Where the plaintiff sold goods to B to be used in a business carried on by him in the name of the defendant, but where B had no authority to buy goods on the defendant's credit, and the plaintiff charged the goods to the defendant,—it was *held*, in an action on book for the price, that it was not enough to charge the defendant in the action that the plaintiff might be justified from the circumstances in regarding the defendant as the principal, unless he also had sufficient grounds for believing that B was authorized to make the purchase on the defendant's credit. *Brown v. Billings*, 22 Vt. 9. 27 Vt. 265.

29. Where a note was given by one as an agent, but without authority, and this was known to the payee;—*Held*, that, in an action thereon by a *bona fide* holder, the principal was not liable. *Holden v. Durant*, 29 Vt. 184.

30. Ratification of act of agent. The acceptance of a contract negotiated in one's behalf by a volunteer agent perfects it, as if made by precedent authority. *Middlebury College v. Williamson*, 1 Vt. 212.

31. Though where an agent exceeds his authority, his principal may repudiate the transaction entirely, yet he cannot adopt one part of it and reject another, but his adoption of it in part is an adoption of it as a whole. *Newell v. Hurlburt*, 2 Vt. 351.

32. That a contract made by an agent, though without authority, cannot be rescinded by the principal while he retains the consideration,—see *Gray v. Otis*, 11 Vt. 628.

33. If an agent exceeds his authority by borrowing money on the credit of his principal, and the money goes into the business of the principal, and to his benefit, yet all without his knowledge, he is not liable therefor to the lender, without a subsequent promise to pay. *Spooner v. Thompson*, 48 Vt. 259.

34. The plaintiff, at the request of T, the defendant's clerk, finished off a room which the clerk wished to occupy and afterwards did

occupy in a house which the plaintiff was building for the defendant, under a contract which did not include the finishing off of that room. *Held*, that from the defendant's ownership of the house and the fact that T was his clerk, it could not be inferred, as matter of law, that the room was finished off by the express or implied consent of the defendant, and that he was not liable to pay therefor. *Emery v. Thompson*, 27 Vt. 614.

35. Where one, without any authority provided, signs his name to a promissory note as attorney for A, a letter afterwards written to the payee by A, in which he speaks of the note as *my note* and promises to pay it if the payee will wait a certain time for payment, is in law an adoption of the act of the attorney, and is equivalent to an antecedent authority to execute the note. So *held* in an action brought upon the note before the expiration of the time for payment named in the letter. *Bigelow v. Denison*, 23 Vt. 564.

36. The defendant in March received money from his wife, which at the time he understood was received by her in payment of a debt due him, but which in fact was the proceeds of a note taken by her for such debt, and by her, without authority, indorsed in the defendant's name to the plaintiff bank, which paid her the money thereon. The defendant, on the 22nd May following, learned the true facts in the case, and knowing that the maker of the note was in failing circumstances, withheld from the bank the fact of the unauthorized use of his name in the indorsement, until after the protest of the note, June 8, and retained the money. *Held*, that this was in law a ratification of the indorsement, and that it was error not so to instruct the jury. *Bank of Orleans v. Fassett*, 42 Vt. 482.

37. The plaintiff authorized her agent to settle a civil prosecution in her behalf for bastardy against one P, a married man, and the agent settled it by taking the note of the defendant to her therefor, and upon the additional consideration, as expressed in an agreement executed by her, that she would not institute or testify in any criminal prosecution against P. In an action upon the note,—*held*, that the note was illegal and void, notwithstanding the agent exceeded his authority in making such agreement not to prosecute, and although the plaintiff signed the agreement without knowing its contents, supposing it to be merely a settlement of the civil prosecution; for that, by receiving the note and putting it in suit, she in law ratified the acts of her agent. *Smith v. Pinney*, 32 Vt. 282.

38. The appropriation by a corporation of money obtained on a promissory note, executed as the note of the corporation by one, as agent, but without authority, is a ratification of his act

and makes it the note of the corporation. *Windham Prov. Inst. v. Sprague*, 43 Vt. 502.

39. Where A acted for and in behalf of B, as in the sale of B's horse, though A was interested in the sale to the extent of having all he could get above a named price, and B being informed of the terms of the contract consented thereto and received the proceeds of the sale, the warranty of A binds B as his agent, whether A acted by the direction and request of B, or by his permission merely in making the sale. *Held* erroneous, upon these facts, to leave to the jury the question of A's agency, or whether B adopted and ratified the contract "*as made on his own account.*" *Pay v. Richmond*, 43 Vt. 25.

40. Where A was agent for B in negotiating the purchase of a horse, and he negotiated the trade so far as to agree upon the price and the terms of payment, and paid part of the price, but the completion of the trade was left open until B should see the horse, and B afterwards, on seeing the horse, took it and adjusted the balance of the price upon the terms first agreed upon by A, and took a bill of sale of the horse;—*Held*, that A was so far agent of B that B was bound by the previous notice to A of an unsoundness of the horse, although B had no such notice or information in fact. *Hill v. North*, 34 Vt. 604.

41. A put upon his farm for the use of B, his tenant, a yoke of oxen at an appraised value, the profits or loss to be divided. By mutual consent B sold the oxen at a price fixed upon, which A received. In an action against both for a false representation as to soundness, made by B in the sale,—*Held*, that both were liable, whether the relation between them be regarded as that of partners, joint owners, or principal and agent, although A did not know of the unsoundness, or of the false representation of B. *Ladd v. Lord*, 36 Vt. 194.

42. The defendants' agent pledged their credit to the plaintiffs, for goods to be supplied to K, their sub-contractor. The defendants agreed to pay therefor, if they had sufficient funds in their hands belonging to K,—which they had. At the defendants' request, K examined his accounts with the plaintiffs and the defendants delivered a statement thereof to the agent who proceeded to pay part. *Held*, that although the agent might have exceeded his authority in the outset, the defendants by their subsequent acts had adopted and ratified his promise. *Burgess v. Harris*, 47 Vt. 322.

43. An expressed disapprobation of the acts or authority of one who assumed to act as agent of another, will not prevent a subsequent ratification and adoption of them. *Woodward v. Harlow*, 28 Vt. 338.

44. One B, without authority, signed the name of the intestate as a subscriber for ten shares of the capital stock of a corporation. In

an action upon the subscription,—*Held*, that the subsequent declarations of the intestate to strangers that he had taken that amount of stock in the corporation, did not amount in law to a ratification of the subscription. They were only evidence. *Rutland & Bur. R. Co., v. Lincoln*, 29 Vt. 206.

45. It is not the duty of a principal, upon learning that his special agent, or other person, has sold his property without authority, to seek the purchaser and give notice of his claim; and his omission to do so, and his mere silence, are not ordinarily to be construed as a ratification of the sale. *White v. Langdon*, 30 Vt. 599, and see *Strong v. Ellsworth*, 26 Vt. 366.

46. **Revocation by death of principal.** The death of the principal instantly terminates the authority of the agent; and all dealings with the agent thereafter, although by parties ignorant of the principal's death, are void and of no effect. *Davis v. Windsor Savings Bank*, 46 Vt. 728; and see *Mich. State Bank v. Leavenworth*, 28 Vt. 209. *Mich. Ins. Co., v. Leavenworth*, 30 Vt. 11. *Sargent v. Seward*, 31 Vt. 509.

47. **Particular agents—Steamboat captain.** The captain of a steamer on Lake Champlain is to be regarded as the general agent of the owners; and *prima facie* the owners are liable for all contracts for carrying made by the captain or other general agent for that purpose, within the powers of the owners themselves. The *onus* of proving that such contract was personal with the captain is upon the owners; and *held*, that the mere fact that the owners permitted the captain to take the perquisites for carrying parcels [as bank bills], was not sufficient to exonerate the owners (a corporation) from liability as common carriers;—that this was an arrangement among themselves. *Farm. & Mech. Bank v. Champlain Tr. Co.*, 23 Vt. 186.

48. **Clerk in Store.** The clerk in a store was *held* to be the general agent of his principal for the sale of goods, and that his sale of goods upon a credit bound the principal, although he exceeded his authority in so doing, where the purchaser had no notice of the limitation of the authority. *Linsley v. Lovely*, 26 Vt. 123.

49. Clerks in our country stores, with whom are left the goods and demands of our merchants, have charge of both, and, in the absence of their principals, have authority to receive pay on the demands, and to institute suits for their security, when an emergency arises, and to employ an attorney therein, and, as incident, to defeat a previous fraudulent attachment, and thus bind their principals. *Davis v. Waterman*, 10 Vt. 526. 24 Vt. 96.

50. **Agent with power of sale.** Where the plaintiff put into the hands of a general

trader, who was also a factor employed in selling goods for others, a lot of goods for sale, and also sent him other goods of like kind by mistake, and not intended or received for sale, and the trader sold all the goods;—*Held*, that the plaintiff could not avoid the sale as to any of the goods. *Gibbs v. Linsley*, 18 Vt. 208.

51. K, the plaintiff's agent, holding the plaintiff's property with power of sale, sold it to S by sale which was fraudulent as to K's creditors, who attached it. *Held*, that the plaintiff's title passed to S; that the sale was good as to the plaintiff, and that he had no remedy against K's creditors. *Id.*

52. A power of sale conferred upon a bailee is a personal trust, which the bailee cannot delegate to another. *Hunt v. Douglass*, 22 Vt. 128.

53. **Sub-agent.** A sub-agent employed to sell stoves, &c., in a given section of country, for cash, or other pay, or on credit, in his discretion, is not, as such, authorized to give the note of his principal payable in such wares at a future day, and thereby bind his principal by the acknowledgment of "value received." *Denson v. Tyson*, 17 Vt. 549.

54. **Agent from necessity.** The defendant had contracted to float certain lumber of the plaintiff down a river and deposit it in a certain cove, but being prevented by the owner of the cove from there depositing it, he left it fastened in an eddy below, from which it was swept away by a freshet. In an action for negligence;—*Held*, that from a contingency not contemplated by the parties the defendant became the plaintiff's agent from necessity, and was bound to take prudent care of the lumber until he had given such notice to the plaintiff as to afford him an opportunity to take charge of it, and that until such notice it remained in the defendant's custody. *Pickett v. Downer*, 4 Vt. 21, and see *Beckwith v. Frisbie*, 32 Vt. 559.

55. **Notice of termination of agency.** There are cases of a long continued agency where notice of a revocation of the agency is necessary, and where, without such notice, there remains such an apparent agency after the revocation, as will bind the principal by the subsequent acts of the agent as to one who *bona fide* contracts with him on the faith of his agency. But this principle does not apply where the supposed agent had originally only a special authority to do a particular act, or make a particular contract. *Watts v. Kavanagh*, 35 Vt. 34.

56. The implied authority arising from a general employment continues even after the agency has in reality ceased, as regards parties who have before given and continue to give credit to it, and who have not actually received, and cannot be presumed to have had, notice of the change. *Tier v. Lampson*, 35 Vt. 179,

57. B had been the defendant's agent in the peddling of stoves, but his agency had in fact ended. He continued the same business, holding himself out to the world as such agent and dealt with the plaintiff, the plaintiff believing him to be still agent. B's general course of dealing was known to the defendant, and the defendant had given no notice of the termination of B's agency. *Held*, that he was bound by B's contract with the plaintiff. *Bradish v. Belknap*, 41 Vt. 172.

58. **Mode of contracting.** One having authority to sign the name of another to a paper—as, a subscription paper—may do it by the hand of a third person. *Norwich University v. Denny*, 47 Vt. 18.

59. If one executes a contract under seal, on the part and behalf of another, he must execute it in the name and affix the seal of the principal. *Roberts v. Button*, 14 Vt. 204. *Wheeler v. Moulton*, 15 Vt. 519. *Isham v. Bennington Iron Co.*, 19 Vt. 259. *Miller v. Rutland & Washington R. Co.*, 36 Vt. 452.

60. The conveyance of a patent right by the deed of A, by the written consent of B, the owner, was *held* to be equally effective with a conveyance directly from B. *Sherman v. Champlain Transportation Co.*, 31 Vt. 162.

61. The agent of a corporation, for a debt of the corporation, gave a note of the character following: "I, A B, as agent of the G. M. T. corporation, promise, &c." Signed, "A B, agent of the G. M. T. corporation." *Held*, that this was the note of the corporation, and that no action lay against A B thereon. *Proctor v. Webber*, 1 D. Chip. 371. 20 Vt. 49.

62. The defendants, agents of an unincorporated company, of which the plaintiff was a member, in consideration of land conveyed to them in trust for the company, executed to him a note therefor, as follows: "For value received, we, the agents of the Wallingford Manufacturing Company, promise to pay C G R ten hundred dollars and interest till paid; and this note is to be subject to such assessments as shall be made on the capital stock of said company, subscribed for by said R, and if such assessments shall not cover the full amount of this note, the balance to be paid in two years from date, but the assessments made are to be indorsed when they become due."—Dated, and signed by the defendants, adding the words, "Agents of the Wallingford Manufacturing Company." The assessments on the plaintiff's subscription amounted to but part of the note. *Held* (by a majority), upon the facts appearing, (1), that the defendants did not intend to contract personally; (2), that they did not exceed their authority,—and hence that they were not personally holden upon the note. *Roberts v. Button*, 14 Vt. 195.

**63. Joint agency.** In a matter of private concern, or of private appointment, confided to more than one agent, not public officers having authority as such, all must join in the execution of the power—as, commissioners appointed by a town to subscribe for stock in a railroad. *Danville v. Montpelier, &c., R. Co.*, 43 Vt. 144. See *Hodges v. Thacher*, 23 Vt. 455. *Newell v. Keith*, 11 Vt. 214.

### III. DUTIES, LIABILITIES AND RIGHTS OF AGENT.

#### 1. As to his principal.

**64.** The primary obligation of an agent, whose authority is limited by instructions, is to adhere faithfully to those instructions; for, if he unnecessarily exceed his commission, he renders himself responsible to his principal for the consequences of his act. *Fuller v. Ellis*, 39 Vt. 345.

**65.** An agent is bound by the instructions of his principal, only as he understood them, unless there was fraud, or some fault on his part in not comprehending them. *Pickett v. Pearsons*, 17 Vt. 470.

**66.** When the character and nature of the business in which an agent is employed require it, he should keep full, accurate and regular accounts of all his transactions—of his payments and disbursements—and should render, at all proper times, an account thereof to his principal, without suppression, concealment or overcharge. Ordinarily, if he omits his duty in this particular, in a court of justice a presumption arises against him. *Prout, J.*, in *Gallup v. Merrill*, 40 Vt. 137.

**67.** But, for a fault in these respects;—*Held*, that he does not thereby forfeit a balance due him, or compensation for his services. *Ib.* 133. *Walker v. Norton*, 29 Vt. 226.

**68.** An agent, authorized to sell only for money, is liable as for money had and received upon a sale, although he sells for something else than money. *Thompson v. Babcock*, Brayt. 24.

**69.** Where the defendant received the plaintiff's money as agent, but afterwards denied the agency and claimed the money as his own;—*Held*, that he could not urge in defense that the suit was brought without a demand first made. One cannot claim the privileges of a relation which he has repudiated. *Tillotson v. McCrillis*, 11 Vt. 477.

**70.** In order that an agent to collect a debt should be held chargeable, in an action of account, as having made the debt or its proceeds his own by reason of his negligence, the case must be one of gross and palpable negligence. *Pickett v. Pearsons*, 17 Vt. 470.

**71** Where an agent, on the purchase of

goods for his principal, assumed a personal liability for the payment, the vendor being unwilling to trust the principal;—*Held*, that the principal could not claim that their relations were thereby changed, so long as the agent made no claim as purchaser, but recognized his agency. *Dow v. Worthen*, 37 Vt. 108.

**72.** An agent is not excused from accounting to his principal for money received on sales of goods for his principal, although such sales, as between the principal and the purchaser, were illegal. *Baldwin v. Potter*, 46 Vt. 402, and see *Thayer v. Partridge*, 47 Vt. 423.

**73.** Where one employs an agent, knowing his incompetency, if the agent does his best he is entitled to compensation. The defendants, a school district, employed the plaintiff to superintend the repairs of the school house. He did this in good faith and with as much diligence and skill as he did his own business. The defendants knew the plaintiff's habits and ability in this respect when they employed him. *Held*, that the plaintiff was entitled to recover what it was worth to him to do the work, although "an ordinarily skillful and shrewd man" could have made the repairs for a less sum. *Felt v. School District*, 24 Vt. 297.

**74.** A was agent of B for selling a patent right, under a contract that he was to have half he could get, and pay his own expenses. A having sold some rights and incurred expenses, the parties agreed that A should give up his agency and B would pay such expenses. A gave up the agency and charged B such expenses. *Held*, that the agreement was upon sufficient consideration, although B might have had a right to terminate the agency at will, without payment of expenses; and that such expenses were recoverable in an action of book account. *Perry v. Buckman*, 33 Vt. 7.

#### 2. As to third person.

**75.** A person assuming to act as the agent of another without authority may be made liable on the contract as principal; or, if the nature of the case do not admit of such remedy, he may be made liable for all damages by action on the case as for a deceit. Thus assuming to act is *prima facie* fraudulent. *Clark v. Foster*, 8 Vt. 98.

**76.** In regard to contracts under seal, this last may be the most appropriate, perhaps the only remedy. *Redfield, J.*, in *Roberts v. Butten*, 14 Vt. 202.

**77.** In simple contracts, if an agent does not disclose his agency and name his principal, he binds himself, although he may not have intended to assume a personal liability. *Royce v. Allen*, 28 Vt. 234.

**78.** An agent who undertakes to bind a principal by simple contract, but without au-

thority or in excess of his authority, binds himself. *Id. Roberts v. Button*, 14 Vt. 195. *Clark v. Foster*, 8 Vt. 98.

79. An agent, whose agency is not known by or disclosed to the party with whom he contracts, becomes personally bound. *Baldwin v. Leonard*, 39 Vt. 260.

80. The defendant, an agent for a school district, employed the plaintiff, an attorney, upon the credit of the district, to defend a suit against the defendant, upon the mutual mistake that the district had authorized this and had assumed the defense. The defense was successful. The plaintiff had made his charges to the district, and in a suit against the district to recover therefor had failed, on the ground that the defendant had no authority in fact to bind the district. In an action of assumpsit to recover for the plaintiff's services and expenses in both suits;—*Held*, that the services in the first suit, having been rendered by request of the defendant and for his benefit and under such mutual mistake, stood like money paid by mistake, and could be recovered for, although rendered upon the credit of the district, and although both parties had the same means of knowledge as to the extent of the defendant's authority, as agent; but that the plaintiff could not recover for his services and expenses in his suit against the district, since both parties had the same means of knowing the extent of the defendant's authority, and these were not for the defendant's benefit. *Paddock v. Kittredge*, 81 Vt. 378.

81. Where a contract is made which, in some sense, ultimately concerns others than the contracting parties, whether the one contracting is personally bound by certain stipulations is mainly a question of intention. In this case, *held*, that the defendant was personally bound. *Hinsdale v. Partridge*, 14 Vt. 547.

82. Where one requests another to render services for a third person, he is not necessarily liable for the services rendered, although such third person is not thereby made liable. *Stone v. Huggins*, 28 Vt. 617.

83. The plaintiff had a suit pending against a town of which the defendant was the (official) town agent, and, during negotiation with the defendant, had offered to take \$60 in settlement. The defendant afterwards wrote the plaintiff a letter, saying: "I have concluded I would accept your offer and pay you the \$60, rather than have any more trouble in the matter; \* \* please withdraw the suit and let it go: \* \* I shall be at home Saturday and I will see that you have the money. Of course this pledge will be sufficient guarantee that I will pay it, &c." In faith of this, the plaintiff abandoned his suit. *Held*, that this was a personal undertaking of the defendant, and bound him as such—it being conceded that the defen-

dant, as such town agent, had no authority to bind the town by such promise. *Clay v. Wright*, 44 Vt. 538.

84. Where a recovery and satisfaction had been had against a turnpike corporation for erecting a toll-house and gate on the plaintiff's land, which work had been done by the present defendants as servants and agents of the corporation;—*Held*, that the defendants were not liable for a continuance of the nuisance,—that being regarded as the act of the principal, and they having done no act affirming the continuance. *Lyman v. Dorr*, 1 Aik. 217.

85. Though there be a right of recovering back money paid to an agent, yet if paid over to his principal before notice to retain it, or suit brought, he ceases to be liable. *Gray v. Otis*, 11 Vt. 628.

86. An agent who makes a promise, not concealing his agency nor exceeding his authority, is not liable to an action thereon. *Hall v. Huntoon*, 17 Vt. 244.

#### IV. ACTS AND DECLARATIONS OF AGENT.

##### 1. As binding his principal.

87. The defendants sent their servant with a message to the plaintiff, a physician, to come and see a boy who had got hurt in their employ, and they would pay him for that visit. The servant delivered the message in this form—that the defendants told him to tell the plaintiff to go and see the boy and attend upon him carefully and see him through it, and they would pay the bill. The plaintiff, upon the faith of this, and relying solely upon the credit of the defendants, attended upon the boy until his recovery, the defendants knowing that the plaintiff was so attending from time to time. Upon report of these facts by an auditor, the county court rendered judgment for the plaintiff for his entire bill; and this judgment was affirmed by the supreme court. *Barber v. Britton*, 26 Vt. 112. (Doubted in *Pratt v. Page*, 32 Vt. 19.)

88. The plaintiff, residing in Vermont, having a note against the defendant residing in California, left it with J, his brother in California, for him to receive the payment of it. The defendant afterwards forwarded to the plaintiff a draft, as payment of the note, whereupon J surrendered to him the note. The draft was protested for non-acceptance. In a subsequent action upon the note, the question was whether the sending of the draft was a payment of the note,—the plaintiff testifying that the note was agreed to be paid by sending money instead of a draft, and the defendant testifying the contrary. It appearing that J, the plaintiff's agent to receive the payment, was cognizant of the agreement and of the

whole transaction;—*Held*, that the fact that he surrendered the note upon the forwarding of the draft was itself evidence tending to show that this was according to the agreement as to the mode of payment. *Moore v. Quint*, 44 Vt. 97.

89. An agent to sell goods and take notes therefor and transmit to his principal wrongfully altered such a note. In an action by the principal declaring upon such note as altered, adding the general counts,—*Held*, in the absence of evidence that the plaintiff knew or assented to such alteration, that the alteration should be treated as the act of a stranger, he clearly not being the plaintiff's agent to alter the note; that the note was not thereby rendered inoperative, and a recovery could be had under the common counts. *Bigelow v. Stephen*, 35 Vt. 521.

90. Where the defendants employed one to cut timber upon a certain lot, whom they trusted as knowing the lines, and he by mistake cut some trees beyond the line on the plaintiff's land, which went to the defendants' use;—*Held*, that the defendants were liable for his trespass. *Small v. Ball*, 47 Vt. 486, and see *Hill v. Morey*, 26 Vt. 178.

91. Demand by agent. Where a demand was made on the defendant by the agent in fact of the plaintiff, and the defendant, expressing no doubt as to the agent's authority, promised to pay;—*Held*, that he could not thereafter object to the sufficiency of the demand, upon the ground that he had no assurance of the agent's authority. *Barron v. Pettes*, 18 Vt. 385.

92. Notice to agent. Notice to an agent, in order to bind his principal, must be in the same transaction. *Blumenthal v. Brainerd*, 38 Vt. 402.

93. Notice of a trust to an attorney, or agent, is in law notice to the client or principal, although such knowledge comes to the attorney or agent while acting in another and different transaction—*Abell v. Howe*, 43 Vt. 403—and although such attorney or agent acquired such knowledge, before he became attorney or agent of the party to be affected by such notice. *Hart v. Farm. & Mech. Bank*, 33 Vt. 252.

94. Declarations. Where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time and constituting part of the *res gestæ*; but the admission or declaration of the agent binds the principal only when it is made during the continuance of the agency, in regard to a transaction then depending,—*et dum fervet opus*; and it is because it is a verbal act and part of the *res gestæ*, that it is admissible at all. *Kellogg, J., in Mason v. Gray*, 36 Vt. 313. *Curtis v. Ingham*, 2 Vt. 287. 23 Vt. 130. *Tillotson v. McCrillis*, 11 Vt. 477. *Un-*

*derwood v. Hart*, 23 Vt. 120. *Barnard v. Henry*, 25 Vt. 289. *Hayward Rubber Co. v. Dunklee*, 30 Vt. 29. *Austin v. Chittenden*, 33 Vt. 553. *Upham v. Wheelock*, 36 Vt. 27. *Earle v. Grout*, 46 Vt. 113.

95. A declaration by an agent of what he is about to do, or has done, or a subsequent concession of what he said or did in the performance of his agency, or any account given as of a past transaction, is not evidence against his principal. *Ib.*

96. On the trial of an *audita querela* to set aside a justice judgment rendered by default, for the alleged reason that the justice was not present within the statute two hours;—*Held*, that the declarations of the attorney of the plaintiff in that suit made at the time, and subsequently, that the justice was not present, that he had not seen him, etc., were not admissible to prove the fact of the justice's absence. *Underwood v. Hart*.

97. Declarations of an agent, made after his agency has ceased, as to the terms of a contract made by him, are not evidence against other parties; and none the more so because he has since deceased. *Stiles v. Danville*, 42 Vt. 282.

## 2. As enuring to the benefit of his principal.

98. The person for whom and with whose funds property is bought becomes at once the owner of it, although the purchase is made by an agent in his own name, and without disclosing his agency. *Ridout v. Burton*, 27 Vt. 383. *Paris v. Vail*, 18 Vt. 277. *Hall v. Williams*, 27 Vt. 405.

99. An agent, authorized to sell lands and receive payment therefor in his discretion, upon sale of the lands took a note and mortgage therefor in his own name, and received a horse in part payment. *Held*, that the horse became the property of his principal, and was not subject to attachment for the agent's debts. *Waldo v. Peck*, 7 Vt. 434.

100. The plaintiff's agent purchased a cow for him of the defendant, avowedly as agent. The defendant declined taking the plaintiff's note therefor, but consented to the agent's taking the cow and giving his own note therefor, which was done, and the note was afterwards paid with the plaintiff's money. *Held*, that the contract was with the plaintiff, so as to entitle him to maintain an action upon a warranty in the sale. *White v. Owen*, 12 Vt. 361.

101. Principal not disclosed. A receipt was executed by a common carrier, acknowledging to have received of A and B certain goods for transportation;—*Held*, that there was nothing in the terms of the receipt to preclude proof that the goods were owned jointly by A, B and C; and that on such proof an action lay

in the names of A, B and C against the carrier for a loss of the goods, although he had no knowledge that C had any interest in them. *Day v. Ridley*, 16 Vt. 48.

102. A father and son were both named D. F. The father purchased land, taking the deed to "D. F., Jr.," describing the grantee as of the town where both resided, and executed notes and a mortgage for part payment of the purchase money in the name of "D. F., Jr.," saying nothing of his acting as agent for his son, and the grantor supposed the father to be in fact the purchaser, that his name was D. F., Jr., and that he (the grantor) was deeding the land to the father. In an action of ejectment, the plaintiff claimed title to the lands by a levy and set-off on execution against the father, and the defendant by deed from the son. There being some evidence that the son had authorized the father to buy the land for him and furnished the money to pay for the place, and that the father was in fact agent for the son in the transaction;—*Held*, that it was properly left to the jury to decide which was the real principal; that this did not depend upon the intention of the grantor; and that the title vested in the real principal. *Prentiss v. Blake*, 34 Vt. 460.

103. If an agent for the sale of goods sell them in his own name, without disclosing his principal, an action for the price may be maintained in the name of the principal. *Lapham v. Green*, 9 Vt. 407. *Squires v. Barber*, 37 Vt. 558.

104. Nor is the principal estopped in such case by the fact that he made a bill of sale of the property in the name of the agent, who was to have as a commission all above a certain price. *Edwards v. Golding*, 20 Vt. 30.

105. An officer sold property on execution, which was bid in by A, and the officer made return that he had sold it to A. A was in fact the agent of B in making the purchase, but did not disclose this fact to the officer. *Held*, that the officer could recover the price in an action against B for goods sold. *Carney v. Dennison*, 15 Vt. 400.

106. *Dictum*.—In contracts made by an agent without disclosing his principal, the suit to enforce them may be in the name either of the principal or of the agent. But, in such case, if the suit be not brought in the name of the person ostensibly contracting, it is subject to every defense which would obtain if it had been so brought. *Lapham v. Green*, 9 Vt. 407.

107. One dealing by simple contract with an agent not disclosing his principal, may be made liable in a suit in the name of the principal, to the same extent as if the agent had been principal and the suit had been brought in his name. *Culver v. Bigelow*, 43 Vt. 249.

108. Where property is intrusted to an agent for sale, any person buying and paying in good

faith will be protected, though the agent appropriate the avails to his own use without authority,—especially where the purchaser knows nothing of the agency. *Cross v. Haskins*, 18 Vt. 586.

109. One who purchases goods of an agent cannot, in an action by the principal for the price, set off a claim against the agent, though agreed to by the agent, if the purchaser had knowledge of the agency, or there were circumstances sufficient to excite suspicion, or to put him upon inquiry as to the right of the agent to deal with the goods as his own. *Squires v. Barber*, 37 Vt. 558.

110. And *Held*, in this case, that there were such circumstances of suspicion, viz., that the agent was insolvent and owed the defendant \$20, and agreed to pay this debt out of the price of the goods in consideration that the defendant would assist him in compromising his other debts, and then told the defendant that he did not carry on business in his own name; the character of the goods sold, [a chest of tea and a barrel of molasses] also implying the existence of a mercantile establishment for the sale of heavy groceries carried on, not in the name of the agent. *Ib.*

### ALIEN.

1. There is no provision in the constitution or laws of this State for declaring the forfeiture, or taking the escheat of lands in this State owned by an alien, and no such attempt has ever been made. It would seem, that the right to interfere with aliens holding real estate in this country, strictly and appropriately, belongs to the national, and not to the State sovereignty. *State v. Boston, &c. R. Co.*, 25 Vt. 433.

2. It is not an essential qualification of a voter in a town or school district meeting, or of an office-holder of a town or school district, that he should be a freeman; a person of foreign birth not naturalized may be such voter or office-holder, if he have all other qualifications. *Woodcock v. Bolster*, 35 Vt. 632 (1863). Changed by Stat. 1869, No. 50.

### ALTERATION OF INSTRUMENT.

1. **Material Alteration.** A joint and several bond of three was altered with consent of two of them in the absence of the third, and afterwards, without the consent of the two, the obligee removed the seal and erased the signature of the third. *Held* (by a majority) that the bond was made void as to all. *Dewey v. Bradbury*, 1 Tyl. 186.

2. That the bond sued upon was surreptitiously ante-dated, was allowed to be pleaded in bar. *Davis v. Cole*, 1 Tyl. 262.

3. If a promissory note be altered in a material point by consent of one signer, and not of another, it is the note of the first, and not of the other. *Broughton v. Fuller*, 9 Vt. 378. 44 Vt. 415.

4. If a lessee fraudulently alter his lease in a material part, he destroys all his future rights under that lease, by destroying his evidence of title; and the lessor may re-enter. *Bliss v. McIntyre*, 18 Vt. 466.

5. — **by a stranger.** If a written instrument be altered in a material point by the owner or holder of it, without the knowledge or consent of the signer, the instrument is avoided, and, *semble*, such alteration works a forfeiture of the debt represented by it. But if the alteration be made by a stranger without authority, the instrument is not thereby avoided;—and, *held*, that an unauthorized alteration of a note, made by the owner's agent to take the note, should be treated as the act of a stranger. *Bige-low v. Stulphen*, 35 Vt. 521. 41 Vt. 602.

6. **Immaterial alteration.** The plaintiff offered in evidence a sealed instrument in which the defendant acknowledged that he had "signed" certain promissory notes. The words "*and executed*," appeared interlined, following the word "signed." The paper was admitted against objection, and without explanation of the interlineation. *Held* correct; and that the words interlined were altogether immaterial, not altering the legal effect. *Langdon v. Paul*, 20 Vt. 217.

7. Wherever, by the alteration of a promissory note, neither the rights nor interests, duties nor obligations of either of the parties are in any manner changed, the alteration is immaterial, though made by the payee. *Derby v. Thrall*, 44 Vt. 413.

8. The defendant as surety for W signed a note to the plaintiff, erroneously naming him *Franklin Derby*. Upon W's delivering the note the plaintiff, by his consent, changed the name "*Franklin*" to the true name, *Francis E. Held*, that the alteration did not vitiate the note. *Id.*

9. **Presumption—Evidence.** The alteration of a written instrument, if nothing appear to the contrary, should be presumed to have been made at the time of its execution. On the usual proof of execution, the instrument should, without reference to the character of any alteration upon it, be admitted in evidence, leaving all testimony in relation to such alteration to be given to the jury; and, generally, the whole inquiry whether there has been an alteration, and, if so, whether in fraud of the defending party, or otherwise, to be determined by the appearance of the instrument itself, or from that

and other evidence in the case, is for the jury. The whole is matter of fact, and they must determine it from all the testimony before them. *Beaman v. Russell*, 20 Vt. 205. *Langdon v. Paul*, 20 Vt. 217. *Kimball v. Lamson*, 2 Vt. 138.

## AMENDMENT.

### 1. Power of Court to allow amendment.

The county court has power to allow any amendment which does not change the parties, or the nature, or cause of action, unless it be of some statute requisite in relation to the process itself. *Bowman v. Stowell*, 21 Vt. 314. *Stevens v. Hewitt*, 30 Vt. 265.

2. — **of return of process.** On motion to dismiss a suit for defective service of the writ, the court decided that the suit be dismissed. After the decision, the plaintiff moved that the officer be permitted to amend his return according to the fact. The court, as matter of law and not of discretion, denied the motion. *Held* erroneous, and that it was within the discretion of the court to allow the amendment. *Bent v. Bent*, 43 Vt. 42.

3. An officer after return of process may, on application to the court, but not otherwise, be permitted to amend his return, provided the rights of third persons will not be affected by it, and there is something on the record by which the amendment or correction can be made. The court will allow the amendment, or not; and if allowed, it will be on such terms as the court think proper to impose. An amendment so made without leave of court was *held* of no validity. *Barnard v. Stevens*, 2 Aik. 429.

4. In trespass tried on appeal in the county court the defendant justified by process, but the return was imperfect. The county court refused to allow the officer to amend his return. *Held* correct; but, *semble*, such amendment might have been permitted by the justice, if it would not affect the interests of third persons and would not be false. *Brainard v. Burton*, 5 Vt. 97.

5. The court properly refused to permit an officer to amend his return after the return day, to affect proceedings in another suit. *Fletcher v. Pratt*, 4 Vt. 182. *Orois v. Isle La Motte*, 12 Vt. 195.

6. — **of writ and declaration.** A writ and declaration wanting in nothing but an *ad damnum* is amendable in that particular. *Lamphere v. Cowen*, 42 Vt. 175.

7. In a case appealed from a justice the plaintiff, by leave of the county court, raised his *ad damnum* from \$100 to \$1,000. At a subsequent term the defendant moved to dis-



miss the suit for want of jurisdiction, when the plaintiff, by leave of court, and before trial, reduced the *ad damnum* to the original sum. *Held*, that the writ was not "amended out of court," but the jurisdiction remained. *Whitney v. Stars*, 16 Vt. 587.

8. The clerk of the county court by mistake signed a writ as "Dep. Clerk." After plea in abatement that he was not deputy clerk, the court allowed him to amend by annexing to his signature the word "Clerk." *Held* correct;—for that such amendment was merely a correction of the misdescription of the capacity in which he exercised the powers of clerk, without supplying any authority not already apparent upon the writ. *Johnson v. Nash*, 20 Vt. 40.

9. The defendant was sued by the name of "The Haverhill Bridge Company." Its true corporate name was "The Proprietors of Haverhill Bridge." The county court allowed the plaintiff to amend his writ and declaration by changing the designation to the true name. *Held*, that the court had power so to do. *Stanton v. Proprietors of Haverhill Bridge*, 47 Vt. 172.

10. A writ and declaration against the defendant corporation sued as the "New York Central Railroad Company," were allowed to be amended by changing this to the present true corporate name, viz: The New York Central and Hudson River Railroad Company. *Held* proper. *Honford v. N. Y. Central, etc., R. Co.*, 47 Vt. 533.

11. **General rule.** The rule established by the court in repeated cases, as to the power of the court to allow amendments, only limits it to the same cause of action, and form of action, and the same parties to the suit; defects of any other character, to any extent, may be cured by amendment. *Poland, J., in Waterman v. Conn. & Pass. R. R. Co.*, 30 Vt. 614.

12. An amendment to a declaration may be made which does not change the form or nature of the action, or introduce a new subject matter; and it is no objection to an amendment that it may enable the plaintiff to recover, where he otherwise could not. Every necessary amendment does this. *Skinner v. Grant*, 12 Vt. 456. (*Boyd v. Bartlett*, 36 Vt. 14. *Dana v. McClure*, 39 Vt. 197.)

13. **Instances.** In an action of slander an amendment was allowed, by adding an averment that the words were spoken of the plaintiff as a preacher and minister of the gospel. *Id.*

14. So, in an action brought by B on a promissory note payable to A, or bearer, an amendment was allowed averring that the plaintiff was the bearer. *Bowman v. Stowell*, 21 Vt. 309.

15. So, on the coming in of the report of an

auditor, the name of one of the defendants was allowed, on plaintiff's motion, to be stricken out, such person not being in life when the cause of action accrued. *Winn v. Averill*, 24 Vt. 283.

16. So, a declaration upon a promissory note may be amended by adding a count upon a count stated. *Stephens v. Thompson*, 28 Vt. 77.

17. So, in an action of ejectment—by adding to the statute form an allegation of special damage done to the premises. *Lippett v. Kelley*, 46 Vt. 516.

18. A declaration containing only the general counts in assumpsit may be amended by adding a count upon a parol submission and award. *Trencott v. Baker*, 29 Vt. 459.

19. Where the declaration in an action upon a judgment misdescribed it in some particulars, but not so as to wholly destroy its identity,—*Held*, that the misdescription could be corrected by an amendment. *Stevens v. Hewitt*, 30 Vt. 262.

20. In assumpsit against husband and wife to recover for the indebtedness of the wife accrued before marriage, the declaration may be amended so as to aver that the debt accrued before coverture. *Montgomery v. Maynard*, 33 Vt. 450.

21. New counts may be added to a declaration by amendment, which allege an enlargement of the time of performance of a contract. *Hill v. Smith*, 34 Vt. 535.

22. And in trover, a new count may be added for additional property taken at the same time with the other. *Haskins v. Ferris*, 23 Vt. 678.

23. So, a declaration in covenant, counting for a breach of the covenant that the premises were free of incumbrance, whereas they were at the date of the deed subject to a certain mortgage, after demurrer sustained on the ground that the covenant did not pass to the plaintiff as a subsequent grantee, was allowed to be amended by a new count declaring upon a covenant in the same deed to warrant and defend the premises against all lawful claims and demands, and setting up the establishment by decree of court of the same mortgage as a paramount title; and this, although the rule of damages in the two cases was different. *Boyd v. Bartlett*, 36 Vt. 9.

24. It is no objection to an amendment, that it sets up the cause of action in such manner as to take the case out of a statute of limitations applicable to the original declaration. As where the declaration was the common counts in assumpsit only, and a specification of the claim described a promissory note, to which the defendant pleaded the statute of limitations of six years, the plaintiff was allowed to abandon his original declaration, and to file a new

count declaring upon the note as a witnessed note. *Dana v. McClure*, 39 Vt. 197.

25. On the question of amendment, in determining whether the amendment introduces a new cause of action, the court is not confined to the question of legal identity upon the pleadings, but may go into extraneous evidence to show that it is the same cause of action in fact. *Hill v. Smith*, 34 Vt. 535. It is to a great extent a question of fact, depending on the purpose and intent of the plaintiff in bringing the suit and framing his original declaration. *Boyd v. Bartlett*, 36 Vt. 12. The party may always amend by more correctly describing the cause of action "intended to be declared on." *Haskins v. Ferris*, 23 Vt. 673. *Trescott v. Baker*, 29 Vt. 463.

26. Where the plaintiffs are named only by their firm name, as "Marshall A. Lewis & Co.," or "Homer, Bishop & Co.," the individual and full names of the partners may be supplied by amendment. *Lewis v. Locke*, 41 Vt. 11.

27. Amendment allowed in a declaration counting upon a several promise, by adding a count upon a joint promise, and therein suggesting that the other joint promisor resides out of the State. (G. S. c. 30, s. 74.) *Carter v. Hosford*, 48 Vt. 433.

28. After the filing of a referee's report, but before judgment, the plaintiff was allowed to raise the *ad damnum* of his writ. *Held*, within the power of the county court. *Harris v. Belden*, 48 Vt. 478.

29. **Discretion limited.** Where a proceeding depends on the discretion of the court below, guided by the particular circumstances of the case, and not on any certain and known rule of law, it is not subject to revision in the supreme court on exceptions. But if the power be exercised (as in granting a new trial or an amendment), in a case where the court by law has no power to grant it, it is error. *Carpenter v. Gookin*, 2 Vt. 495. (*Bourman v. Stowell*, 21 Vt. 313.)

30. **Instances.** Thus, to allow the amendment of a declaration which changes the form of action, or introduces a new count for a new cause of action not contained in the original declaration, is error. *Ib.*

31. So, to permit an amendment which changes the parties, and, at the same time, the cause of action. *Emerson v. Wilson*, 11 Vt. 357.

32. In a case appealed from a justice, where, upon the papers, the justice has no jurisdiction, no amendment can be made in the county court so as to give a jurisdiction. *Thompson v. Colony*, 6 Vt. 91.

33. Where either the name of the surety, or the sum in which he is bound, is omitted in the minute of the recognizance upon the writ,

the court, by force of the statute, has no power to amend the defect. *Peck v. Smith*, 3 Vt. 265.

34. A certificate, defective in stating the day, month and year when a *qui tam* writ was signed by the magistrate [stated as *exhibited*] cannot be amended so as to comply with the statute. *Pollard v. Wilder*, 17 Vt. 48.

35. The direction in a writ cannot be amended, after the entry of a suit in court, by inserting the statute reasons for authorizing a person to serve it. *Dolbear v. Hancock*, 19 Vt. 388.

36. The county court has no power, on a trial, to permit a sheriff to amend his return upon an execution which has been returned by him to the clerk's office, so as to render such execution, as amended, evidence in the case. *Paul v. Slason*, 22 Vt. 231.

37. **Cases appealed.** The whole power of the county court to allow new declarations to be filed in appealed cases rests upon its general power and authority to allow amendments of the process and proceedings pending in court. *Stevens v. Hewitt*, 30 Vt. 262.

38. The court on appeal may allow new counts to be added for the same cause of action, but not for what is, in fact, a new or distinct cause. *Keyes v. Throop*, 2 Aik. 276.

39. A declaration before a justice described a note as payable to A B, or bearer. On appeal, the plaintiff was properly allowed to file a new declaration omitting the words "or bearer," to make it correspond to the truth and prevent a variance. *Bucklin v. Ward*, 7 Vt. 195.

40. The form of action is not changed merely by changing its name;—as from "*trespass*" before the justice to "*trespass on the case*" in the county court. The cause of action stated at length is deemed the true one, and not the name by which it is called. *Coggswell v. Baldwin*, 15 Vt. 404.

41. The filing of a new declaration on appeal is mere matter in amendment. If variant from the former and containing new matter, the defendant should object to its being received: it is not matter for abatement. *Way v. Wakefield*, 7 Vt. 228.

42. The objection that a new declaration filed in the county court, on an appeal, sets up a new or other cause of action, or varies the cause or form of action from that before the justice, must be taken advantage of by a motion to dismiss the new declaration, or by an objection to receiving it,—otherwise the objection is waived. *Held*, that the objection was not reached by a special demurrer for that cause. *Blodget v. Skinner*, 15 Vt. 716.

43. In a suit before a justice, the declaration was only for goods sold and delivered. *Held*, that on appeal the plaintiff could not recover for work and labor, under a new declaration containing the common counts in assump-

sit, although the account for work and labor was mixed in with the account for goods sold, and the plaintiff intended that his writ should be for the whole account. *Devey v. Nicholas*, 44 Vt. 24.

**44. Acquiescence in an amendment.** An amendment which the court has no power to make may be acquiesced in;—as, by afterwards pleading to the merits without reserving exceptions to the amendment. *Peck v. Smith*, 3 Vt. 265. 32 Vt. 629.

**45. Effect of amendment.** The necessary effect of overruling an amendment to a declaration, once allowed, is to restore the proceeding to its original state. *Barber v. Ripley*, 1 Aik. 80. 7 Vt. 227. 11 Vt. 358.

**46. —by relation.** A new count, in the nature of an amendment to a declaration, relates back to the commencement of the suit; so that a plea to such new count, that the cause of action did not accrue within 14 years before "the filing of the new declaration," was held bad on demurrer. *Dana v. McClure*, 39 Vt. 197.

**47. —as to time.** Independently of any showing of the day on which an amendment of process was procured to be made in the county court, it will be taken to have been made on the last day of the term. *Burns v. N. Bank of St. Albans*, 45 Vt. 269.

**48.** Where the plaintiff procured an amendment of his writ on the last day of the second term, and the defendant within thirty days thereafter filed his motion to dismiss the action for causes arising from the amendment;—*Held*, that it was not error for the court, at the succeeding term, to entertain the motion and dismiss the action. *Id.*

**49. —as to bail.** Where an amendment does not make the bail liable to a greater sum, nor subject him to any new or additional responsibility, he is not thereby discharged, though the amendment be by a new count, and the recovery be upon that. *Wright v. Brownell*, 3 Vt. 435.

**50. Amendment to conform to verdict.** The declaration counted for an injury to the plaintiff's grist-mill, saw-mill and lath-mill and machinery and premises by the stopping of the flow of water thereto. The jury found specially that the plaintiff's right of water claimed was limited to the grist-mill. The court then before judgment allowed the declaration to be amended to correspond with the verdict. *Held* correct. *Kimball v. Ladd*, 42 Vt. 747. "Any court, &c., may at any time permit either of the parties to amend," &c. G. S., c. 30, s. 41. *Dana v. McClure*, 39 Vt. 201.

**51.** In an action by husband and wife for an injury to the wife, the plaintiffs were permitted, after verdict and motion in arrest and

hearing thereon, but before judgment, to amend their declaration by striking out an allegation of expense and loss of service to the husband,—the trial having proceeded solely for damage to the wife:—*Held*, no error. *Bates v. Cilley*, 47 Vt. 1.

**52. Amendment of verdict.** The court has power to correct an informality in a verdict, even after the jury are discharged—as, where in an action of assumpsit the jury rendered a verdict of "guilty," and it was changed by the county court to "did assume and promise," &c. *Postor v. Caldwell*, 18 Vt. 176. So, where in an action of book account before a justice, the jury returned a verdict that the defendant did assume and promise—*ruled*, that the justice might have corrected the verdict and recorded it in proper form. *Mason v. Lawrence*, 2 Vt. 560.

**53.** A general verdict for the plaintiff in an action of ejectment was corrected by the supreme court to conform to the truth—it appearing by the bill of exceptions that the defendant had an interest in the premises. *Warren v. Henshaw*, 2 Aik. 141. 18 Vt. 180.

**54. Non-assumpsit** and the statute of limitations pleaded, and issues joined;—no evidence given on second issue;—verdict for plaintiff on first issue, without noticing the second. The court, at a subsequent day in the term, on motion, ordered the verdict amended so as to embrace both issues. *Held* correct. *Davis v. Hoy*, 2 Aik. 308.

**55. —of judgment.** Record of judgment in the supreme court amended upon motion, under a rule. *Lowry v. Catlin*, 2 Vt. 365.

**56.** Where a husband and wife were joined as defendants in ejectment, where the wife's title was not involved, and judgment passed against both, the supreme court allowed the plaintiff to amend, on terms, by striking out the name of the wife, and affirmed the judgment against the husband. *Mattocks v. Stearns*, 9 Vt. 326.

**57. —after judgment.** After the affirmance of a judgment for the defendant in an action of assumpsit upon the judgment of another State, the court refused to allow an amendment, changing the action to debt—the court being divided as to whether such amendment was allowable, upon any terms. *Boston India Rubber Co. v. Hoit*, 14 Vt. 92—*quære* suggested.

**58.** An amendment after judgment, upon the facts as they stood before the amendment, cannot render the judgment erroneous. An amendment may cure error, but cannot create it. *White River Bank v. Downer*, 29 Vt. 332.

**59. Power of court to revise and correct its records.** It is a power incident to a court of general jurisdiction, independent of any statute, to exercise a revisory power over its own records, and, by a direct inquiry into the

matter, to correct the record according to the truth, and prevent the unjust operation of an erroneous or imperfect record. This is usually done on motion founded on affidavits and notice, in a summary way, in the sound discretion of the court, where the furtherance of justice requires it. *Mosseaux v. Brigham*, 19 Vt. 457. *Pettes v. Montague*, cited 26 Vt. 449. *Scott v. Stewart*, 5 Vt. 57.

60. This power exists to set aside a default, *Scott v. Stewart*; or the levy of an execution, &c. *Tudor v. Taylor*, 26 Vt. 444.

61. The county court, within certain limits, has such power over its records and judgments as to warrant the court in ordering them corrected, and, if necessary, for sufficient reasons, to order a case after final judgment to be brought forward, and to vacate that judgment and open the case for further proceedings. This is ordinarily so far a matter of discretion, that the supreme court will not revise the proceedings on exceptions. *Peck, J., in Smith v. Howard*, 41 Vt. 74.

62. The plaintiff had obtained final judgment in the county court in an action of assumpsit, on which he was entitled to an execution against the body. By inadvertence, the execution was issued against the goods, chattels and lands only, and was returned *nulla bona*. At the next term, on the plaintiff's petition, the county court vacated the judgment and rendered a judgment for the same damages, adding interest. The avowed purpose of the proceedings was to enable the plaintiff to procure a new execution against the body, so as to charge the bail on the original writ. *Held* erroneous; and that the motion should have been denied on the very ground on which the plaintiff prayed to have it granted, that is, the charging of the bail. *Ib.*

63. The original plaintiff died pending his suit and the same was prosecuted to judgment by his administrator, and execution issued in the name of the deceased plaintiff, and was delivered to an officer and returned in such way as, upon a proper execution, to charge the property attached. The county court afterwards, on the motion of the administrator, allowed the execution to be amended by the clerk. *Held*, that this was error; and, on the ground mainly, that such amendment might charge the officer or his bailees, who were already discharged by reason of the defect in the execution. *Allen v. Thrall*, 41 Vt. 79.

64. It is not competent for the county court, after judgment, to order the case brought forward and to hear evidence and adjudicate a fact and engraft into the record material statements, for the mere purpose of reviving a lien [as a mechanic's lien] that has lapsed and become extinct as against purchasers and owners of the estate who acquired title after such lien

had lapsed and terminated. *Haynes v. Kimpton*, 47 Vt. 46.

65. **Amendment in criminal cases.** The complaint of a town grand juror may be amended by leave of court—like an information or indictment by those who presented them, with leave of court. *State v. Batchelder*, 6 Vt. 479. (Enlarged by stat. 1870, No. 5.)

66. —on appeal from probate court. On an appeal from the probate to the supreme court, the court refused to allow the referee, appointed by rule of the probate court, to amend his report. *Wolcott v. Wolcott*, 11 Vt. 207.

67. **In what court motion to be made.** On the remanding of a case to the county court for a new trial, an application for leave to amend pleadings should be made to the county court. *Allen v. Parkhurst*, 10 Vt. 557.

68. **Record of town clerk.** The refusal of the court to allow a town clerk to amend a town record was *held* not a judicial act, and so not the subject of error,—for the right of the clerk to correct his record did not depend upon the opinion of the court. *Hoag v. Durfey*, 1 Aik. 286.

## ANCIENT LIGHTS.

Long continued use of light for the windows of one's dwelling, standing on or near the line of his land, raises no presumption of a grant, nor creates the right to a continued use against the owner of the adjoining land. The English doctrine of ancient lights discussed, and denied. *Hubbard v. Town*, 33 Vt. 295.

## ANIMALS.

1. **Duty to restrain vicious animals.** It is the duty of the owner of a vicious ram, who knows of the propensity of the animal to butt persons, so to restrain him as to prevent him from doing injury. *Oakes v. Spaulding*, 40 Vt. 347. The same law as to a dog accustomed to bite mankind. *Brown v. Carpenter*, 26 Vt. 638.

2. The defendant, the owner of a cow accustomed to hook horses, and that known to him, was made liable for the hooking of the plaintiff's colt while the cow was in the highway, but upon the plaintiff's land on her way to water, and the colt had been turned loose in the highway by the plaintiff. *Coggswell v. Baldwin*, 15 Vt. 404.

3. The fact that a mare, in general kind and orderly, but which, when in heat, had on several occasions kicked at other horses, imposes

no duty on the owner to restrain her when not in heat. *Tupper v. Clark*, 43 Vt. 200.

4. **Dog.** A dog may be used in driving off cattle trespassing upon one's lands, and, if so done in a prudent and careful manner, the owner is not responsible for an injury done by the dog to the cattle. *Clark v. Adams*, 18 Vt. 425. *Davis v. Campbell*, 23 Vt. 236.

5. **Held**, that it is lawful for any person, though not in self-defense, to kill a dog accustomed to bite mankind, as *communis hostis* or a common nuisance, when such dog is at large—that is, not confined or physically restrained. *Brown v. Carpenter*, 26 Vt. 638.

6. **Ram.** O and S were the owners in common of a vicious ram, known by each to have the habit of butting persons. The ram was kept for the separate use of both, each having the immediate charge of him from time to time as occasion required. The ram had been with the flock of S until the sheep-washing, when, both flocks being washed together, O, of his own accord and in the absence of S, took the ram and put him in his own pasture, S not thereafter interfering, or inquiring to know where or in what manner O was keeping the ram. While so in the pasture of O, running at large, the ram butted the plaintiff and injured her. **Held**, in an action against O and S for the injury, that S was liable equally with O. *Oakes v. Spaulding & Oakes*, 40 Vt. 347.

7. **Barrett, J.** No distinction can be made, as to the duty of restraining a vicious animal, between sole and joint owners; and what is the duty of one is equally the duty of the other, as to third persons; and, unless under peculiar circumstances, the duty rests solely upon ownership. *Ib.* 352.

8. **Statutes.** The forfeitures under sections 4 and 6 of G. S., c. 104, "for the restraint of rams," are distinct and independent and may both be enforced; and by the same person, if he be both the owner or keeper of the sheep and the person taking up the ram. *Town v. Lamphire*, 34 Vt. 365. *Hall v. Adams*, 2 Aik. 130.

9. In case of distinct and several owners of sheep running in the same flock, either owner, without joining the others, may sue for the penalty given by statute against the owner or keeper of a ram found with them. *Hall v. Adams*.

10. Where several rams, having escaped together and belonging to separate owners, are found off the inclosure of the common keeper of them and with the sheep of another, each owner is liable to the penalty of \$5 for the escape of his own ram under G. S., c. 104, s. 6. Whether the keeper would be liable for more than one penalty,—*quære*. *Town v. Lamphire*, 37 Vt. 52.

11. The penalty imposed by G. S. c. 104, s. 6, is incurred, if the ram is found off its

owner's or keeper's premises and with the sheep of another, unless it is made to appear that this was caused by some positive wrongful act of the prosecutor himself, or could not have been prevented by the utmost care and diligence of the owner or keeper. *Town v. Lamphire*, 36 Vt. 101. *S. C.* 37 Vt. 52. *Hall v. Adams*, 1 Aik. 166. *Phelps v. Parish*, 39 Vt. 516.

12. The neglect of the prosecutor to maintain and keep in repair his portion of the division fence through which the ram escaped, does not affect or qualify this liability (36 Vt. 101); although the prosecutor had said he would see that his part of the fence was properly up and would risk the ram's getting out over it—it not appearing that the defendant had acted upon this assurance so as to create an estoppel. 37 Vt. 52.

13. **Suffer to run at large.** Under the statute which provided that if any person should suffer his swine to run at large, &c., they might be impounded;—**Held**, that an avowry was insufficient which alleged only that the swine "were running at large," &c., "contrary to the form," &c., "of the statute entitled," &c.—the word *suffer*, or its equivalent, being omitted,—that word meaning to allow, or permit. *Adams v. Nichols*, 1 Aik. 316.

14. The defendant on several occasions rode his horse from his house along the highway, mostly off his own premises, through a village and over two railroad crossings at grade, to a distance of more than a mile and a half, and then fastened the reins to the surcingle so that the horse could not get its head down to feed, and left it to go back home alone, and went on himself about half a mile further, and out of sight of the horse, to his work. The horse was kind, and would when thus left go directly home, and did on these several occasions and on the occasion in question, when it was met by the defendant's son who was waiting to meet and care for it. In an action for the penalty under G. S. c. 100, s. 29, for suffering cattle, &c., to run at large in the highway;—**Held**, that if the horse, owing to his training, habits and instincts, would not wander about the highway when thus left, but would and did on such occasions go directly home, and was so under the supervision, care and control of the defendant and his son, this was not a "running at large," which subjected the defendant to the penalty. *Russell v. Cone*, 46 Vt. 600.

15. **Joint action.** A joint action upon the statute to prevent injury to sheep by dogs, does not lie against two separate owners of dogs for the damage done by them together. *Adams v. Hall*, 2 Vt. 9.

16. G. S. c. 104, s. 9, allows the several owners of dogs concerned jointly in the worrying, &c., of sheep to be joined as defendants,

but does not require it. *Rowe v. Bird*, 48 Vt. 578.

As to impounding animals, see POUNDS; REPLEVIN.

## APPEAL.

- I. EFFECT IN GENERAL.
- II. APPEAL FROM COUNTY COURT.
- III. APPEAL FROM JUSTICE OF THE PEACE.

- 1. *Taking an appeal.*
- 2. *From what judgment.*
- 3. *In what cases.*
- 4. *Proceedings after appeal.*

### IV. APPEAL FROM PROBATE COURT.

- 1. *What order or decree may be appealed from.*
- 2. *Who may appeal.*
- 3. *Mode of appeal, and procedure thereafter.*
- 4. *Appellate court as a court of probate.*

### I. EFFECT IN GENERAL.

1. **Vacates the judgment.** An appeal vacates the judgment appealed from. *Bates v. Kimball*, 2 D. Chip. 83. *Love v. Estes*, 6 Vt. 286. *Probate Court v. Rogers*, 7 Vt. 198. *Allen v. Fletcher*, 14 Vt. 274. *Fletcher v. Blair*, 20 Vt. 124. *Allen v. Rice*, 22 Vt. 333. *Small v. Haskins*, 26 Vt. 209. *Stearns v. Stearns*, 30 Vt. 213. *Probate Court v. Glead*, 35 Vt. 24. *State v. Remelee*, 35 Vt. 562. *Woodbury v. Woodbury*, 48 Vt. 94.

2. If the appeal is carried up by neither party, this operates as a discontinuance. *Bates v. Kimball*. *Love v. Estes*. *Allen v. Fletcher*. *Probate Court v. Glead*.

*Note.*—By stat. 1865, No. 10, as to criminal cases, and by stat. 1866, No. 37, as to civil cases, an appeal from a justice only suspends the judgment unless the appeal is entered; and by stat. 1864, No. 65, the party appealing from a decree or denial of the probate court, or from the allowance or disallowance of commissioners, may withdraw his appeal before entry,—the effect of not entering the appeal, in the first case, and of withdrawing it, in the last, being to affirm the original judgment or decree.

3. **Brings up whole case.** An appeal vacating the judgment appealed from, brings up the whole case and opens it for new proof to the extent of the jurisdiction of the court below, upon the original complaint or declaration. *State v. Remelee*, 35 Vt. 562.

4. Judgment of *respondent ouster* on a plea in abatement, and trial thereafter on the merits,—on appeal, the question in abatement will be heard. *Lacy v. Roberts*, Brayt. 20.

5. **Affirmance.** A judgment is *affirmed* on appeal where it passes for the appellee, though for a less sum than below. *Page v. Johnson*, 1 D. Chip. 338. *S. C. Brayt*. 124.

6. **Dismissal of appeal.** The dismissal of an appeal annuls the appeal *ab initio*, and leaves the judgment appealed from in force as though never appealed from. *Loveland v. Benton*, 2 Vt. 521.

### II. APPEAL FROM COUNTY COURT.

7. **Practice.** An appeal, on cause shown, may be allowed to be entered after the day fixed by the rules of court, and even after a complaint for affirmance. *Bennet v. Whitney*, 1 Tyl. 59. *Miller v. Gould*, 2 Tyl. 405.

8. An appeal from the county court to the supreme court and an entry of such appeal was allowed to each party. *Hastings v. Hodges*, 1 D. Chip. 124.

9. The entering of a review by one party did not prevent an appeal by the other. *Hubbard v. Leonard*, 1 D. Chip. 216.

10. Where one of several joint defendants appeals from a judgment in a prosecution under the forcible entry and detainer act, he is considered as appealing for all, and all may appear and plead. *Hurlbutt v. Meachum*, 2 Tyl. 397.

11. A parol submission to arbitration, pending an appeal, without an award wholly settling the controversy, nor carrying the hearing beyond the time for entering the appeal, was *held* not to deprive the party of the right to enter the appeal. *Hayes v. Blanchard*, 4 Vt. 210.

12. On an appeal from the county to the supreme court;—*Rule*d, that the defendant might change the issue from the court below to the jury in the supreme court, without notice to the other party. *Stanton v. Loyd*, 1 Aik. 35.

13. **Subjects of appeal.** Under former statutes, a judgment discharging trustees because the principal was not an absconding, &c., debtor, was *held* subject to an appeal to the supreme court. *Page v. Hurd*, 1 Aik. 105. Also a judgment by *nil dicit*. *Smith v. Langworthy*, 1 Aik. 106—and judgment on demurrer, that a plea in bar is sufficient. *Durkee v. Mayo*, 1 Aik. 129.

*Note.*—By stat. 1824 (Slade's Stat. 118), the right of appeal to the supreme court for the trial of issues of fact was taken away. Questions of law now pass to the supreme court only on exceptions, or by writ of error.

### III. APPEAL FROM JUSTICE OF THE PEACE.

#### 1. *Taking an Appeal.*

14. The entering of bail is a part of the taking of an appeal from the judgment of a justice,

and this must be done within the two hours, or the appeal is irregular. *Webb v. Hopkinson*, 10 Vt. 544; and see *Finney v. Hill*, 11 Vt. 283. *Arnold v. Brooks*, 36 Vt. 204.

15. Where a party had notice of a suit before a justice, and sent his son to appear for him and take an appeal, and the son appeared and consented to a judgment, but through misapprehension, neglected to enter bail in season for an appeal, and execution issued upon the judgment;—*Held*, that he was not entitled to relief by petition under the Act of 1829, for having been "illegally refused" an appeal; and judgment *contra* below was reversed. *Finney v. Hill*.

### 2. From what judgment.

16. Where a justice upon a hearing and trial rendered a judgment that the plaintiff become *non suit*;—*Held*, this being a trial upon the merits, that an appeal lay from the judgment; that its character was not changed by misnaming it. *Smith v. Crane*, 12 Vt. 487.

17. A judgment by a justice in favor of the plaintiff for costs alone, although clearly irregular, is such a judgment as either party can appeal from. *McDaniels v. Johnson*, 36 Vt. 687.

### 3. In what cases.

18. A prosecution founded on the Act of 1807, s. 8, entitled "an act to punish undue speculations," &c., was *held* appealable. *Penniman v. Robinson*, 5 Vt. 569.

19. An appeal does not lie from the decision of a justice, under the statute, that an extent issue against a collector of taxes for delinquency. *Grimbold v. Rutland*, 28 Vt. 324.

20. **As depending on amount in controversy.** Where the *ad damnum* in a justice writ is over ten dollars, the suit is appealable by either party, irrespective of the real amount of the claim presented. *Fuller v. Howard*, 6 Vt. 561.

21. In actions of tort—as trover—where the damages are open and uncertain, the right of appeal from a justice is to be determined by the *ad damnum* in the writ; and where this is set at ten dollars, the case is not appealable, though the value of the property named in the declaration is set at more than ten dollars, and the plaintiff's evidence may be that it was worth more. (G. S. c. 31, s. 70.) *Cole v. Goodall*, 39 Vt. 400. See *Church v. Vanduzee*, 4 Vt. 195.

22. **Fictitious offset.** A suit is not made appealable by the pleading of a fictitious offset,—as where the defendant introduces no evidence to sustain it, nor excuse therefor. *Brush v. Hurlburt*, 3 Vt. 46.

23. Where the *ad damnum* in a justice writ

was ten dollars, although the declaration was in two counts each claiming ten dollars, but presumed to be for the same subject matter, and where there was nothing in the plaintiff's written exhibit or specification, or by the declaration itself, showing that the demand was above ten dollars;—*Held*, that the action was not appealable, and could not be made so by a fictitious plea in set-off. *Weston v. Marsh*, 12 Vt. 420.

24. **Exhibits.** Whenever the plaintiff's specification or exhibit, in an action before a justice, exceeds \$10, so that the defendant has the right to litigate matters described in it to an amount exceeding \$10, the action is appealable; and this right of appeal the plaintiff cannot limit by demanding not more than \$10 in his writ and declaration. *Williams v. Mason*, 45 Vt. 372. *Church v. Vanduzee*, 4 Vt. 195. *Conn. & Pass. R. R. Co. v. Bates*, 32 Vt. 420.

25. The defendant subscribed for one share of the plaintiffs' stock, and thereby contracted to pay the plaintiffs \$100 in ten equal instalments, no part payable till the performance of a condition precedent. In an action before a justice, the declaration set forth this contract, averred performance of the condition, and claimed to recover the first instalment under an *ad damnum* of ten dollars. *Held*, that the action was appealable. *Conn. & Pass. R. R. Co. v. Bates*.

26. In general assumpsit before a justice, the *ad damnum* in the plaintiff's writ and the sum demanded in the declaration was ten dollars. The debit side of the plaintiff's specification on trial was \$38.32, and the credit side \$32.16, leaving a balance of \$6.66—for which balance, with 80 cents interest, the plaintiff obtained judgment. *Held*, that by reason of the specification, or exhibit, the action was appealable. *Williams v. Mason*, 45 Vt. 372.

27. In an action of book account before a justice, there was nothing in the writ, nor in the specification or exhibits produced by the plaintiff on trial, which made the case appealable. The defendant, on cross-examination, called out the plaintiff's book, on which appeared charges, in all, exceeding ten dollars. *Held*, that the book, drawn out in this way, could not be regarded as the plaintiff's exhibit, and that the case was not thereby made appealable,—the judgment, in such case, being a bar to a recovery for the items not presented. *Warren v. Newfane*, 25 Vt. 250.

28. **Burden on appellant.** A party appealing from a justice judgment must show affirmatively that the county court has appellate jurisdiction. Where the declaration contained three counts, each concluding with an *ad damnum* of ten dollars, but all descriptive of a single transaction and apparently for one cause of action;—*Held*, that the case was not

appealable. *Persons v. Center T. Co.*, 20 Vt. 170.

**29. Action on note.** Under the statute disallowing an appeal from a justice in any action upon a note, &c., of less than \$20;—*Held*, that an appeal lay, nevertheless, where an offset was pleaded and tried, the subject matter of which would have entitled the parties to an appeal, if the action had been brought upon it. *Baker v. Blodget*, 1 Aik. 342.

**30.** A justice suit upon a note exceeding twenty dollars, but indorsed below ten dollars, the *ad damnum* in the writ being ten dollars, where no plea in offset is filed, is not appealable under the act of 1821. *Boardman v. Harrington*, 9 Vt. 151. G. S. c. 31, s. 70, has the same construction. *Sumner v. Jones*, 24 Vt. 320.

**31.** An appeal lies from a justice in an action upon a promissory note for less than \$20, made payable with interest, when the amount, by adding interest, exceeds \$20. *Smith v. Smith*, 15 Vt. 620.

**32.** An action before a justice upon a promissory note given for more than \$20, although indorsed below \$20, but not below \$10, where the *ad damnum* in the writ exceeds \$10, is appealable. *Sumner v. Jones*, 24 Vt. 317. *Tyler v. Lathrop*, 5 Vt. 170. 9 Vt. 152. 15 Vt. 622.

**33.** In a justice suit the declaration counted upon two promissory notes, both amounting to less than \$20, and had a count for \$20 money had and received—[*ad damnum* \$20]. On trial, the plaintiff offered in evidence only the two notes, and waived the money count. *Held*, that the case was not appealable. *Cooper v. Miles*, 16 Vt. 642.

#### 4. Proceedings after appeal.

**34. Tender of judgment.** After an appeal from a justice judgment, the tender of a confession of judgment before the same person, but who was not then in office as a justice, is nugatory, and will not avail to prevent an affirmance. *Smith v. Fisher*, 17 Vt. 117.

**35. Payment.** Where the plaintiff appealed from the judgment of a justice against him, and more than twelve days before the term of court to which the appeal was taken paid to the defendant (or to the justice), according to the statute, the costs allowed to the defendant, and the appeal was not entered in the county court;—*Held*, that this operated as a *retraxit*, or an open and voluntary renunciation of the suit and cause of action, and was a bar to a further action or claim for the same cause or duty; and that, *to this extent*, the effect was the same as if the judgment had been affirmed in the county court. *Catlin v. Taylor*, 18 Vt. 106. *Small v. Haskins*, 26 Vt. 209.

**36.** In such case,—*Held*, that the judgment

of the justice in an action of trespass *qua. clau.*, where the title to land came in question, was not conclusive of the title, inasmuch as the judgment was vacated by the appeal, and such payment did not, in this respect, operate as an affirmance. *Small v. Haskins*.

**37. Entry of appeal.** An appeal from a justice takes the case to the county court as it stood before the magistrate, and it stands upon the same pleadings [as, a plea in abatement], unless new pleadings are filed. *Whittaker v. Perry*, 37 Vt. 631.

**38.** The Act of 1866, No. 37, relating to appeals from judgments of justices, does not abridge the right of the appellee under G. S. c. 31, s. 64, to enter the appeal for affirmance. *Ide v. Story*, 47 Vt. 62.

**39. Certificate of "wilful and malicious."** Where the party appealing from a justice judgment does not enter his appeal in the county court and the judgment is there affirmed on the complaint of the appellee, it is affirmed with all its incidents, among which is the adjudication that the cause of action arose from the wilful and malicious act of the defendant, &c. *Reynolds v. Provan*, 31 Vt. 637.

**40.** *Held*, that where a justice judgment, appealed from by the defendant, is brought into the county court by the plaintiff on complaint for affirmance, the court can only affirm the judgment as rendered, and cannot grant a certificate for a close jail execution where none was granted by the justice. *Spaulding v. Woodworth*, 42 Vt. 570. *Barrett, J.*, dissenting.

**41. Copies of appeal papers.** An appeal from a justice, entered in the county court upon appeal papers not properly certified (as, by the county clerk instead of the justice), gives the court jurisdiction, so that, notwithstanding a motion to dismiss, the cause may be continued and amended copies filed, and the court may proceed to trial and judgment. *Carruth v. Tighe*, 32 Vt. 626. *Ib.* 778. See *Goodenow v. Stafford*, 27 Vt. 437. *Orange v. Bill*, 29 Vt. 442.

**42.** An appeal from a justice will not necessarily be dismissed on motion, where the appeal copies do not disclose the right of appeal, since such right may grow out of the character of the defense, which may not appear in the copies; and the presumption is in favor of the regularity of the appeal, until the contrary is shown. *Johnson v. Williams*, 48 Vt. 565.

**43.** New copies of appeal from the judgment of a justice cannot be filed in the county court in vacation, after final judgment on the copies originally filed, so as to make them part of the record,—not even by the allowance of the county judges. *Wood v. Davis*, 48 Vt. 319.



IV. APPEAL FROM PROBATE COURT.

1. *What order or decree may be appealed from.*

**44. Final order and effect.** The order, sentence, decree or denial of the probate court from which an appeal lies must be a final one—that is, it must be a final disposition of the subject matter before the court. An appeal from the main question takes with it all incidental orders, and makes the whole, in effect, the subject of revision. *Adams v. Adams*, 21 Vt. 162.

**45. Interlocutory.** From a proceeding in the probate court, under G. S. c. 52, s. 7, for the examination of a party charged with embezzling the goods, &c., of an estate, no appeal lies until the case is finished in that court. An appeal from an order that the party answer certain interrogatories is premature, and will be dismissed. *Kimball v. Kimball*, 19 Vt. 579.

**46.** A decree of the probate court, that an administrator ought to render his account, is not a final decree from which an appeal lies in the first instance, but is rather interlocutory; though it affords a sufficient basis for a suit upon the bond conditioned to perform the orders of the court. *French v. Winsor*, 24 Vt. 402.

**47.** An order of the probate court, refusing to accept and record the report of the commissioners of claims, being matter of discretion, is but interlocutory, and is not such a final decree as is the subject of an appeal. *Hodges v. Thacher*, 23 Vt. 455.

**48.** An appeal does not lie from the presentation of a contingent claim to commissioners of an estate, but only from the subsequent allowance, or disallowance. *Hobart v. Herrick*, 23 Vt. 627.

**49.** An order of the probate court renewing a commission of claims on an estate is strictly interlocutory, and no appeal lies until the coming in and acceptance of the commissioners' report. *Timothy v. Farr*, 42 Vt. 43.

**50. Special case.** The refusal of the probate court, on petition, to reopen and revise a former decree allowing an administrator's account, which petition was preferred after the time for an appeal from such decree and a decree for distribution had passed, was *held*, under the circumstances, to be the subject of an appeal. *Adams v. Adams*, 21 Vt. 162. 23 Vt. 720.

**51. Personal discretion.** A bequest was made to a trustee to be applied to the benefit of the *cestui que trust*, as should be found necessary in the judgment and discretion of the judge of probate for the district of H;—*Held*, that the judge of probate in the exercise of his judgment and discretion acted personally, and not officially,—that no new jurisdiction was con-

ferred upon him, and that no appeal lay from his proceedings. *Downer v. Downer*, 9 Vt. 231.

**52. Guardian.** By the probate act of 1821 (Slade's stat. 333, s. 7) an appeal lies from an appointment by the probate court of a guardian to an idiot, *non compos*, &c. *Shumway v. Shumway*, 2 Vt. 339. 8 Vt. 390.

**53.** An appeal does not lie from the decree of the probate court refusing to appoint a guardian of a person alleged to be insane, nor from a decree discharging such guardian, on the ground that the ward is no longer a proper subject of guardianship. *Nimblet v. Chaffee*, 24 Vt. 628.

**54. Homestead.** Proceedings for setting out the homestead of a deceased housekeeper, for the benefit of his widow and children, fall within the general jurisdiction of the probate court in the settlement of estates; and a right of appeal is given, under the general provisions of G. S. c. 48, s. 30, from an order or decree confirming the report of the commissioners in setting out the homestead. *Byram v. Byram*, 27 Vt. 295. *True v. Morrill*, 28 Vt. 672.

2. *Who may appeal.*

**55. Party "interested."** Under the statute authorizing any person "interested in any order, &c." of the probate court to appeal therefrom, such person must have some legal interest which may, by such order, &c., be either enlarged or diminished,—as, heir, creditor, legatee, widow, administrator, &c. *Woodward v. Spear*, 10 Vt. 420. *Hemmenway v. Corey*, 16 Vt. 225.

**56.** A person who has no interest in an estate cannot appeal from the decree of the probate court, assigning dower in the land which he claims adversely. *Hemmenway v. Corey*.

**57.** The administrator of an heir to an estate has the same right of appeal from commissioners, as the heir would have had if living. *Arnold v. Waldo*, 26 Vt. 204.

**58.** Under G. S. c. 53, s. 27, an appeal from commissioners, other than by the executor or administrator, can be taken only by a creditor, devisee, legatee or heir; and by such only in case the executor or administrator declines to appeal. Such interest of the appellant, as found by the probate court, must appear upon the record sent up; but such finding is not conclusive and may be inquired into on appeal. *Gilbert v. Howe*, 47 Vt. 402.

**59.** The intestate's widow, being administratrix of his estate, married, whereby her authority was extinguished. Thereupon the intestate's children applied to the probate court for the appointment of P as administrator *de bonis non*, and the widow applied for the appointment of her then husband. The court appointed P.—*Held*, that an appeal lay by the widow. *Hilliard v. McDaniels*, 48 Vt. 122.

### 3. Mode of appeal, and procedure thereafter.

**60. The application.** Where an appeal from a decree of the probate court is prayed for and the bond given within the 20 days, the appeal is not lost by the court's neglect beyond the 20 days to allow the appeal. *Cummings v. Hugh*, 2 Vt. 578.

**61.** An application for an appeal from commissioners, under G. S. c. 53, s. 19, is "filed in the register's office," if duly left with the judge of probate. *Robinson v. Robinson*, 32 Vt. 738.

**62.** An appeal from the probate court was left at the residence of the judge between 11 and 12 o'clock at night of the last day for taking an appeal, and the appeal was filed and lodged in the register's office on the morning following. It not appearing that the appeal came to the possession and knowledge of the judge until such following morning, it was dismissed, as not taken in time. *Robinson v. Robinson*.

**63.** After the appeal bond is taken, approved and filed, and the appeal has been allowed, the probate court has no power to permit the cancelling of such bond by substituting another. *Blake v. Kimball*, 22 Vt. 632.

**64. Stating objections.** On an appeal from the decree, &c., of the probate court the appellant should state, in writing, his objections thereto, and this lays the foundation for all further pleadings and proceedings. *Hove v. Pratt*, 11 Vt. 255. *Baker v. Goodrich*, 1 Aik. 395. (See G. S. c. 48, s. 30, and *seq.*)

**65.** No precise form of excepting to the order or decree appealed from has been established. It is necessary that every substantial averment upon which the appellant relies should be made, and such as are not denied are of course considered as admitted. *Kendrick v. Harris*, 1 Aik. 273.

**66.** Appellant from an entire decree of the probate court, which embraced distinct matters, was held confined, on his appeal, to the matters complained of in his objections filed. *Banfill v. Banfill*, 27 Vt. 557.

**67. Withdrawing an appeal.** Where an appeal was taken from the appointment of an administrator and a paper was afterwards filed in the probate court by the appellant withdrawing the appeal, which was not entered in the county court;—*Held*, that the appeal operated as a mere suspension of the decree of appointment, and that, upon such discontinuance of the appeal, the power of the administrator revived and took effect from the date of his appointment. *Fletcher v. Fletcher*, 29 Vt. 98.

**68. Probate of will—Intervening damages.** Where an appeal from a decree of the probate court allowing a will was taken subsequent to the issuing of letters to the executors;—*Held*, that the powers of the executors ceased

at once, and that the appointment of a special administrator, *pendente lite*, became necessary; and where, in such case, the decree was affirmed on appeal;—*Held*, that the expenses of the special administration, beyond what would have been necessary if the estate had been settled by the executors without an appeal, are "intervening damages" within the meaning of the appeal bond. *Sargeant v. Sargeant*, 20 Vt. 297.

**69.** But that the words, "intervening damages and costs occasioned by the appeal," did not cover the expenses of the appellee in following the appeal, beyond his taxable costs. *Id.*

**70. Guardian.** A claim in behalf of a *non compos*, having no guardian, was presented to commissioners, which they disallowed for want of authority in the person presenting it. That person was afterwards appointed guardian and took an appeal. *Held*, that such appeal was an adoption and ratification of the act of presentment and, on motion to dismiss, the appeal was held regular. *Thurston v. Holbrook*, 31 Vt. 354.

**71. Notice of appeal.** Where an appeal from the probate court is entered in the appellate court without giving the appellee the required statute notice, the practice is not to dismiss the appeal, but to continue the case, ordering notice to be given. *Woodward v. Spear*, 10 Vt. 420. *Meech v. Meech*, 37 Vt. 414.

**72.** But this is matter of discretion, not revisable on exceptions. *Treasurer v. Raymond*, 16 Vt. 364. *Rutland & Bur. R. Co. v. Wales*, 24 Vt. 299.

**73. Objection waived.** An objection to the competency of commissioners appointed by the probate court to set out dower, cannot be urged on an appeal from a decree accepting their report. *Kendrick v. Harris*, 1 Aik. 273.

**74.** An objection that an appellant from a decree of the probate court had not sufficient interest to entitle him to an appeal the county court is not bound to consider, when first taken after issue joined and the trial begun. *Stevens v. Joyal*, 48 Vt. 291.

**75. Appeal from commissioners.** An appeal does not lie from the disallowance by commissioners, to an amount exceeding \$20 in the aggregate, upon two or more several and distinct claims, required to be presented in the names of several parties, although both claims are owned by the same party, where the disallowance on each is less than \$20; as where one claim was in favor of A and B, and the other in favor of A and C, and A owned and presented both. *Barlow v. Thrall*, 11 Vt. 247.

**76.** In taking an appeal from the allowance by commissioners of a claim against an estate, minuteness and precision are not required in stating the objections; and if, instead of being manifestly frivolous and impertinent, they tend to show that the claim ought further to be liti-

gated, it must belong to the court of probate to determine whether they are stated in terms sufficiently positive and definite. Where the objection stated was that the claim was *unjust*, and the probate court allowed the appeal,—*Held*, that the county court erred in dismissing the appeal on motion, for want of a written statement of objections. *Barnard v. Barnard*, 16 Vt. 223.

77. The prayer for an appeal "from the decision and report of commissioners of claims" (G. S. c. 53, s. 19), was *held* sufficient, where expressed to be "from the order and decree of the probate court"—the court having made a decree accepting the report and ordering it to be recorded. *Robinson v. Robinson*, 32 Vt. 788.

78. An appeal from commissioners under G. S. c. 53, s. 27, is not perfected without the giving of a bond as well to secure the estate as the adverse party, and if the bond be only to secure the adverse party, the appeal will be dismissed,—and this upon *motion*, if the defect appear upon the record; nor can the defect be supplied by the filing of a new bond in the county court. *Arnold v. Waldo*, 36 Vt. 204.

79. A report of commissioners was returned to the probate court and endorsed, "Filed, accepted and ordered to be recorded this 31st May, 1860." Afterwards, this entry was made thereon, "On re-examination of this report, it is rejected for errors therein found and sent back to the commissioners for correction this 15th day of August, 1860." The plaintiff afterwards presented his claim to the commissioners, and, within twenty days from the final return and acceptance of the report, took an appeal. *Held*, that the appeal was taken in due time; that the probate court had power of its own motion, and summarily, to annul the order of record, and to recommit the report, on account of errors apparent on its face, so long as it was not actually recorded. *Adarene v. Marlowe*, 33 Vt. 558, and see *Hodges v. Thacher*, 23 Vt. 455. 32 Vt. 739.

80. **Appeal not entered.** On the allowance of mutual claims by commissioners of an estate, the administrator appealed from the allowance against the estate and duly filed his objections. The appeal was not entered at the next stated session of the county court. *Held*, that the administrator could not at a later term enter a complaint for an affirmance of the allowance in favor of the estate, or for his costs;—that by the neglect of both parties to enter the appeal at the first term, the whole proceedings were discontinued; and that the claim against the estate was forever barred;—as to the effect of such proceedings upon the claim allowed in favor of the estate, *quære*. *Allen v. Fletcher*, 14 Vt. 274.

81. Where an appeal was taken from an allowance of commissioners, but was entered by neither party;—*Held*, that no action lay

upon the appeal bond—the appeal vacating the judgment, and the non-entry of the appeal operating as a discontinuance of the suit and carrying the bond with it—and this, although the appellee had no notice of the appeal and no order of notice was made by the probate court. *Probate Court v. Gleed*, 35 Vt. 24.

82. **Declaration.** On appeal from commissioners, the court allowed the claimant, upon terms, to file a declaration, where he had omitted to do so in the probate court, as required by statute. *Francois v. Lathrope*, 2 Tyl. 372.

83. On an appeal from commissioners, the claimant must declare according to the nature of the several classes of his demands, in the several forms of action and counts appropriate to each, though resulting in different forms of trial; and these must be met by various pleas suited to their nature. *Adams v. Corbin*, 8 Vt. 372. *Abbott v. Keith*, 11 Vt. 525.

84. **Brings up whole claim.** Where all the items of the plaintiff's claim before commissioners were recoverable in one suit and one form of action and he appealed, but the appeal taken was general;—*Held*, that the appeal brought his whole claim before the county court—as well the items allowed, as those disallowed. *Morse v. Low*, 44 Vt. 561.

85. —and **set-off.** An appeal by a claimant from the allowance by commissioners of an offset to his claim, vacates the decision and opens the case, both as to the offset and the principal claim. *Stearns v. Stearns*, 30 Vt. 213. *Woodbury v. Woodbury*, 48 Vt. 94.

86. The effect is the same where the administrator appeals from the allowance of the claim presented—or filed objections under the Stat. 1821. (Slade's Stat. 354.) *Allen v. Rice*, 22 Vt. 333.

87. **Evidence.** Where the commissioners' report does not show what claims were exhibited, this may be shown on appeal by evidence *aliunde*. *Woodbury v. Woodbury*, 48 Vt. 94.

88. **Bail in appellate court.** On the granting of an appeal from commissioners on petition to the supreme court, bail for the appeal was entered in that court. *Wing v. Bates*, 16 Vt. 148.

89. **Creditor appealing.** Where a creditor of an estate took appeals, under the statute, from the allowance by the commissioners of claims against the estate presented by the administrator and others, and prosecuted such appeals at his own expense and succeeded, and costs were awarded;—*Held*, that such creditor was entitled to the costs; and the administrator having received the costs and executed releases therefor, chancery decreed that he pay the same to such creditor. *Sutton v. Sutton*, 21 Vt. 74.

#### 4. Appellate Court as a Court of Probate.

90. In appeals from the probate court, the proceedings will conform to the practice of that court. *Wadsworth v. Fassett*, 2 Tyl. 127.

91. An appeal from the probate court to the supreme court brings the whole case before that court, to be determined upon its merits, as the supreme court of probate. *Smith v. Rix*, 9 Vt. 240. (Since changed by statute—appeals lying only to the county court, and exceptions as to “all questions of law” arising in the county court “in probate matters” passing to the supreme court. G. S. c. 48, ss. 28, 29. *Hutchinson v. Hutchinson*, 38 Vt. 703. *Clark v. Clark*, 21 Vt. 490.)

92. The jurisdiction of the county court, as an appellate court in probate matters, is measured only by the extent of the jurisdiction of the probate court, and extends over all matters within the jurisdiction of the probate court, for the rehearing and re-examination of all subjects which have been acted upon in that court. *Adams v. Adams*, 21 Vt. 162. *Boyden v. Ward*, 38 Vt. 628.

93. On appeal from the probate court, the county court acts as a higher court of probate, and may revise all questions resting in discretion, as well as others; as, the removal of an administrator. *Holmes v. Holmes*, 26 Vt. 536. *Adams v. Adams*. *Hilliard v. McDaniel*, 48 Vt. 122.

94. Supreme court. Although matters resting in the discretion of the probate court pass to the county court upon appeal, they cannot be revised in the supreme court, not being questions of law. *Phelps v. Phelps*, 16 Vt. 78. *Adams v. Adams*, 21 Vt. 162. *Frost v. Frost*, 40 Vt. 625;—as, for the refusal to reconsider, revise and alter a decree of distribution after the time for an appeal had passed. *Hutchinson v. Hutchinson*, 38 Vt. 700.

95. Administrator's account. An appeal from the allowance of an administrator's account opens every item of the accounts for examination, whether or not presented or objected to in the probate court; and the commissioners should report each item, and whether allowed or disallowed, and the facts found as the reason of their decision. *Barker v. Rogers*, 2 Vt. 440.

96. On such appeal, either party may present any proper claim, whether presented in the probate court, or not. *Clark v. Clark*, 21 Vt. 490.

97. Certificate of decision. The certificate to the probate court of the final decision upon an appeal, as required by the statute, is designed to furnish notice to that court of the general result of the appeal, so that its subsequent action may be in conformity to such decision, rather than to restore jurisdiction to it. The want of such certificate, therefore, is not a legal bar to further proceedings in the pro-

bate court, though upon subjects affected by the decision of the appellate court; and the probate court can nevertheless act with effect, if its action is warranted by the law and the fact as they really exist at the time. *Green v. Clark*, 24 Vt. 136.

For Appeals in other cases, see the appropriate titles, as PAUPER; HIGHWAYS; CHANCERY, &c.

### APPRENTICE.

1. Relation created by deed. The relation of master and apprentice can be created only by deed. *Squire v. Whipple*, 1 Vt. 69. 7 Vt. 450. *Holgate v. Cheney*, Brayt. 158.

2. A agreed by parol to bind his son to apprenticeship to B by written indentures, and put the son to service with B before executing the indentures. The boy left service, after having received necessary articles and instruction, and A then refused to execute the indentures. Held, that B could recover of A, on the general counts in assumpsit, for the articles and services so furnished the son. *Squires v. Whipple*, 2 Vt. 111.

3. Death of master. An indenture of apprenticeship becomes not void, but merely voidable by the death of the master. *Phelps v. Culver*, 6 Vt. 430.

4. An apprentice bound out by the overseers of the poor is assignable without his consent, and may be retained in the service of an administrator after the death of the master, with the assent of the overseer. *Ib.*

5. Revocation. Where an indenture of apprenticeship becomes voidable on election, the apprentice cannot recover for services under the indenture rendered before revocation, over and above benefits received. *Ib.*

6. Nor can the master recover for excess of expenses incurred above services rendered, before revocation. *Hudson v. Worden*, 39 Vt. 382.

7. The plaintiff, at ten years of age, was bound out by his father as an apprentice to the defendant until the plaintiff should become twenty-one. He served under the indenture until he was sixteen, when he went into the State of New York and there enlisted as a soldier in the U. S. army and went into military service, as a substitute for one C, from whom he received therefor \$325, which he forwarded to the defendant. In an action to recover this money;—Held, that, as the indenture, on the defendant's arriving at the age of fourteen, became, at least, voidable at his election, the leaving and enlisting and going into the military service was an abandonment of the indenture, and in law a revocation of it, and that the plaintiff could recover. *Ib.*

8. **Harboring.** One may lawfully harbor and employ an apprentice who has left his master's service, though without cause, even after notice from the master not to harbor or employ him, if the master for any cause refuses to take back the apprentice. *Conant v. Raymond*, 2 Aik. 243.

9. In case for harboring the plaintiff's apprentice, knowledge by the defendant of the apprenticeship must be proved, and the measure of damages is the injury sustained by the plaintiff; while in *assumpsit* for the services of the apprentice, such knowledge is not material, and the measure of damages is the value of the services to the defendant. Such action is a waiver of the tort. *Id.*

As to *binding out* pauper children, see PAUPER I.

## ARBITRATION.

### I. GENERAL POWERS OF ARBITRATORS AND THEIR PROCEEDINGS.

#### II. REVOCATION.

#### III. AWARD,—*Publication; Validity; Construction; Effect; Setting aside, &c.*

#### IV. ACTION ON THE AWARD.

### I. GENERAL POWERS OF ARBITRATORS AND THEIR PROCEEDINGS.

1. **Their meetings.** A declaration upon an award was *held ill*, where it set forth a submission to five, the award to be made by a majority, and an award made by three, but did not aver that the other two were notified, nor that they attended. *Blin v. Hay*, 2 Tyl. 304.

2. Where a submission required that the award should be made by the arbitrators, or a majority of them;—*Held*, that all must be present at the hearing, but that this fact need not appear upon the face of the award; if denied, it might be proved otherwise. *Risford v. Nye*, 20 Vt. 132.

3. In case of a written submission to three persons named, and if either one of them could not be obtained, to accept another person named;—*Held*, that an award made by the four, acting by the mutual consent of the parties given on the day of hearing, was good. *Blanchard v. Murray*, 15 Vt. 548.

4. **Umpire.** It is no objection to an award, that the umpire was appointed before the arbitrators entered upon the business, nor that the umpire joined with the arbitrators in making the award. *Woodrow v. O'Conner*, 28 Vt. 776.

5. **Postponement.** The power of arbitrators is not determined by their neglect to attend at the time and place appointed for holding the

arbitration; but they may appoint another session within any reasonable time, unless prevented by a revocation, or by the terms of the submission. *Harrington v. Rich*, 6 Vt. 666.

6. **Correcting mistake.** An arbitrator may, after publishing his award, correct a clerical mistake in it—as, by inserting the word "dollars," manifestly omitted by mistake, &c. *Goodell v. Raymond*, 27 Vt. 241.

7. **Awarding costs.** By early and general practice adopted in this State, the rule must be considered settled, that it is incident to the authority given to arbitrators, in a general submission, where no mention is made of costs, to award concerning the costs of arbitration. *Bowman v. Downer*, 28 Vt. 532. *Hawley v. Hodge*, 7 Vt. 240. But see *contra*, especially as to fees of the arbitrators, *Morrison v. Buchanan*, 32 Vt. 289.

8. **Proceedings.** It is not necessary that arbitrators should follow the rules of law in taking evidence, or in other matters, to make their award good. While governed by their own judgment, without corruption or partiality in their proceedings and decisions, the parties being present, or having a fair opportunity to be present at all hearings, the award should stand. *Sabin v. Angell*, 44 Vt. 528.

9. It is no objection to an award, that neither the arbitrators nor witnesses were sworn, where the parties agree that they need not be, or where the law of the place does not require it. *Woodrow v. O'Conner*, 28 Vt. 776.

10. **Sunday.** Although a judgment rendered on Sunday is void at common law, an award of arbitrators is not a judgment, and an award published on Sunday is not for that reason void, where the submission did not require this to be done, and the parties had no agency therein and did not act in violation of the statute. *Blood v. Bates*, 31 Vt. 147. *Sargeant v. Butts*, 21 Vt. 99.

### II. REVOCATION.

11. Every submission to arbitration, though by deed and declared irrevocable, may be revoked before award and publication, and such revocation annuls all contracts relative to the submission, and leaves the other party solely to his redress upon the bond or agreement of submission. *Aspinwall v. Tousey*, 2 Tyl. 328.

12. Where a party to a written submission made a parol revocation, and thereupon the arbitrator declined proceeding;—*Held*, in an action upon the submission, that the defendant could not dispute the revocation because not in writing. *Hawley v. Hodge*, 7 Vt. 237.

13. An express revocation of a submission must follow the form of the submission. If the submission be by deed, the revocation must be under seal; if by writing, then so must be the

revocation; and if simply by parol, then it may be so revoked. *Sutton v. Tyrrell*, 10 Vt. 91.

14. The entry and continuance of a cause in court, before an award made under a submission which provided that all pending suits should be discontinued, without saying when, was held not to work a revocation of the submission.—What is an implied revocation, or revocation in law, see *Id.*

15. A letter sent to the arbitrator by one of the parties "objecting to any decision of the case," until furnished with a copy of the brief of the counsel of the other party according to an agreement of counsel, is not a revocation, but only a request for delay; and the arbitrator may proceed to make a binding award, although such copy was not furnished, the counsel of each party having furnished the arbitrator his brief. *Keyes v. Fulton*, 42 Vt. 159.

16. The revocation of a submission is a breach of the condition of an arbitration bond to observe, perform and keep the award. *Craftsbury v. Hill*, 28 Vt. 768.

17. One party to a submission by bond legally revoked it by deed, but the other party got an award made in his favor notwithstanding, which the revoking party paid, but releases were not executed as the award provided. Held, that such payment was not *per se* a waiver of the revocation. *Hathaway v. Strong*, 2 Tyl. 105.

18. A parol agreement to alter the terms of an arbitration bond so as to include in it an additional subject of dispute, although omitted by mistake, was held not to merge or supersede the bond; and that a revocation of the agreement, which had not been so acted upon by the other party as that such revocation would operate as a fraud upon him, did not excuse him from not performing the bond. *Patrick v. Adams*, 29 Vt. 376.

### III. AWARD—publication; validity; construction; effect; setting aside, &c.

19. **What is an award.** An award on a parol submission was held binding, although the parties supposed, and were so advised by the arbitrator, that the award would not be legally binding, as the submission was not in writing;—the court finding that the parties did in fact agree to abide the award. *Ennos v. Pratt*, 26 Vt. 630, citing *Howard v. Puffer*, 23 Vt. 365.\*

20. **What is not.** Parties left out a matter of difference to others, introducing no testimony, but one of the parties made a statement. The referees, after retiring to consult, reported that they had agreed, but that neither party was to be bound by their determination and would be under no obligation to abide by it. The plaintiff said he would hear what they had to say and then determine; and the referees thereupon announced their conclusion. Held,

that the action of the referees was intended to be, and was, in fact, merely advisory, and had no binding force as an award. *Sartwell v. Horton*, 28 Vt. 370.

21. **Publication.** An award is made and published when the terms of the submission, in these respects, are complied with. The delivery of an award to the party entitled to it, or notice to him that it is ready to be delivered, and of its contents, is a publication; and is sufficient, unless the submission requires something more. *Morse v. Stoddard*, 28 Vt. 445. *Risford v. Nye*, 20 Vt. 132.

22. A bond of submission provided that the arbitrators should "make and publish their award in writing under their hands and seals." The arbitrators so made their award, and informed the attorney of the recovering party of its contents. Held, that this was a sufficient publication under the submission, and that the submission could not be thereafter revoked by the other party, although he had not been informed of the award. *Morse v. Stoddard*.

23. **Award as to real estate.** A pending action of ejectment, and controversy as to the seizin and possession of land, may be the subject of arbitration, and may be awarded. *Blanchard v. Murray*, 15 Vt. 548.

24. An award of arbitrators in writing and under seal, concerning the title of lands, made in pursuance of a submission under seal, becomes part of the contract, and a court of equity will decree a specific performance as of any other contract under seal; and the award requires no subsequent ratification by the parties. *Akely v. Akely*, 16 Vt. 450. *Id.* 594.

25. An award as to a division line between adjoining proprietors, made upon an oral submission, if of any validity, has no greater effect than a parol agreement of the parties. To be conclusive, it must be acquiesced in for 15 years. *Smith v. Bullock*, 16 Vt. 592.

26. The owners of contiguous pieces of land, each acknowledging the sufficiency and validity of the title by which the other holds his land, may bind themselves by their written submission and an award, though not sealed, as to the location of the dividing line; and each will be estopped from afterwards denying that as being the true line. *Stewart v. Cass*, 16 Vt. 663.

27. **Parol award.** A parol award is good though the submission be in writing, unless the submission provide to the contrary. *Marsh v. Packer*, 20 Vt. 198. *Goodell v. Raymond*, 27 Vt. 241.

28. **U. S. revenue stamp.** No U. S. revenue stamp was required upon an award of arbitrators. *Celley v. Gray*, 37 Vt. 136.

29. **Award must follow submission.** The parties agreed to exchange farms, the difference in price to be paid to either according to

the award of appraisers agreed upon, calling the orator's farm \$5,000; but if, in the opinion of the appraisers, that was overvalued or undervalued, the defendant's farm should be valued in the same proportion. The appraisers appraised the farms at their real value and awarded to the orator the difference, which was much less than the difference by the other mode of estimate—the orator's farm being actually worth only about \$3,000. *Held*, that the award was void, as not following the submission—and for this and other causes it was set aside in chancery. *Howard v. Edgell*, 17 Vt. 9.

30. If two entire subject matters are submitted to arbitration and only one of them is awarded upon, the award is not binding; and *held*, that this applies with peculiar force where the claims are upon different sides, and especially in case of mutual law suits. *Morse v. Hale*, 27 Vt. 660.

31. **Agreement to extend.** If parties to a written submission to arbitration do, upon the trial before the arbitrators, submit by mutual consent to the arbitrators matters not included in the written submission, and the arbitrators, acting under such mutual consent of the parties, try the matters so verbally submitted and make their award, neither party can, after publication, object that the award exceeded the submission; so *held*, where the submission was by a bond reciting the agreement to submit. *Woods v. Page*, 37 Vt. 252.

32. **Certainty of award.** The degree of uncertainty to avoid an award should be such as would avoid any other contract;—such as would leave the meaning of the arbitrators wholly in doubt. *Akely v. Akely*, 16 Vt. 450.

33. The fact that the arbitrators have stated results, without the processes which led to them, does not make an award uncertain. The amounts claimed, the respective accounts of the parties, and the findings upon them need not be stated. To make an award invalid for this cause, it must be the decision which is left uncertain, not the reasoning which led to the decision. *Lamphire v. Cowan*, 39 Vt. 420.

34. Where the claims on both sides in an arbitration are pecuniary, or for damages capable of being reduced to a certain sum, if the arbitrators, professing to decide on the whole subject, find a balance due from one to the other, such an award is conclusive, although the particulars from which that balance resulted are not stated;—unless the submission requires something more than the ascertainment of a sum due, as, *e. g.*, a direction for the performance of some specific act. *Bowman v. Downer*, 28 Vt. 532.

35. An award that the plaintiff shall execute and deliver to the defendant "a good authentic deed of conveyance of all the land which the plaintiff holds by deed of conveyance from one

Samuel Martin, being a part of the old Cox farm,"—was *held* sufficiently certain. *Whitcomb v. Preston*, 18 Vt. 53.

36. In an action on an award that the defendant should pay the "taxable costs" of a certain suit;—*Held*, (1) that the award was not objectionable for uncertainty; (2) that no action lay upon it without averment and proof that the defendant had notice of the amount before suit brought. *Wright v. Smith*, 19 Vt. 110.

37. An award undertaking to define a boundary is void for uncertainty, which refers for description to monuments which do not in fact exist, and fixes upon a line which cannot be ascertained. *Giddings v. Hadaway*, 28 Vt. 342.

38. **Mutuality and finality.** An award is not binding, which is not mutual and final;—as where no protection or benefit whatever could result to one of the parties from the submission or award, but the original claim is left in force. *Onion v. Robinson*, 15 Vt. 510.

39. Where the award of an arbitrator was not full and final upon all the matters submitted, it was *held* fatally defective. *Smith v. Potter*, 27 Vt. 304.

40. An award was *held* to be final, which settled a partnership, and divided the assets and liabilities as between the parties, and established their rights and duties towards each other, although it did not provide a remedy or method of enforcement. It could do no more; and such award is mutual and final. *Lamphire v. Cowan*, 39 Vt. 420.

41. An award that one party shall pay a stranger a debt for which both parties are bound, is valid as between the parties to the award. *Ib.*

42. **Divisibility.** Where one article of an award is in itself so complete and independent of the rest, that its separate enforcement will work no injustice, it may be recovered upon, although other portions of the award are void. *Ib.* *Giddings v. Hadaway*, 28 Vt. 342.

43. An item improperly allowed in an award does not avoid the award, where it is so stated as to be separable. In such case it is to be severed and deducted. *Hartland v. Henry*, 44 Vt. 593.

44. In assumpsit upon a parol award of arbitrators declaring for the aggregate amount of the award, where the award was in fact made up of distinct and separate items, with their values, and it was so announced, some of which items were within the legal scope of the decision, and some not;—*Held*, that a recovery could be had, under such declaration, for the sum of the items which were properly awarded. *Dalrymple v. Whitingham*, 26 Vt. 345.

45. Where a submission was of all demands, and the arbitrators added to their award that

the parties should execute mutual general releases; *Held*, that this was well enough, and did not affect the main award, which was itself a bar to all claims. *Shepherd v. Briggs*, 28 Vt. 81.

46. Under a parol submission to arbitrators of all matters of difference between the parties, the arbitrators awarded a certain sum to the plaintiff, and a further sum of \$50 for further breach of contract, unless the defendant should within six days after notice pay the sum first stated. *Held*, that the plaintiff could not recover the \$50, it being, as stated, a penalty for not performing the rest of the award, and not within the submission; but that this was severable, and did not vitiate the rest. *Sabin v. Angell*, 44 Vt. 523.

47. In an award one provision was, that the costs should "be made up by the parties." *Held*, that this did not vitiate other parts of the award. *Rixford v. Nye*, 20 Vt. 132. 39 Vt. 420.

48. Arbitrators, in adjusting sundry claims between the parties, made seven successive awards, five in favor of the plaintiff and two in favor of the defendant, each complete in itself, and struck no final balance of the awards; but this was mere matter of computation. In an action on the arbitration bond to pay "the award";—*Held*, that these were but details of one award, and that the plaintiff was entitled to recover the final balance. *Semble*, that if the defendant had withheld his portion of the award, the plaintiff might have had judgment for that part which was in his favor. *Kendrick v. Tarbell*, 26 Vt. 416.

49. **Construction.** Awards are to be liberally construed according to the intent of the parties. If, by manifest implication, that appears which, if positively expressed, would render the award good, that is sufficient to support the award. *Rixford v. Nye*, 20 Vt. 132. *Lamphire v. Cowan*, 39 Vt. 426. *Young v. Kinney*, 48 Vt. 22.

50. A submission and award very inartificially drawn, were sustained, the judge saying, that courts, very justly, ever strive to support and enforce the adjudications of these domestic tribunals created by the parties, as in the interest of peace and, generally, of substantial justice. *Soper v. Frank*, 47 Vt. 368.

51. The submission to arbitration of a cause pending in the county court provided, that "the costs in the county court shall follow the decision of the arbitrators, and shall follow the judgment of said arbitrators to be made as in a court of law." *Held*, that this provision referred to the costs only, and not to a rule of decision upon the merits. *Edwards v. Harrington*, 45 Vt. 63.

52. Arbitrators may award that payment be made at a future day, and by installments, and

may require the performance of conditions by the other party before payment; and where the subject matter was a continuing contract for support during life, which was wholly broken;—*Held*, that they might award the payment of an annual sum during the life of the party entitled to such support, under a submission of "all questions of damages growing out of an alleged violation" of such contract. *Remelee v. Hall*, 31 Vt. 532.

53. A submission recited that "Whereas a controversy is now existing between us concerning the settlement of book accounts and all other deal and disputes between us," and then agreed "to submit all of said controversies which we cannot settle ourselves, if any there should be, &c." *Held*, that the submission did not include matters of deal not in controversy [as certain promissory notes not at that time disputed], and, therefore, such claims, not presented to the arbitrators, were not barred by the award. *Robinson v. Morse*, 29 Vt. 404. *Id.* 464.

54. Where a submission in writing was of "all differences and accounts,"—*Held*, that an award thereon was not a bar to a claim not presented, about which there was no dispute, and which stood adjusted by a previous award under a parol submission. *Trescott v. Baker*, 29 Vt. 459.

55. **Effect.** An award, acquiesced in by the parties to it, cannot be impeached by a third person who has got possession of the money awarded. *Penniman v. Patchin*, 6 Vt. 325.

56. An award will ordinarily have no greater effect than a judgment. It will only bar what is adjudged, unless perhaps, &c. *Redfield, J.*, in *Briggs v. Brewster*, 23 Vt. 100. 29 Vt. 408. 29 Vt. 464. See *Robinson v. Morse*, 26 Vt. 392. *Buck v. Buck*, 2 Vt. 417.

57. Under a general submission to arbitration, *not in writing*;—*Held*, that matters within the submission, but not brought before the arbitrators, are not barred by the award; but the decision was limited to such submissions. *Buck v. Buck*.

58. In case of a written submission of all matters in difference, where only a part was embraced in the award;—*Held*, that in order to impeach the award on this ground, the party must distinctly show that the matters not awarded upon were so brought to the notice of the arbitrator that it became his duty to hear and determine them. *Young v. Kinney*, 48 Vt. 22.

59. Whether matters falling within the terms of the submission, but, through mistake, forgetfulness or accident, not presented to the arbitrators, are barred by the award—*quære*. *Robinson v. Morse*, 26 Vt. 392. It so seems:—see *Barker v. Belknap*, 39 Vt. 180.



60. Where a submission to arbitration is by deed, an award, made in pursuance of it, is a bar to an action for the recovery of any matters included in the submission, though not in fact brought before the arbitrators. *Robinson v. Morse*, 26 Vt. 392.

61. So, where the submission is in writing, and under a rule of the probate court authorized by statute. *Barker v. Belknap*, 39 Vt. 168.

62. The submission of the subject matter of a pending suit to arbitration and an award according to the submission, operate in law to discontinue and put an end to the suit. *Rixford v. Nye*, 20 Vt. 132. *Babcock v. School District*, 35 Vt. 250.

63. The plaintiff had a claim against the defendant, an officer, for the wrongful attachment of his last cow upon a writ in favor of G. The plaintiff and G afterwards submitted certain specified matters, and "all matters existing between them" to arbitration, and an award was made, this claim not being presented or adjudicated. In an action of trespass against the officer,—*Held*, that the award was no defense, for that the plaintiff was not bound to resort to G instead of the officer for remedy, even although he might have done so, and the officer was not a party to the submission. *Robinson v. Hawkins*, 38 Vt. 693.

64. The defendant had leased premises to the plaintiff for five years, and during the first year they agreed to "dissolve," and left to arbitrators to determine what sum the defendant should pay the plaintiff in consideration that the plaintiff would, at the end of the first year, surrender the term and premises. The arbitrators awarded a certain sum. Before the expiration of the year the plaintiff assigned the lease and remainder of the term to his son, and informed the defendant thereof and that he did not consider himself bound by the award, as the defendant had not paid; that he had nothing further to do with it, and the defendant must go to the son about it. The defendant did go to the son and paid him \$100, to surrender the premises. In an action on the award;—*Held*, (1) that the award was payable only when the surrender was to be made; (2) that having refused to surrender and having assigned the estate, the plaintiff could not recover; (3) that as the defendant acted upon the notice given him in making the purchase of the son, this operated as an estoppel *in pais* to any claim of the plaintiff. *Soper v. Frank*, 47 Vt. 368.

65. Impeachment of award at law. Neither mistake, nor irregularity of conduct of arbitrators, nor both, not going to the whole award, is a defense in an action at law upon the award. *Shepherd v. Briggs*, 28 Vt. 81.

66. In an action upon an award, or an arbitration note, the award, like a judgment, cannot be collaterally impeached by evidence that

it was procured by the plaintiff by false testimony. *Woodrow v. O'Conner*, 28 Vt. 776.

67. —in equity. Partiality or corruption in the arbitrators, or fraud of the party in obtaining an award, are grounds of defense exclusively of equitable cognizance. *Emerson v. Udall*, 13 Vt. 477.

68. An award is in itself conclusive of the legality and justice of the claim submitted and allowed, and of all inferences to be drawn therefrom. To avoid an award upon the score of fraud, it is necessary to prove facts not within the scope of the inquiry before the arbitrators, and from their nature not concluded by the award; simply to show that the claim allowed was unfounded, and that the party presenting it knew it, is not sufficient. *Emerson v. Udall*, 8 Vt. 357.

69. In order to warrant the setting aside of an award for fraud of a party, such party must, either by suggestion of falsehood or the suppression of truth, have presented to the arbitrators a state of facts in regard to the merits of his claim which were factitious, and which he at the time believed to be such. *Redfield, J., in Emerson v. Udall*, 13 Vt. 484. *Howard v. Puffer*, 23 Vt. 365.

70. An award will not be set aside by a court of equity on the ground that one of the parties, without any mistake as to the facts, misapprehended one of the legal consequences of the award—as, the settling of title to land. *Howard v. Puffer*, 26 Vt. 687.

71. No mistake in matter of fact, depending upon the misjudgment of an arbitrator, whether in weighing evidence, or the construction of contracts or written admissions, will avoid an award. The mistake must be one which shows that the arbitrator was misled, deluded, and so far misapprehended the case, that he failed to exercise his real judgment upon it—*e. g.* a mistake in computation. *Redfield, C. J., in Vanderwerker v. Vt. Central R. Co.*, 27 Vt. 180, 187.

72. The court refused, on bill in equity, to set aside an award for misconduct of the arbitrators, where they were not satisfied that the misconduct was intentional, or sufficiently gross, although the court characterized it as "discreditable." *Cutting v. Carter*, 29 Vt. 72.

73. But where a party to an arbitration procured a false allowance in his favor by withholding from the inspection of the other party his books and papers, from which he was conscious the incorrectness of his claim would appear;—*Held*, that this was such a fraud as demanded setting aside the award. *Id.*

#### IV. ACTION ON AWARD.

74. Under a general submission arbitrators may award money, and releases; and assump-

sit lies upon an award, though the submission contains no express promise to abide the award. *Bellows v. Barnard*, Brayt. 29.

75. If parties agree to submit, and actually do submit, and an award is made in the premises, an agreement to abide the award is implied, though not expressed in the submission. *Stewart v. Cass*, 16 Vt. 668.

76. Where an award orders acts to be done by both parties within a certain time, the party who refuses to perform within the time set cannot afterwards compel the other party to perform. *Anon.* Brayt. 29.

77. Certain property in the custody of the defendant was awarded by arbitrators to the plaintiff. At a later date, the parties executed mutual releases. Afterwards the defendant refused to surrender the property and converted it. *Held*, that an action therefor did not lie upon the covenant to perform the award, but trover. *Bridgeman v. Eaton*, 3 Vt. 166.

78. **Arbitration notes.** An arbitration note—that is, a promissory note executed by one party to the other, subject to indorsement to correspond with the award, and deposited with the arbitrator to be delivered to the recovering party—takes effect as a valid obligation upon its delivery to the party in whose favor a valid award is made; and a recovery may be had upon it, on the money counts. *Woodrow v. O'Conner*, 28 Vt. 776. *Bagley v. Winwall*, Brayt. 28.

79. **Declaration.** In declaring upon an award, it is sufficient to set forth that part on which the plaintiff relies, and to say that *among other things* the arbitrators awarded, &c. *Blanchard v. Murray*, 15 Vt. 548.

80. **Damages.** Where, as a consideration for submission to arbitration, the plaintiff released his original cause of action, and the defendant refused to proceed according to the submission;—*Held*, that the rule of damages was the plaintiff's cost and expenses, and the value of the claim or cause of action released. *Day v. Essex Co. Bank*, 13 Vt. 97.

81. Where parties agreed in the submission, each to perform the award, or, on failure, to pay to the other \$500 in lieu of all other damages, and the award was for the payment of a sum of money less than \$500;—*Held*, in an action on the award, that the plaintiff could recover only the amount of the award with interest. *Whitcomb v. Preston*, 13 Vt. 53.

### ARREST.

1. **Right to arrest.** For the purpose of preventing the commission of crime, or breach of the peace, public officers may, upon common principles, without any statute authorizing it,

make arrests, and take and detain the instruments of crime. In many instances, a private person may do the same. *Spalding v. Preston*, 21 Vt. 9. *In re Powers*, 25 Vt. 261.

2. —**to demand assistance.** In the making of arrests for any criminal matter or cause, a sheriff, or other like officer, may command suitable aid and assistance (G. S. c. 12, s. 11); and any person so assisting may justify by the order of a known public officer, although the officer be not justified by his process. *McMahan v. Green*, 34 Vt. 70.

3. If there be a misnomer of the defendant in a criminal process, whether the arrest of the person intended cannot be justified by the officer under the warrant—*quare*: The order of the officer will justify the person assisting him in such case. *Id.*

4. **Duty to arrest.** An officer having an execution against the body of a party whom he holds in arrest upon criminal process, or who is present while the party is so under arrest, is bound to wait the opportunity to make an arrest upon the execution, unless necessarily prevented; and for neglect so to do the officer was held liable. *Warner v. Lowry*, 1 Aik. 55.

5. **Writ of protection.** A writ of protection *ad testificandum* suspends all civil process against the subject of it, while coming to and attending upon court, and for a reasonable time for returning home after the rising of the court. *Hall ex parte*, 1 Tyl. 274.

6. **Privilege from arrest.** Parties, witnesses and bail are privileged from arrest, in a civil suit, during their attendance upon court, or before any tribunal sitting in the nature of a court in the administration of justice, and in going to and returning from it, whether compelled to attend or not. *Fletcher v. Baxter*, 2 Aik. 224.

7. The arrest of one having special privilege or exemption from arrest is not void, but merely voidable. The privilege may be waived. It cannot be pleaded and put in issue to the jury, but is ground for a motion to the court for a discharge, or for release on *habeas corpus*. *Id.*

8. Where the principal was arrested while attending court as a witness, and gave bail and suffered judgment to pass against him without claiming his privilege;—*Held*, that he had waived his privilege, and that it was no defense to an action against the bail. *Id.* (See G. S. c. 33, s. 84.)

9. One who is personally privileged from arrest must take the earliest opportunity to assert his privilege to prevent or defeat an arrest, or he will be held to have waived his privilege; and it cannot be afterwards asserted, so as to render his imprisonment unlawful, in an action for false imprisonment. So *held*, where the plaintiff was again imprisoned upon an execution regular on its face, after having been

discharged on taking the poor debtor's oath. *Wood v. Kinsman*, 5 Vt. 588. Brayt. 118.

10. An officer, holding a writ of attachment against a person attending a justice court as a suitor, arrested him, but recognizing his privilege discharged him from arrest, and so made return, making no other service. *Held*, that this was no service of the writ. *Wheeler v. Barry*, 6 Vt. 579.

11. That the defendant was attending court as a witness when he was arrested upon the writ, is no cause for abating the writ. *Booraem v. Wheeler*, 12 Vt. 811. Changed by G. S. c. 33, s. 84 (1849).

12. The giving of bail is not a presumed waiver of privilege from arrest. *Washburn v. Phelps*, 24 Vt. 506 (1852).

13. G. S. c. 33, s. 84, giving persons "privileged from arrest" the right to plead such privilege in abatement, is intended for those only who are exempt from arrest on peculiar grounds, as parties and witnesses, attorneys, members of the legislature, &c., and does not include a person not so "privileged," who is arrested upon the filing of an affidavit that he is about to abscond, &c. *Bank of Vergennes v. Barker*, 27 Vt. 248.

14. The statute (G. S. c. 36, s. 20) exempting a party "in any cause" from arrest while going to, attending or returning from the trial of such case, does not extend to the respondent in a criminal prosecution. *Scott v. Curtis*, 27 Vt. 762.

15. Arrest on *capias* for debt. If one assume to justify by special process of *capias*, he should state such facts as justify that form of process. *Wright v. Hazen*, 24 Vt. 148.

16. An officer arresting one on a *capias* as an absconding debtor cannot be required to take the debtor for examination before the justice signing the writ, while the justice is out of his proper county, since the justice has no power to perform judicial acts there. *Whitcomb v. Cook*, 38 Vt. 477.

17. When at the time a debtor is arrested upon a writ procured against his body by affidavit, the magistrate signing the writ is temporarily absent from the county, and the debtor notifies the officer that he wishes to be taken before the magistrate for an examination, we think the officer ought not, and has no legal right to commit him forthwith to jail, so that he can have no opportunity to go before the justice and have an examination; that it is the duty of the officer to detain the debtor in custody for a reasonable time, at least, to afford opportunity for such examination, and that if he did not, in this case, but committed him, the imprisonment would be unlawful. But during the period of such delay, the officer may place the debtor in any safe and secure place for safe-keeping that is reasonable and proper, and may

use the common jail for such purpose. *Poland, C. J. Id.*

18. An officer having arrested one as an absconding debtor, may lodge him temporarily in the county jail for safe keeping, in view of the debtor's right to procure bail or to submit himself to examination in discharge of the arrest. But such custody remains in the officer until transferred to the jailer by a full commitment upon the writ, by leaving with him a copy, &c., as provided in G. S. c. 38, s. 61. *Kenserson v. Bacon*, 41 Vt. 578.

19. Until such full commitment, the debtor's right to be taken before the authority signing the writ for examination in discharge of his arrest continues; and if, after such request made at any time before such full commitment, the officer neglects or refuses to comply therewith and so commits the debtor, he becomes a trespasser *ab initio*, and liable for false imprisonment. *Id.*

20. Under the Act of Nov. 5, 1845 (see G. S. c. 33, s. 78);—*Held*, (1), that where a debtor was arrested on an execution issued from the county court, the county clerk was the proper authority to examine him for a discharge; (2), that he was entitled to such examination in a case where the execution issued without other affidavit than the one upon which the original writ issued; and (3), that he was so entitled after he had been committed to jail and had given a jail bond, where he was not chargeable with neglect in seasonably claiming his privilege and had not waived it. *Davis ex parte*, 18 Vt. 401.

21. Discharge by judge. The written order of a county judge discharging a debtor from arrest, made in due form under G. S. c. 38, s. 79, not only justifies but requires the release of the prisoner; and where he has passed upon the question of reasonable notice to the creditor, and the order states that the proceedings were had "after proof of due notice" to the creditor, the question of due notice cannot be raised in an action against the sheriff for an escape. *Brown v. Mason*, 40 Vt. 167, and see *Raymond v. Southerland*, 3 Vt. 494.

22. —by creditor on execution. As a general rule, if the creditor discharge his debtor from arrest on execution, it is equivalent to a discharge from imprisonment, and virtually discharges the debt; but if so discharged by request of the debtor, or by mutual assent, it does not so operate. *Foster v. Collamer*, 10 Vt. 466. 20 Vt. 377.

23. Action for wrongful arrest. Trespass for false imprisonment does not lie for an imprisonment upon an *alias* execution, because of an arrest upon a former one and a discharge from custody by the creditor. *Nason v. Sewall*, Brayt. 119.

24. An action does not lie against the party

procuring an arrest and imprisonment upon an execution issued upon a judgment not void, but voidable merely. *Kimball v. Newport*, 47 Vt. 88.

25. Where several, by combination and conspiracy, enticed a citizen of this State to go into another State that he might be there arrested on civil process, and he was so arrested;—*Held*, they were liable to him in an action on the case, although the debt for which he was so arrested was justly due. *Phelps v. Goddard*, 1 Tyl. 60.

*Promise not to arrest*;—see *Steele v. Bates*, 2 Aik. 388.

## ASSIGNMENT.

### I. ORDINARY ASSIGNMENTS.

#### II. ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. *At common law.*
2. *Under statutes.*

### I. ORDINARY ASSIGNMENTS.

1. **Mode of assigning.** If a draft, or order, is drawn on a debtor for funds of the drawer in his hands, in favor of a third person for good consideration, this operates as an equitable assignment which the assignor will not be allowed to defeat, although the drawee, having notice, neither pays nor accepts the order. *Blin v. Pierce*, 20 Vt. 25.

2. A promissory note, given and made payable to A, or bearer, was delivered by A to B, with an authority "to use the avails of it for the support and comfort of B, as she might need, or find occasion." *Held*, that this did not create an agency for the benefit of A, nor confer a mere power of attorney which was revoked by the death of A, but was an assignment, authorizing B to demand payment, and the maker of the note to pay to B, after the death of A; and, the maker having so paid, *held*, that he was not liable to the executor of A. *Lamb v. Matthews*, 41 Vt. 42.

3. A lease of lands, sheep, &c., from A to B, with conditions of purchase, had indorsed thereon the words, "Assigned the within instrument to C," signed by A, and it appeared that C had thereafter received the rents due upon the lease. *Held*, that these facts alone did not prove such a transfer to C of all interest in the lease, as to defeat an action by A to recover for a conversion of the property specified in it. *Bradley v. Arnold*, 16 Vt. 382.

4. **Oral assignment.** An assignment of a chose in action by words without writing operates as an equitable transfer of it, and, when followed by notice thereof from the assignee to the debtor, will be protected and enforced by courts of law against a subsequent attachment by trustee process. No symbolical delivery

is essential to the assignment. *Noyes v. Brown*, 33 Vt. 431. *Hutchins v. Watts*, 35 Vt. 380. *Spafford v. Page*, 15 Vt. 490.

5. *Dictum.* An oral agreement assigning a chose in action requires a symbolical delivery. *Whittle v. Skinner*, 23 Vt. 531. *Held contra* in *Noyes v. Brown*.

6. **Subject of assignment.** A person in the actual employment of another and receiving wages under a subsisting engagement, may make a valid assignment of his future earnings for the security and payment of either present or future indebtedness—although such engagement is not for any set time and either party may terminate it at pleasure. *Thayer v. Kelley*, 28 Vt. 19.

7. An unliquidated balance of account is assignable, and may be held by the assignee, after notice to the debtor, against a trustee process. (*Dictum contra* of *Redfield, J.*, in *Whittle v. Skinner*, 23 Vt. 531, *denied*). *Trescott v. Potter*, 40 Vt. 271.

8. A written instrument, as follows: "Due Harvey Groot \$295, in part payment for a piano forte, said piano to be selected by Mr. Groot," is assignable, and the assignee or his agent takes the assignor's right of selection. *Groot v. Story*, 41 Vt. 533.

9. **Protection of assignee.** A note not negotiable is assignable in equity, so that, after notice, the maker can pay to the assignee only, and cannot be held as trustee of the payee. *Newell v. Adams*, 1 D. Chip. 346.

10. The equitable interest of the assignee of a chose in action will be protected at law; and in an action by the assignee, brought in the name of the assignor, the debtor can set up no defense which accrued after notice to him of the assignment,—as, payment, release, set-off, &c. *Ib. Strong v. Strong*, 2 Aik. 373. *Lampson v. Fletcher*, 1 Vt. 168. *Haven v. Hobbs, Ib.* 288. *Weeks v. Hunt*, 6 Vt. 15. *Cummings v. Fullam*, 13 Vt. 484. *Day v. Abbott*, 15 Vt. 632. *Campbell v. Day*, 16 Vt. 558. *Stiles v. Farrar*, 18 Vt. 444. *Blake v. Buchanan*, 22 Vt. 548. *Upton v. Moore*, 44 Vt. 552.

11. To avoid the effect of a release, pleaded or proved, it is not sufficient to reply or prove that the suit is brought for the benefit of another than the plaintiff of record, and that the defendant knew this before the release was given. To avoid the effect of the release, there must have been an assignment of the claim. *Beech v. Canaan*, 14 Vt. 485. *Weeks v. Stevens*, 7 Vt. 72.

12. C was sued upon a contract, and defended upon the ground that he was agent of M. He employed the plaintiffs as his attorneys, and was cast in the suit, on the ground that he did not disclose his agency when he made the contract. He then brought suit against M, to recover what he had been compelled to pay and

his expenses, and, pending the suit, assigned his entire claim, upon sufficient consideration, to the defendant, and afterwards settled with the plaintiffs their bill for services in the first suit by giving them his note therefor, telling them that if such part of his claim against M should be allowed in the suit, they should have the benefit of it, and have so much of the judgment against M. A judgment was obtained against M in the suit, and the amount of the plaintiffs' claim against C was embraced in it. The defendant collected the whole amount of the judgment, and held the money. In an action to recover the amount of the plaintiffs' bill, as their money in the hands of the defendant;—*Held*, that the liability of C to the plaintiffs, equally as if paid, passed by his assignment to the defendant, as part of his claim against M, and that the giving of the note gave him no additional right against M; that C gained nothing and the plaintiffs lost nothing by that arrangement; that the equitable title to the whole claim, which became vested in the defendant by the assignment, could not be divested by any subsequent agreement between C and the plaintiffs; that the plaintiffs had no lien upon the judgment, and could not recover. *Ormsby v. Fifield*, 38 Vt. 143.

**13. Where assigned as collateral security.** The equitable interest of the assignee of a note not negotiable, which is assigned as collateral security merely for a debt owing, extends only to the amount of the debt, and does not cover costs accrued in a suit to recover the debt. As to the excess above such debt, the maker of the note may avail himself of a release by the payee, though executed after the assignment. *Blake v. Buchanan*, 22 Vt. 548.

**14.** The assignee of a promissory note for collateral security is entitled to recover the full amount of the maker, and to hold the excess, if any, above the claim secured in trust for the assignor. *Sawyer v. Cutting*, 23 Vt. 486. See *Bank of Rutland v. Woodruff*, 34 Vt. 89.

**15. Assignee takes subject to equities.** The assignee of a chose in action takes it subject to all the equity, existing at the time, in the original obligor or debtor. *Foot v. Ketchum*, 15 Vt. 258.

**16.** Where a deputy sheriff recovered judgment against a bank for money deposited, which he had collected on an execution, and the sheriff had been obliged to pay the creditor for the laches of the deputy in failing to pay over the money so collected;—*Held*, that the equitable title to the money deposited and the judgment was in the creditor, until he was paid by the sheriff, and that on such payment the sheriff became entitled to be subrogated to the rights of the creditor in the judgment; and that this equity would prevail over the equitable rights of one who had taken from the dep-

uty an assignment of the judgment, though taken upon good consideration and without notice of the pre-existing equity of the sheriff. *Downer v. S. Royalton Bank*, 89 Vt. 25.

**17.** The rule that a *bona fide* purchase, for value and without notice, is a good defense against prior equitable claims, applies only where the purchaser has acquired a *legal title* or a *legal superiority* in good faith and for value. But the purchaser of a chose in action, which is assignable only in equity, takes it subject to all equities attached to it, although without notice of them,—not only such as exist between the debtor and the assignor, but such as exist in favor of a third person as against the assignor. As between mere equities, priority in time gives priority of right. *Wilson, J. Ib.*

**18.** An assignment of a demand not negotiable, since it does not transfer the legal right of action, does not preclude the defendant from offsetting mutual demands against the plaintiff of record, which were mature and actionable previous to the assignment. *Walker v. Sargeant*, 14 Vt. 247.

**19.** The defendant was indebted to the plaintiff on book account, and was, at the same time, surety of the plaintiff for a larger sum. The plaintiff assigned his account, of which the defendant was notified, and the defendant afterwards paid the debt for which he was surety. In an action of book account by the assignee in the name of the plaintiff;—*Held*, that the sum so paid should be allowed to the defendant, notwithstanding the assignment, the defendant having an earlier equity than the assignee, and dating from his undertaking of suretyship. *Barney v. Grover*, 28 Vt. 391.

**20.** A party taking a railroad mortgage bond *pendente lite*, or after a foreclosure, as collateral security for the debt of the assignor, takes it subject to such equities as existed against it in the hands of the assignor, and with no greater rights under it. *Knapp v. Sturgis*, 36 Vt. 721.

**21. Notice of assignment.** The debtor will be protected as to all *bona fide* defenses—as payment to the assignor, &c.,—arising before he had knowledge of the assignment. *Campbell v. Day*, 16 Vt. 558.

**22.** To perfect an assignment of a chose in action as against *bona fide* creditors of the assignor, notice of the assignment must be given to the debtor before attachment; and this is so, whether it be an assignment of a single chose in action, or a general assignment for the benefit of creditors. Notice comes in lieu of possession taken, as in case of chattels. *Ward v. Morrison*, 25 Vt. 593. *Barney v. Douglass*, 19 Vt. 98.

**23.** Until notice of the assignment of a chose in action has been given, the same evidence that would be admissible between the

original parties is admissible against the assignee;—as, an admission by the assignor that the debt had been paid,—for, until such notice, the rights and interests of the debtor are in no way affected by the assignment. *Loomis v. Loomis*, 26 Vt. 198.

24. The defendant had contracted with one S for a daily supply of milk for one year from April 1st, at a stipulated price per quart payable monthly. S so furnished the milk until Sept. 1st, when, without the knowledge of the defendant, he sold out his business to the plaintiff, who supplied the defendant through the month of September, the defendant all the while supposing that he was supplied by S under the special contract. Upon then being informed of the facts, and upon the plaintiff's refusing to carry out the contract of S for the rest of the year, the defendant refused to pay the plaintiff for the milk furnished by him during the month of September. In an action of book account brought therefor;—*Held*, that the plaintiff was entitled to recover, but only to the same extent as if the action had been by S after a like refusal on his part to carry out the special contract, and subject to a like deduction from the contract price, of the defendant's damages on account of such refusal. *Smith v. Foster*, 36 Vt. 705.

25. **Form of notice.** No particular ceremony or form of words is prescribed, or necessary, to constitute sufficient notice of the assignment of a demand, so as to protect it from trustee process against the assignor; but it must be such knowledge or information, communicated by the assignee or by his procurement, to the alleged trustee, as gives him fully to understand that he, the assignee, is the owner of the demand. A notice of this character may be sufficient, though the communication be merely casual and be made for no definite purpose. *Dale v. Kimpton*, 46 Vt. 76.

26. A, the assignee of an unsettled claim of M against B, said to B: "If there is anything due from you to M, I want you to pay it to me." B replied that he had been requested to do the same thing by two others that day. A answered: "I claim it." *Held*, that this did not fairly and reasonably give B to understand that A had an assignment of the debt, but was rather a request, and was not a sufficient notice of the assignment to protect the fund from a trustee process for the debt of M. *Cahoon v. Morgan*, 38 Vt. 234.

27. **Action by assignee.** The transfer of a chose in action not negotiable, whereby the assignee becomes the absolute owner, whether it be by purchase or gift, is a sufficient consideration to sustain a special promise by the debtor to pay to such assignee, and an action may be sustained upon such promise in the name of the assignee. *Smilie v. Stevens*, 41 Vt.

321. *Moar v. Wright*, 1 Vt. 57. *Bucklin v. Ward*, 7 Vt. 195. *Hodges v. Eastman*, 12 Vt. 358. *Goodnow v. Parsons*, 36 Vt. 46. *Alkis v. Jewell*, *Ib.* 547. 31 Vt. 565. *Stiles v. Farrar*, 18 Vt. 444. *Goss v. Barker*, 22 Vt. 520.

28. Where a note, not negotiable, had been assigned for a valuable consideration, and upon notice thereof given by the assignee the maker promised to pay it to the assignee;—*Held*, in an action thereon in the name of the payee, for the benefit of the assignee, that such promise amounted to an acquiescence in the assignment and a waiver of all right, or claim, to interpose an offset to the note, although then existing against the payee. *Stiles v. Farrar*.

29. The assignee of a judgment may maintain an action in his own name for neglect of an officer, after such assignment, to collect the execution. *McGregor v. Walden*, 14 Vt. 450. 31 Vt. 473.

30. So, for such neglect, or to pay over the money collected, the assignee may maintain an action in the name of the party recovering the judgment; and the rule of damages is the same in both cases. *Chase v. Plymouth*, 20 Vt. 469. *Bradley v. Chamberlain*, 31 Vt. 468.

31. —**against assignee.** An action for the breach of a mere personal contract cannot be brought against one to whom the obligor has assigned his interest, unless the assignee has entered into some new contract with the plaintiff to perform it. *Smith v. Kellogg*, 46 Vt. 560.

## II. ASSIGNMENTS FOR BENEFIT OF CREDITORS.

### 1. At common law.

32. It was agreed between the owner of certain personal property and certain of his creditors, that the plaintiff, a third person who then had possession of the property, should keep it till a certain day and then sell it at auction and apply the proceeds among such creditors in a certain specified order. To this the plaintiff agreed, and employed one of such creditors to keep the property until the day of sale; but before that day the defendant, another creditor, attached and took away the property. *Held*, that the contract operated as a direct assignment to the plaintiff for the benefit of the particular creditors, and that the defendant was liable to him in trespass for the attachment. *Mason v. Hidden*, 6 Vt. 600.

33. A general assignment by a debtor of all his property, for the benefit of all his creditors, is valid. *Hall v. Denison*, 17 Vt. 310. (Subsequently prohibited by Act of 1843.)

34. A general assignment for the benefit of creditors imports a consideration,—especially where a nominal consideration is expressed, and the assignee executes a covenant for the faithful performance of the trust. *Ib.*

35. It is no objection to such an assignment, that there is in it a reservation of the surplus to the assignor, after all his debts are paid. *Ib.*

36. The assent of creditors to an assignment in trust for their benefit, without conditions, will be presumed; and where the condition only affected the question of a preference—as, that creditors shall be preferred who shall within 90 days become parties to the assignment and release their claims, and after that the estate shall be distributed *pro rata* among all other creditors—and no such preference had been claimed;—*Held*, that the assent of creditors to such final distribution would be presumed, and the assignment was not invalidated by such condition of preference. *Ib.*

37. By a valid assignment in trust for the benefit of creditors the relation of trustee and *cestui que trust* is at once created between the assignee and the creditors, so that the assignee cannot revoke the instrument; and the assignee cannot be held as trustee, under the trustee process of attachment, where there is no surplus in his hands after paying the debts embraced in the assignment. *Ib.*

38. A reservation to the assignor of the residuum, in an assignment in trust for creditors, without providing for all the creditors, renders the assignment void at common law. *Dana v. Lull*, 17 Vt. 390. *Goddard v. Hapgood*, 25 Vt. 351. *Therasson v. Hickok*, 37 Vt. 454.

39. Where a voluntary assignment of all one's property to a trustee for the benefit of a part of the creditors of the debtor is objected to, because it leaves, expressly or by implication, a resulting trust to the debtor as to the surplus, it is no answer, that, in the end, it turned out that the property assigned was not sufficient to pay such preferred creditors. *Dana v. Lull*.

40. *Held*, that a person not in debt may make a voluntary conveyance of his property or a contract for his future support, which will be valid as to subsequent creditors. *Buchanan v. Clark*, 28 Vt. 799.

41. Fraud does not consist in transferring property with a view to prefer one creditor to another, but in transferring property with the intent to prefer one's self to all his creditors. He may lawfully pay or secure one creditor to the exclusion of another. *Gregory v. Harrington*, 33 Vt. 241.

42. An assignment in trust for the benefit of creditors, if made with intent to prevent a particular creditor from getting his pay from the property assigned, or otherwise, except at the assignor's pleasure, was *held* to be void as to such creditor, although the assignee was ignorant of such purpose, and although the assignment, in other respects and in its results, aside from such intent, was valid. *Stickney v. Crane*, 35 Vt. 88.

43. A party took and held possession of

goods under a valid assignment from his debtor. He afterwards, for his better protection, attached the goods and irregularly sold them on execution. *Held*, as against other creditors of the assignor, that he had not thereby lost his right under the assignment. *Tilton v. Miller*, 34 Vt. 576.

44. Where a creditor accepted in writing the provisions of an assignment by his debtor for the benefit of creditors, by which he agreed to accept the dividends which might accrue after a faithful accounting by the assignee, and await the same;—*Held*, that the agreement was on sufficient consideration, and operated as a temporary bar to his right of action on his claim. *Kingsbury v. Deming*, 17 Vt. 387.

45. But the acceptance of a dividend under such an assignment, where there is nothing in the terms of the assignment binding the creditors to delay, does not preclude the creditor from suing at any time. *Bank of Bellows Falls v. Deming*, 17 Vt. 366.

46. So, too, if, under such an assignment, there has been an unreasonable delay in settling the estate and perfecting the accounting, a creditor who assented to the assignment, and joined in the agreement to delay, may bring his suit. *Foster v. Deming*, 19 Vt. 813.

## 2. Under statutes.

47. Stat. 1843—General assignment. Under the Statute of 1843 (C. S. c. 64, s. 6) enacting that "all general assignments made by debtors for the benefit of creditors shall be null and void as against the creditors of said debtors;"—*Held*, that to come within the statute the assignment must be of *substantially all the debtor's property and in trust for the benefit of his creditors*. If so, it is within the statute. *Noyes v. Hickok*, 27 Vt. 36. *Mussey v. Noyes*, 26 Vt. 462. *Bishop v. Catlin*, 28 Vt. 71. *Therasson v. Hickok*, 37 Vt. 454.

48. Unless the assignment be made to trustees in trust for creditors, it is not a "general assignment" under the act, although it be of all the debtor's property. *Peck v. Merrill*, 26 Vt. 686.

49. Where an assignment of an insolvent debtor conveyed to a trustee, by general description, all the property he owned or possessed in two towns named, and there was no allusion in the assignment to his ownership of any other property, the assignment being made, as expressed, "to save a great sacrifice and waste of property;"—*Held*, that the court would not *intend* that there was other property, and that this should be understood as a general assignment of all the debtor's estate. *Dana v. Lull*, 17 Vt. 390; and see *Bishop v. Catlin*, 28 Vt. 71.

50. A deed of assignment by a debtor to assignees provided as follows: The assignees

"shall forthwith take possession, and faithfully, and as soon as practicable, and in the most beneficial manner, dispose of and convert into money the said real and personal estate, and collect the said choses in action, and apply the money therefrom arising (after paying expenses) in payment and discharge of the debts due the assignees, and for which they are holden as sureties, and pay the surplus to the assignor, or to such person as he shall appoint;"—*Held*, (1), that this did not give the assignees power to sell on credit; (2), nor power to compound with creditors; (3), nor was the preference given unlawful, or a violation of the statute against fraudulent conveyances; and (4), this purporting on the face of it to be but a partial assignment, must be so regarded until the contrary be shown, and therefore not a violation of the statute of 1843 against general assignments. *Mussey v. Noyes*, 26 Vt. 462.

51. Stat. 1852. This Statute of 1843 was repealed by implication by Stat. 1852, No. 18, relating to assignments. *Farr v. Brackett*, 30 Vt. 344.

52. *Held*, by a majority, that the Act of 1852, No. 18, embraced other than general assignments, and that an assignment of a portion of the debtor's property for the benefit of a part only of his creditors, not executed according to the provisions of that act, was inoperative as against an attaching creditor. *Passumpsic Bank v. Strong*, 42 Vt. 295.

53. In order that a conveyance should come within the statute regulating assignments (Stats. 1852 and 1855), there must be a trust created for the benefit of some person other than the assignee, or grantee. If made directly to a creditor to secure a debt of the grantor, or a liability incurred for him, it does not come within the statute. *McGregor v. Chase*, 37 Vt. 225. *Noyes v. Brown*, 33 Vt. 442.

54. Under the Assignment Act of 1852, No. 18, and the like Act of 1857, No. 11, the filing of a copy of the assignment, &c., in the clerk's office is a sufficient taking of possession by the assignee, to prevent an attachment of the assigned property. *Vail v. Peck*, 27 Vt. 764. *Moore v. Smith*, 35 Vt. 644.

55. A father leased his farm, farming tools and stock to his son for three years, at a stipulated yearly rent to be paid to the lessor's brother, to be applied on the lessor's indebtedness to such brother, and the lessee to keep one cow for the lessor on the farm. The lessor owed debts to others than his brother and was insolvent, and the lease was all of his attachable property, except an old horse worth perhaps \$40. A creditor of the lessor attached the leased personal property. In an action therefor by the lessee;—*Held*, that the lease was not an assignment in such sense as to subject it to the special requirements necessary to the validity of assign-

ments either at common law or under the statutes, and that it was upon its face valid as against the general creditors of the lessor. *Stanley v. Robbins*, 36 Vt. 422.

56. Law of place. A voluntary assignment for the benefit of creditors, made according to the laws of the domicile of the assignor, will pass the personal property assigned wherever situate, unless its operation is limited or restrained by some local law or policy of the State where the property is situate. *Hanford v. Paine*, 32 Vt. 442.

57. A resident of New York made in that State an assignment of all his property for the benefit of his creditors. Among his property was an interest as partner in a stock of goods in a store in Vermont, which his partner, a resident of Vermont, carried on. The assignment was valid by the laws of New York, but was not according to the Vermont Statute of 1852 (G. S. c. 67), relating to assignments. *Held*, that this statute did not apply to foreign assignments, and that the assignee, having taken possession of the stock of goods under the assignment, could hold them against the attaching and trusteeing creditors of the assignor. *Ib.*

58. Ratification. An assignment void (*i. e.* voidable) under the statute, may be remedied by a new assignment conforming to the statute, or by further declarations of trust, &c.. *Merrill v. Englesby*, 28 Vt. 150.

59. And it may be affirmed by the creditors assenting to it, so as to be binding not only upon themselves, but as against other creditors, if it be such a disposition of the effects as the debtor has a right to make. *Ib.*

60. A general assignment in trust for the benefit of creditors, which was void as to the plaintiff not assenting thereto, was *held* good as to every thing done under it down to the time that the plaintiff expressed his dissent by attaching a part of the estate assigned. *Therasson v. Hickok*, 37 Vt. 454.

61. Where a creditor, in such case, brought a trustee process against the trustee named in the assignment, this was *held* a ratification both of the assignment itself and of any disposition of the property which the trustee had made under it. *Bishop v. Catlin*, 28 Vt. 71.

## ASSOCIATIONS.

1. Written articles. Persons associating under written articles for the purpose of building a meeting house, substantially, but not wholly, in accordance with the Act of Nov. 10, 1814, in addition to that of Oct. 26, 1797, were *held* to have become a corporation, although the acts were not referred to in the articles, nor did the articles allude to the creation of a cor-



poration. *Rogers v. Danby Universalist Ass'n.*, 19 Vt. 187.

2. **Right of control.** The right to control and manage the affairs of a voluntary association rests with the majority of the individual members. Though they may make constitutions and pass by-laws which they declare shall not be altered except in a certain way, as by the concurrence of two-thirds, &c., yet these may be altered or abrogated by the same power which created them: viz, a majority. *Smith v. Nelson*, 18 Vt. 511.

3. The right to the control of the property of an association for religious worship, and of electing and employing a minister, is vested in the corporate body, or in the majority of the individual members. The relation of the minister chosen and ordained over such voluntary society, agreeably to the usages of the denomination or church to which they profess to belong, cannot be dissolved against his will and that of a majority of the association, by the proceedings of any ecclesiastical tribunal whatever. *Ib.*

4. A majority vote of a church and society, acting as an existing organized association in a collective *quasi* corporate character, binds the minority—as to compromise a suit. *Horton v. Baptist Church, &c.*, 84 Vt. 309.

5. Where by the constitution of a religious society, a vote laying a tax was required to be passed by two-thirds the members present;—*Held*, that where the record simply stated that it “*was voted*” to lay the tax, the court could not assume that it was by a two-thirds vote. *Perrin v. Granger*, 30 Vt. 595.

6. **Church Law.** The canon law of the Roman Catholic Church has no force or authority in this State, as such, and is not to be considered in determining the legal rights of parties except so far as recognized in or made part of some agreement under which those rights are derived. *O’Hear v. De Goesbriand*, 33 Vt. 593.

7. We have no religious establishment, no ecclesiastical law, or courts, established by any authority. All their laws are wanting in this essential requisite to give them any authority, that they are not *prescribed by the supreme power in the State*. And though they may form constitutions, enact canons, laws or ordinances, establish courts, or make any decisions, decrees or judgments, yet they can have only a voluntary obedience, and cannot affect any civil rights, immunities or contracts, or alter or dissolve any relations, or obligations, arising from contracts. When their proceedings are to be examined by ordinary tribunals of justice, their *power* is a phantom, and they can receive no other consideration than the regulations of any other voluntary associations, formed for trifling, or for grave and important purposes. *Williams, C. J.*, in *Smith v. Nelson*, 18 Vt. 549.

8. **By-laws.** In 1862 F became a member of a voluntary charitable society, by the by-laws of which the members, by paying their regular assessments, were entitled to 25 cents per day during their sickness, and the widow of each member dying should be paid 25 cents per day, so long as she remained a widow, &c.; but so long as there should be \$20 in the treasury the society should not reduce its aid to the sick. The constitution provided for changes in the by-laws, and how such changes might be made. In 1868 the society became incorporated, the charter providing that the society might alter or change its by-laws. The by-laws remained unchanged until August, 1869, when the corporation adopted new by-laws providing that such widow should receive 25 cents per day, until she should get \$200, in full of her right. F died in January, 1869. The plaintiff was his widow, and had received the \$200. In a suit to recover the 25 cents per day from the death of F, less the \$200 received;—*Held*, that the society had the right so to amend its by-laws, and thus limit the claim,—this being by a general law applicable to all, and there being no suggestion of fraud, or that the regulation was not wise and salutary; that such change in the by-laws was assented to by F in becoming a member of the society, with such right of change expressed in the constitution. *Figure v. Mutual Society of St. Joseph*, 46 Vt. 362.

9. **Abandonment.** The “Mount Lebanon Royal Arch Chapter” of Free Masons, an incorporated association, in 1836 voted to and did dispose of all their real and personal property, being their hall, furniture and equipment, and of their funds to the trustees of an academy, to use the interest, “and the principal to be returned when called for by this institution.” For 23 years the Chapter held no meetings, elected no officers, and did no act required by their laws and rules, and was without visible sign of existence. They then procured a new charter from the “State Royal Arch Chapter,” certified as a renewal of their original charter. On a bill in equity by the members (embracing some new ones) of the present Chapter, claiming as an *association or society*, and not in their individual and personal rights, to recover of said trustees the principal of said fund;—*Held*, that the original association had become dissolved and ceased to exist, by abandonment and *non user*, and that the new association had not legally succeeded to their rights or property, and the bill was dismissed. *Strickland v. Prichard*, 37 Vt. 324.

10. **Contracts.** Under a valid contract to pay an annual sum to a religious society for the support of the gospel;—*Held*, that the party could not release himself by giving notice of a change in his religious sentiments, and withdrawing himself from the church and society

and joining another, although by the articles of compact a member ceasing to pay ceased to be longer a member of the society. *Cong. Society v. Swan*, 2 Vt. 222.

11. The members of a joint stock company are liable, *in solido*, for the debts of the company. *Cutler v. Thomas*, 25 Vt. 73.

12. **Suit.** The treasurer of a voluntary association for charitable purposes, after its dissolution, was, on bill brought by the remaining members, decreed to account for funds of the association in his hands, to be disposed of according to the original intention of the association. *Penfield v. Skinner*, 11 Vt. 296.

13. The treasurer of an unincorporated religious association was allowed to maintain a bill to recover, for the association, a legacy given to it, he suing in behalf of the whole. Any members of the association might maintain such suit in behalf of the whole, if recognized by them. *Smith v. Nelson*, 18 Vt. 511.

14. Proceedings of the presbytery and synod of the Associate [Scotch] Church, in relation to the Associate congregation of Ryegate, considered and overhauled. *Ib.*

15. **Committee.** The building committee, or agents, of a voluntary association for the building of a meeting house, of which they and the plaintiff are members, are not liable to an action for services rendered or material furnished by the plaintiff in the building of the house, he knowing the facts, although done at the request of the defendants, where it does not appear that the defendants made an express promise to pay, or pledged their individual credit, or that funds of the association were in their hands with which to make the payment. *Abbott v. Cobb*, 17 Vt. 593. *Cheeny v. Clark*, 3 Vt. 431. 12 Vt. 325.

16. The fixing of the amount of the capital stock in the articles of association for the building of a meeting house, was *held*, under the circumstances, not to limit the building committee as to cost of building. *Rogers v. Danby Univ. Society*, 19 Vt. 187. The same, also, where the expense was to be based on an estimate of the number of pews, and the average price at which they should be sold. *Sawyer v. Meth. Ep. Socy. in Royalton*, 18 Vt. 405.

17. **Sale of pews.** In order to justify the sale of a pew for non-payment of a tax or assessment, it is necessary, (1), that the shares be defined; (2), that the assessments be upon the shares; (3), that the forfeiture or sale, as well as the assessment, be in conformity with the constitution and by-laws of the society. *Perrin v. Granger*, 33 Vt. 101. *S. C.* 30 Vt. 595.

See MEETING HOUSE.

## ASSUMPSIT.

1. **When maintainable, and when not.** The allowance of a claim by commissioners is matter of record;—assumpsit does not lie thereon. *Woods v. Pettis*, 4 Vt. 556.

2. Where the time for the performance by the plaintiff of a contract under seal is enlarged by parol agreement of the parties, the plaintiff's remedy for a breach is assumpsit, and not covenant, or other action counting upon the contract as under seal. *Smith v. Smith*, 45 Vt. 433.

3. Assumpsit will not lie against a sheriff, or other officer, for a misfeasance, or non-feasance, in the execution of his official duties. *Walbridge v. Grinnold*, 1 D. Chip. 162;—nor against the sheriff upon the promise of his deputy, expressed in his receipt given for an execution, that he will execute it and return it according to law. *Tomlinson v. Wheeler*, 1 Aik. 194;—nor against a tax collector for neglect to levy, collect and pay over taxes. *Charleston v. Stacy*, 10 Vt. 562.

4. Where the defendant, without fraud, claimed to pass a turnpike gate, toll free, on the ground of exemption or privilege, and on such claim was permitted to pass;—*Held*, that an action of assumpsit did not lie to recover the tolls, although his claim of exemption, or privilege, was not well founded. *Center Turnpike Co. v. Smith*, 12 Vt. 212.

5. A postmaster, who receives a letter containing money which is lost through his lack of proper care, though liable for his neglect in a proper action, is not liable in an action for money had and received, unless he has put the money to his own use. *Danforth v. Grant*, 14 Vt. 283. 23 Vt. 663.

6. Where the plaintiff purchased wool for the defendants and was to have a share of the profits on the defendants' sales, the court say: Whether the plaintiff's remedy may be assumpsit, or must be account, depends upon whether he had any property in the wool, and so in the specific money for which it was sold;—or whether the form of the contract was only a mode of determining his compensation for services. *Mattocks v. Lyman*, 16 Vt. 113.

7. **Matters of tort.** Assumpsit for goods sold does not lie where the goods were taken tortiously, there being no sale in form or fact. *Winchell v. Noyes*, 23 Vt. 303.

8. Where the defendant wrongfully sold a note belonging to the plaintiff;—*Held*, that although the plaintiff could maintain trover, he might waive the tort and recover in assumpsit for money had and received. *Wier v. Church*, N. Chip. 95.

9. Where the plaintiff's property has been wrongfully taken or appropriated and converted into money, he may waive the tort and re-

cover of the wrong doer in assumpsit, in a count for money had and received. *Burnap v. Partridge*, 3 Vt. 144. *Scott v. Lance*, 21 Vt. 513. *Stearns v. Dillingham*, 22 Vt. 624. *Phelps v. Conant*, 30 Vt. 277. *Ehrell v. Martin*, 33 Vt. 220. *Kidney v. Persons*, 41 Vt. 386. *Turnpike Co. v. Smith*, 12 Vt. 217.

10. But it must appear that the defendant has actually received money to the use of the plaintiff, or that he has received that which he considered as equivalent thereto and accounted for it as such. *Williams, J., in Burnap v. Partridge*, 3 Vt. 146.

11. As, a promissory note or negotiable paper, or the satisfaction of a money demand. *Prout, J., in Kidney v. Persons*, 41 Vt. 392.

12. The conversion into money may sometimes be presumed as matter of fact, as where other property has been received which is salable and time has elapsed without accounting for it; and perhaps where the property was disposed of at a fixed price, or was purchased for the purpose of selling again, and sufficient time has elapsed for that purpose and it is not otherwise accounted for. *Williams and Prout, J. J., supra. Flower Brook Mfg. Co. v. Buck*, 18 Vt. 238.

13. But where the defendant has received no money, as where he wrongfully sold the plaintiff's property and took his pay in a *harness*, such action will not lie. *Kidney v. Persons*, 41 Vt. 387.

14. Under a count for money had and received from the sale of timber wrongfully cut and converted, where the plaintiff's claim was only to recover the net proceeds, or the value of the "stumpage";—*Held*, that there could be no recovery where the defendant had not received enough to pay the expense of cutting and marketing the timber. *Lemington v. Stearns*, 48 Vt. 38.

15. One cannot of his own mere motion waive a tort and sue therefor in assumpsit, or on book account. Thus, he cannot convert a trespass upon his lands by the defendant's sheep, into a charge for pasturing the sheep. *Stearns v. Dillingham*, 22 Vt. 624.

16. Nor recover in this action or in book account for a quantity of manure taken and appropriated under a claim of right, beyond the amount which the defendant had a license to take. *Scott v. Lance*, 21 Vt. 507.

17. Nor, in an action on book, for money delivered to the defendant only to be carried by him to a third person, which the defendant received for that purpose, and agreed but neglected to deliver. *Drury v. Douglas*, 35 Vt. 474.

18. Otherwise, where the money is received to be used for the benefit of the plaintiff, and to be accounted for. *Whiting v. Corwin*, 5 Vt. 451.

19. Instances given where a person is virtually made liable in assumpsit for a tort. *Center Turnpike Co. v. Smith*, 12 Vt. 212.

20. **Other cases.** C, an apparent agent of the defendant, used the plaintiff's railroad ties, without license from the plaintiff, in the repair of the defendant's railroad; and afterwards agreed with the plaintiff that the defendant should pay for them; to which the plaintiff assented, supposing C to have authority to purchase ties for the defendant. C in fact had not such authority. *Held*, that the plaintiff could recover in assumpsit. *Beecher v. Grand Trunk R. Co.*, 43 Vt. 133.

21. Where the plaintiff paid the defendant money upon a note, and the defendant failed to indorse the payment, and afterwards denied having received the money and claimed the whole note;—*Held*, that the defendant was liable for the money paid in *indebitatus assumpsit*. *Eastman v. Hodges*, 1 D. Chip., 101 (1797).

22. Assumpsit lies against a bank, after notice and demand, upon a bill of the bank destroyed, but not upon a bill lost. *Ross v. Bank of Burlington*, 1 Aik. 43.

23. If one decoy another from a foreign government, under promise not to sue or arrest him, and in violation of his faith he does sue, or arrest him, the process may be avoided for the fraud; or assumpsit will lie for such breach of promise to recover just damages. But if, instead of avoiding the process for the fraud, he pleads to the action and judgment passes against him, he cannot in such action of assumpsit include as damages the amount of such judgment. *Steele v. Bates*, 2 Aik. 338.

24. The defendant received of the plaintiff an absolute deed of land, but with the parol understanding that it should be sold, if necessary, and the avails applied towards the discharge of a liability assumed for the plaintiff. The defendant went into possession of the land, treated and used it as his own absolutely, neglected a favorable opportunity to sell it, and compelled the plaintiff to discharge out of other property such assumed liability. The plaintiff brought this action of assumpsit for land sold, and on the trial the defendant claimed that the transaction was an absolute sale, and that he had paid for the land. *Held*, that the defendant, this claim failing, could not also set up the trust character of the transaction as a defense, but that the plaintiff was entitled to recover the value of the lands, with interest from the time of the discharge of the liability assumed by the defendant for the plaintiff. *Crane v. Thayer*, 18 Vt. 162.

25. **Trusts.** Matters of trust are of original and special equity jurisdiction, and assumpsit does not lie to recover money held in trust, where parties not on the record are interested in the distribution. *Congdon v. Cahoon*, 48 Vt. 49.

26. **Common money counts.** The plaintiff, under a parol contract with the defendant for the purchase of lands subject to a mortgage but to be of no effect if the defendant did not obtain full title thereto, paid a part towards the purchase. The defendant suffered the land to pass on a foreclosure of the mortgage. *Held*, that the plaintiff could thereafter recover the sum so paid, in an action of general *indebitatus assumpsit*, without demand. *Way v. Raymond*, 16 Vt. 371.

27. Where a judgment, after being paid by the defendant therein, was reversed on writ of error;—*Held*, that an action for money had and received did not lie against the plaintiff in that suit where he was, to the knowledge of the defendant therein, a mere nominal party—the suit being prosecuted wholly for the benefit of a third person, and where the judgment was paid to such third person, and not to the plaintiff. *Catlin v. Allen*, 17 Vt. 158.

28. Under the statute (G. S. c. 20, s. 6) providing that a town may (under certain circumstances), “by an action,” without specifying what form of action, recover of the town where a pauper was last legally settled, the expenses of maintaining such pauper;—*Held*, that general *indebitatus assumpsit* was a proper action. *Pawlet v. Sandgate*, 19 Vt. 621.

29. The plaintiff's clerk, having authority to borrow money on the credit of the plaintiff to be used in the plaintiff's business, borrowed a sum on the plaintiff's credit with the intent, unknown to the lender, to use the same in gambling, and lost the same, together with other money wrongfully taken from the plaintiff's store, in gaming with the defendant. *Held*, that all this was the plaintiff's money illegally obtained and held by the defendant, and that he was liable therefor to the plaintiff in *assumpsit*, as for money had and received. *Burnham v. Fisher*, 25 Vt. 514.

30. *Assumpsit* for money had and received lies to recover back money paid upon a false claim, not made in good faith, nor supposed to be right, if there is duress, or any undue advantage taken of the payer's situation, or if paid under the terror of inceptive legal proceedings, fraudulently instituted. *Sartwell v. Horton*, 28 Vt. 370.

31. General *indebitatus assumpsit* on the common money counts:—the plaintiff's evidence was, that the defendants agreed to pay him \$300, in consideration that he would become a substitute for a drafted man. The defendants' evidence was that they would pay him \$100, and that he should have in addition the bounties which might be paid by the State of Maine and the United States, understood by both parties to be \$100 each. *Held*, that if the contract was as claimed by the defendants, the plaintiff could not recover in this action the

\$100 expected to be received from the U. S., but which was not paid, nor payable under the U. S. regulations, to such substitute. *Glover v. Greenlaw*, 38 Vt. 182.

32. The defendant having bargained with N for the purchase of his farm, stock and produce, but taking no deed, agreed with the plaintiff by parol, that they together would carry out the contract with N, sell the property in a short time, and divide the profits. The plaintiff advanced money to the defendant to be paid to N towards the property, and assisted in the transaction. The property was all sold in the name of N, but under the direction of the defendant, the purchasers taking their deeds direct from N. The proceeds were received by the defendant, and there was a balance of profits in his hands. In an action of *assumpsit* to recover the one-half of such profits;—*Held*, 1st, that such action would lie; 2d, that the contract was upon sufficient consideration; 3d, that it was not within the statute of frauds. *Bruce v. Hastings*, 41 Vt. 380.

33. Under a parol agreement, that if the plaintiff would work upon the defendant's farm and aid in paying off incumbrances the defendant would deed to the plaintiff the farm (or a part of it), where the plaintiff performs on his part and the defendant refuses to convey, or if there is a mutual abandonment of the contract, the plaintiff may recover for his services and money paid, on the common counts in *assumpsit*. *Stone v. Stone*, 43 Vt. 180. *Graham v. Chandler*, 38 Vt. 559.

34. Where money was deposited with the clerk for a defendant in a petition of foreclosure, as a condition imposed by order of the chancellor for the passing of a decree, and the decree was taken and the money paid over to the defendant, it was *held*, that the plaintiff's obvious misadventure in the foreclosure suit could not be corrected in an action of *assumpsit* to recover back the money. *Sweet v. Tucker*, 43 Vt. 355.

35. General *assumpsit* lies to recover the consideration paid for the purchase of property, where the sale is avoided for fraud, or where the consideration entirely fails. *James v. Hodsdon*, 47 Vt. 127.

36. *Indebitatus assumpsit* for money lent was *held* to lie upon a due bill of the following tenor: “Due F. H. eighty dollars on demand.” *Hay v. Hide*, 1 D. Chip. 214.

37. Where the plaintiff, being surety for a third person, paid the debt upon the guaranty of the defendant that he would see the debt paid and save the plaintiff harmless therefrom;—*Held*, that a recovery could be had under the common count in *assumpsit* for money paid at the defendant's request. *Lapham v. Barrett*, 1 Vt. 247.

38. (*Money's worth*). The plaintiff, being surety for the defendant, gave his own note for

the amount which the creditor received as payment. *Held*, that this was equivalent to the payment of so much money, and sustained a count for money paid. *Lapham v. Barnes*, 2 Vt. 213.

39. Where, on the dissolution of a partnership between the plaintiff and the defendant, the defendant retained a portion of the partnership assets sufficient to pay a particular partnership debt, and agreed with the plaintiff to pay it, and the plaintiff was afterwards obliged to pay that debt;—*Held*, that the plaintiff could recover for the amount so paid upon the common money counts in assumpsit—such assets being treated as money's worth, and fairly presumed to have produced money. *Hicks v. Cottrill*, 25 Vt. 80.

40. The defendant authorized the plaintiff to settle a suit pending against him by a third person, and pay \$12 therefor; and he settled the same by giving his own note for \$13, and the claim was discharged. *Held*, that the defendant had received money's worth, and that the plaintiff could recover in assumpsit, on the count for money paid, \$12, without proof of payment of the note. *Houston v. Fellows*, 27 Vt. 634.

41. *Indebitatus assumpsit* for money had and received was *held* not to lie to recover interest accrued on the plaintiff's execution against the defendant, which the plaintiff had forborne to collect at the defendant's request, and on his promise to pay such interest. *Beedle v. Grant*, 1 Tyl. 433. (1802.)

42. An order drawn by the plaintiff on a third person in favor of the defendant, is competent evidence under a count for money had and received. *Phelps v. Mott*, Brayt. 76.

43. Assumpsit for money had and received does not lie to recover back money voluntarily paid upon a note given in consideration of a contract to build a house, which has not been performed. *Rollins v. Walker*, Brayt. 222.

44. G drew an order on B, in whose hands he had property for sale, in favor of S for a certain sum. B declined to accept the order, but promised S, if the order was left with him, to pay on account of it any balance, not exceeding that amount, which might remain in his hands after his own claims should be satisfied. S accepted the promise and left the order with B. *Held*, that after the subject matter of the accounts between G and B was closed so that the balance could be ascertained, and after demand, B was liable to S on a count for money had and received. *Sutton v. Burnett*, 1 Aik. 197.

45. The defendant by deed, without covenants, and for "a valuable consideration," as expressed, conveyed to the plaintiff all the right, title, interest and claim which he, as heir, had in the estate of his ancestor deceased. He afterwards received certain moneys distributed

to him as heir. *Held*, that he was liable to the plaintiff therefor in assumpsit for money had and received;—that no action lay upon the deed, but it was evidence in this action to show the plaintiff's right to the money. *Colgrove v. Fillmore*, 1 Aik. 347.

46. The plaintiff conveyed land to the defendant in trust to sell, and, out of the avails, to indemnify himself against certain liabilities, and account. He sold the land in part upon credit, by consent of the plaintiff, taking a note therefor payable to his own order, the cash payment not being sufficient for his indemnity. *Held*, that until the money was received upon the note, or at least until expiration of the time of credit, the defendant was not liable on a count for money had and received. *Beach v. Dorwin*, 12 Vt. 139.

47. The county of W being about to build a court house, the plaintiff, being interested in the question of location, signed a subscription paper, promising to pay a certain sum to the defendant "for land sufficient to set a court house upon," provided the court house should be located in the particular place specified. The defendant thereupon conveyed to the county the land specified, by a deed satisfactory to the locating committee, containing a clause that the land should revert to him whenever the county should voluntarily cease to occupy it as a site for a court house. After this deed was recorded the plaintiff paid his subscription. The court house was erected on the spot, and in about two years was consumed by fire. The county then determined to abandon that site and not rebuild upon it, unless the entire lot could be procured without expense to the county; and another subscription was raised and the whole lot purchased, the defendant getting on this second purchase a price equal to the value of the entire lot at the time of the first purchase. In an action of assumpsit for money had and received to recover back the amount of his subscription;—*Held*, that there was no fraud, mistake, or failure of consideration which entitled the plaintiff to recover. *Barnes v. Baylies*, 18 Vt. 430.

48. A writing in these words: "For value received of Cummings & Manning, or order, thirty dollars and eighty-three cents on demand and interest annually," signed by the defendant, was *held* to express with proper certainty, that the defendant had received money of the plaintiffs to the amount of \$80.83, and was sufficient to sustain a count for money had and received; and it seems, the omission in the note might be supplied by intentment. *Cummings v. Gassett*, 19 Vt. 308.

49. Assumpsit for money had and received is "an appropriate action" to recover back money paid for liquors sold in violation of law. (G. S. c. 94, s. 32). *Laport v. Bacon*, 48 Vt. 176.

50. The plaintiff sought to recover a balance due him on settlement, and also an additional sum paid to defendant as usurious interest and allowed in the settlement. *Held*, that this could not be done on the basis of an account stated, for the defendant had never agreed to the larger sum, and it could not be assumed that he would have done so if the plaintiff had refused to make the allowance he did. *Rowell v. Marcy*, 47 Vt. 627.

51. The plaintiff contracted by parol with the defendant for the lease of the defendant's tavern house for one year from a future day named, and delivered to the defendant a watch in part payment of the agreed rent. The defendant afterwards refused to carry out the agreement, and tendered the watch back to the plaintiff, which the plaintiff refused to receive, and brought his action of assumpsit to recover for the watch. *Held*, that the title to the watch vested in the defendant by the contract, and that it did not become re-vested in the plaintiff by the tender; and that the defendant was liable therefor as for goods sold. *Hawley v. Moody*, 24 Vt. 608.

52. No recovery can be had upon the money counts in assumpsit, against one who acted as known agent of the owner in the sale of lands, where the money was paid by the plaintiff directly to such owner. *Dyer v. Graves*, 37 Vt. 369.

53. — for use and occupation. Assumpsit for use and occupation will lie upon a contract expressed or implied, where a tenant enters and enjoys the premises by the consent or permission of the owner. *Howard v. Ransom*, 2 Aik. 252.

54. Where the holding is by the permission of the owner, an implied undertaking to pay rent may be inferred from slight circumstances. *Watson v. Brainard*, 33 Vt. 88.

55. *Dictum*. The mere fact of occupancy, might create a presumption of tenancy, *prima facie*, but subject to be rebutted. *Keyes v. Hill*, 30 Vt. 759.

56. Assumpsit for use and occupation will not lie, unless there is a contract, express or implied, in regard to the occupancy of the premises, by which the relation of landlord and tenant (substantially) is created between the parties. *Hough v. Birge*, 11 Vt. 190. *Keyes v. Hill*, 30 Vt. 759. *Stacy v. Vt. Central R. Co.*, 32 Vt. 551. *Watson v. Brainard*, 33 Vt. 88. 44 Vt. 59.

57. It will not lie where the defendant's possession was under a contract of purchase, which failed without his fault. *Hough v. Birge*. *Way v. Raymond*, 16 Vt. 371. 44 Vt. 59.

58. Nor where it was under a claim, or agreement to procure the title by proceedings *in invitum* under a statute. *Stacy v. Vt. Central R. Co.*, 32 Vt. 551.

59. The plaintiff and her daughter occupied a homestead left by the plaintiff's husband at his decease, but not set out by the probate court. In the plaintiff's absence from home, the defendant married the daughter and moved upon the place and continued to occupy it, refusing, on demand, either to buy it, leave it, or to pay rent, but offering to let the plaintiff occupy with him, which she declined to do. The plaintiff then brought ejectment, which failed for want of proof of proper notice to quit. In assumpsit for use and occupation, the court directed a verdict for the plaintiff. *Held*, erroneous,—and that the case should have been submitted to the jury, to find whether or not an implied contract of tenancy existed. *Chamberlin v. Donahue*, 44 Vt. 57.

60. *Indebitatus assumpsit* for use and occupation does not lie upon a contract for agistment, where the plaintiff retains possession of the land. *Howard v. Ransom*, 2 Aik. 252.

61. To recover for use and occupation, the declaration must be appropriate for such claim,—as, a count for use and occupation. It cannot be recovered under a count for money had and received. *Beach v. Dorwin*, 12 Vt. 189.

62. Under the common money counts, the indorsee of a negotiable promissory note may recover against the maker. *Chase v. Burnham*, 13 Vt. 447. *Brigham v. Hutchins*, 27 Vt. 569:—although the indorsee be one of the payees and the note is indorsed by the payees in blank. *Malley v. Weinman*, 48 Vt. 180.

63. An action cannot be sustained upon the money counts by the introduction of a promissory note not due at the commencement of the suit. This would be absurd. *Harrington v. Rathbun*, 11 Vt. 58.

64. *Special counts*. Where there is a special contract, so long as the parties profess to proceed under it there can be no recovery in general assumpsit, nor in the action of book account, for any labor performed under it, but the remedy must be upon the contract. *Camp v. Barker*, 21 Vt. 469. *Myrick v. Slason*, 19 Vt. 121.

65. Damages sustained by the non-performance of an executory contract for the purchase of property, cannot be recovered under the general money counts in assumpsit. *Hemenway v. Smith*, 28 Vt. 701.

66. Where a contract is for the manufacture and delivery of an article at a future day, and the party is prevented from completing his contract by the fault of the other party, he cannot recover as for goods sold and delivered, or for work and labor and materials furnished, under the general counts in assumpsit, but is out to a special count to recover his damages for breach of the special contract. *Allen v. Thrall*, 36 Vt. 711. *Curtis v. Smith*, 48 Vt. 116.

67. A declaration in assumpsit need be special, only when the plaintiff claims damages for the breach of a special contract. Whatever stipulations may have been made about the price, mode or time of payment, if the terms have transpired so that money has become due, and nothing remains to be done under a special contract but to pay money, the general counts are sufficient. *Way v. Wakefield*, 7 Vt. 228. *Matlocks v. Lyman*, 16 Vt. 118. *S. C.* 18 Vt. 96. *Perry v. Smith*, 22 Vt. 301. *Groot v. Story*, 41 Vt. 583. *Wainwright v. Straw*, 15 Vt. 215. *Kent v. Bowker*, 38 Vt. 148. *Wilkins v. Stevens*, 8 Vt. 214.

68. In this State it has been repeatedly and uniformly held, that where goods are sold, or services performed under a special contract for payment in other goods, or in services, and the time of payment has elapsed, and payment has not been made according to the contract, such special agreement is no obstacle to a recovery in general assumpsit or by an action of book account. *Poland, C. J.*—and so held in *Kent v. Bowker*. *Way v. Wakefield*. *Stearns v. Haven*, 16 Vt. 87. *Matlocks v. Lyman*. *Porter v. Munger*, 22 Vt. 191.

69. Issue and evidence. In assumpsit, declaring in one count upon a special contract and adding the general counts, a demurrer was sustained to the special count. On trial under the common counts;—*Held*, that the special contract could not be read in evidence, for that it did not support the general counts. *Culver v. Barnett*, 1 Tyl. 182.

70. Where the declaration contained a special count upon a contract and also the common money counts, and the special count and the proof only tended to show that the plaintiff had advanced his money at the defendant's request and for his benefit, upon a promise of being reimbursed in a particular manner at a day certain, and that time had expired;—*Held*, that a recovery could be had on the common counts, although the contract set up in the special count might not be proved as laid. *Stevens v. Talcott*, 11 Vt. 25.

71. In assumpsit for services performed under a special contract and for damages for improperly discharging the plaintiff;—*Held*, that under the general issue evidence was admissible for the defendant, both as tending to show a good cause for such discharge and to reduce the value of the plaintiff's services, that it was part of the contract of hiring that the plaintiff should act as foreman of the defendant in his absence and keep his men industriously at work, whereas the plaintiff had induced the men to neglect their work and to lose time. *Stoddard v. Hill*, 38 Vt. 459.

72. In assumpsit part payment need not be specially pleaded. *Britton v. Bishop*, 11 Vt. 70. (Changed by G. S. c. 83, s. 15.)

73. Pleading. In an action on simple contract, a plea denying any consideration is bad on special demurrer, as amounting to the general issue. *University of Vt., &c., v. Baister*, 42 Vt. 99.

74. Declaration *held* bad on demurrer for not setting forth a valid consideration for the defendant's promise; also for stating that the defendant *verbally* promised, in a case required by the statute of frauds to be in writing. *People's Bank v. Adams*, 43 Vt. 195.

75. A declaration in assumpsit upon a warranty alleging a breach, but concluding in the common form of a count in *indebitatus assumpsit* for money had and received, was *held* sufficient on motion in arrest, by rejecting such conclusion as surplusage. *Parlin v. Bundy*, 18 Vt. 582.

76. Where a judgment is set aside on *audita querela*, the money collected on the execution is embraced and recoverable under the general *ad damnum* of the writ. *Alexander v. Abbott*, 21 Vt. 476.

77. In declaring upon a contract payable in such goods as the plaintiff should want, it is not sufficient to aver a general demand; but it should be averred that the plaintiff designated the goods he wanted, or else that he waived his right to select and authorized the defendant to deliver such as suited his convenience. *Stevens v. Chamberlin*, 1 Vt. 25.

78. In an action declaring specially upon a certificate of deposit made payable "on the presentation of this certificate," there was no averment of a demand by presentation of the certificate. The declaration was *held* ill on general demurrer. *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377.

79. The plaintiff declared upon a special contract of the defendants, that "for a certain reasonable hire and reward to be thereupon paid by the plaintiff to the defendants in that behalf," they would furnish a railroad car for the carriage of certain sheep of the plaintiff and would carry them therein, &c., and alleged, as a breach, the refusal to furnish the car. On motion in arrest;—*Held*, that the contract was susceptible of the interpretation, that the plaintiff's promise was to pay for the car and freight at the end of the carriage, and that therefore the declaration was sufficient without averring a readiness to pay the freight at the time of demanding the car. *Waterman v. Vt. Central R. Co.*, 25 Vt. 707.

80. Where the time of payment mentioned in any written contract, not under seal, is enlarged by agreement, it is sufficient, in declaring upon such contract, to allege the non-payment according to the contract, without noticing the agreement to enlarge the time; and if payment was in fact made according to the enlarged time, the defendant is left to show the agree-

ment to enlarge the time of payment, and payment accordingly. *Pike v. Mott*, 5 Vt. 108.

81. An averment that on, &c., in consideration that the plaintiff "had then and there" delivered to the defendant a certain horse of the plaintiff in exchange for a certain horse of the defendant, he, the defendant, "then and there" promised that the latter horse was sound, &c., was held to be an averment that the warranty was given at the time of the exchange, and not afterwards, and so there was a sufficient consideration for the promise. *Wightman v. Carlisle*, 14 Vt. 296, contradicting *Bloss v. Kittredge*, 5 Vt. 28.

82. **Parties.** The ultimate grantee of land incumbered by a mortgage and an intermediate grantor with warranty, while a bill of foreclosure was pending against them, called upon the mortgagor, whose debt it was, to pay the mortgage debt, and he promised to do so; but he failing, they jointly paid the debt. Held, that they could maintain a joint action of *indebitatus assumpsit* against him for money paid to his use. *McIntyre v. Ward*, 18 Vt. 434. See *Whipple v. Briggs*, 28 Vt. 65.

83. A bank, by mistake, surrendered to the defendant a note before that time discounted for him, and which others had signed with him as his sureties. Held, that *indebitatus assumpsit* lay against him alone for the amount due upon the note. *Vt. State Bank v. Stoddard*, 1 D. Chip. 157.

84. **Non-joinder.** In an action of *assumpsit* upon the common counts, the non-joinder of a proper defendant must be pleaded in abatement, or the objection is waived, although no specification was filed or furnished. The rule in book account actions does not apply here. *Mellendy v. N. E. Protective Union*, 36 Vt. 31. *Hardy v. Cheney*, 42 Vt. 417.

85. **Damages.** *Indebitatus assumpsit* is an equitable action, in which the plaintiff should recover no more than the defendant ought in equity to pay. *Wheeler v. Shed*, 1 D. Chip. 208.

86. The orator and the defendant were two of four joint executors who had given a joint bond for faithful administration. The other two ultimately became insolvent. The orator, by decree in chancery, had been compelled to pay for the default of one of the insolvent executors before his insolvency, without fault of the orator. Held, that the defendant was liable to him for one-half of the sum so paid and for one-half of all the expenses incurred in defending the suit in chancery—such defense having been reasonable, hopeful and prudent. *Marsh v. Harrington*, 18 Vt. 150. 23 Vt. 593. 37 Vt. 541.

87. In general *assumpsit* to recover the consideration paid on the fraudulent sale of a patent right, the plaintiff was allowed to recover what he had paid in good faith, by way of

compromise, to the indorsee of the note he gave on the purchase, although the note bore a notice that it was given for a patent right;—that, assuming that he might have successfully defended a suit by the indorsee, he was under no legal obligation to attempt it. *James v. Hodsdon*, 47 Vt. 127.

88. If the plaintiff has performed labor on his own material under a contract to furnish a specific article or a perfected work, in estimating his damages for a breach, the value of the material not gone to the use of the defendant must be taken into account. *Allen v. Thrall*, 36 Vt. 711. *Curtis v. Smith*, 48 Vt. 116.

89. **Judgment.** In *assumpsit*, the statute (G. S. c. 30, s. 78) does not warrant separate judgments against several defendants. *Machine Co. v. Morris*, 39 Vt. 393.

## ATTACHMENT.

### I. OF PERSONAL PROPERTY.

1. *What is attachable.*
2. *What is not attachable.*
3. *Requisites and validity of attachment.*
4. *Rights and liabilities of attaching officer.*
5. *Rights and liabilities of creditor as to debtor.*
6. *Requisites for preserving lien.*
7. *Discharge of attachment lien.*
8. *Bailment to receiptor.*
9. *Sale on attachment.*

### II. OF REAL ESTATE.

### III. DEFENSE BY SUBSEQUENT ATTACHING CREDITOR.

### IV. ATTACHMENT AIDED IN CHANCERY.

#### I. OF PERSONAL PROPERTY.

1. *What is attachable.*

1. **Generally.** "Goods, chattels and estate."  
—(Statute form of process.)

2. Bank bills, or money, can be attached or taken in execution, under the general provision in relation to goods and chattels, if they can be so taken without committing an assault and violating the personal security of the debtor. *Lovejoy v. Lee*, 35 Vt. 430. *Prentiss v. Bliss*, 4 Vt. 513.

3. Intoxicating liquor is subject to attachment, and may be sold on execution for a lawful purpose. *Nutt v. Wheeler*, 30 Vt. 436.

2. *What is not attachable.*

4. **Generally—perishable property.** The law impliedly forbids the attachment of property



which is peculiarly perishable in its nature, whenever it is manifest that the purposes of the attachment cannot be effected before it will decay and become worthless—as, fresh meat during a portion of the year, fresh fish, green fruits and the like. *Royce, J., in Wallace v. Barker*, 8 Vt. 443; but *held*, that fresh beef in December was subject to be taken on execution. *Leavitt v. Holbrook*, 5 Vt. 405.

5. Where a log coal pit about half burned and incapable of being removed, requiring care and skill to save the property and render it of any value, was attached by an officer who suffered it to remain in the debtor's hands, and he disposed of the coal made;—*Held*, that the officer could not claim the coal by his attachment. *Wilds v. Blanchard*, 7 Vt. 138.

6. Where part of a charcoal pit was burned and the work completed, and the residue had so far progressed as to have been entirely burned to coal, though some labor and skill were still necessary in order to separate and preserve it properly;—*Held* (consistent with *Wilds v. Blanchard*), that if the sheriff saw fit to attach and take possession of the coal and run the risk of being able to keep it safely, he had a right to do so. *Hale v. Huntley*, 21 Vt. 147.

7. **Money collected.** Money collected by an officer on an execution cannot be attached while in his hands, as the property of the creditor in the execution. The officer stands as debtor to such creditor, not for the identical pieces of money, but for the sum. *Conant v. Bicknell*, N. Chip. 66. 1 D. Chip. 50. *Prentiss v. Bliss*, 4 Vt. 513.

8. Where an officer had attached personal property and sold it on the attachment, and such attachment had been dissolved;—*Held*, that the proceeds of such sale could not be taken upon another writ returning as attached "the amount of the money made" upon such sale, which then stood to the general credit of such officer in bank; but that the officer stood as debtor of the defendant for such proceeds, and the same could be attached only by trustee process. *Adams v. Lane*, 38 Vt. 640.

9. *Semble*, it might be otherwise, if the first attachment had not been dissolved so that the money had remained in the official possession and custody of the officer, and potentially under his control. *Id.*

10. **Property leased.** Property held by a tenant under a subsisting lease cannot be specifically attached as the property of the lessor; and a sale of it on execution will convey no title to the purchaser, although sold with a reservation of the right of the lessee to retain possession during his term. *Smith v. Niles*, 20 Vt. 315. 26 Vt. 236. 36 Vt. 433.

11. **Personal property in possession of a**

lessee cannot be attached as the property of the lessor, except in the manner provided by the statute (G. S. c. 33, ss. 31, 32). It cannot be taken from the lessee's possession. *Brigham v. Avery*, 48 Vt. 602.

12. **Trust property.** Trust property is not subject to be taken on attachment, or execution, for the debt of the trustee; and this rule applies to property in the hands of an executor, both real and personal, whether coming directly from the testator, or from the collection of debts, or other assets of the estate. *Williams v. Fullerton*, 20 Vt. 346. 38 Vt. 639.

13. **Statutory exemptions. Construction.** It is established by the whole current of decisions in this State on the subject, that the statutes exempting certain property from attachment are remedial in their character, and ought to receive a liberal construction in favor of the debtor. *Peck, J., in Mundell v. Hammond*, 40 Vt. 644. The exemption is charitable and in the cause of humanity, and ought to receive a liberal practical construction. *Colamer, J., in Dow v. Smith*, 7 Vt. 470. *Haskins v. Burnett*, 41 Vt. 702. *Webster v. Orne*, 45 Vt. 40.

14. **Instances.** Thus, a cooking stove is exempt from attachment, as an article of household furniture "necessary for upholding life." *Crocker v. Spencer*, 2 D. Chip. 68. *Hart v. Hyde*, 5 Vt. 328.

15. So is a brass time piece, or clock—the word "necessary" extending to things of convenience and comfort which are suitable to the situation. *Leavitt v. Metcalf*, 2 Vt. 342.

16. So, one cow being exempt, the butter made from the cow is exempt. *Id.*

17. And the only cow is exempt, though the debtor reside in Canada, the cow having strayed into this State and been here attached. *Haskill v. Andros*, 4 Vt. 609.

18. A two-year-old heifer, forward with calf, the owner having no other cow, is a cow within the intent and scope of the statute. *Dow v. Smith*, 7 Vt. 465. So, though the heifer be not with calf. *Freeman v. Carpenter*, 10 Vt. 433.

19. Under the statute exempting "one yoke of oxen or steers, as the debtor may select;"—*Held*, that a pair of steer calves, less than a year old, were exempt. *Mundell v. Hammond*, 40 Vt. 641.

20. The statute exempting from attachment two horses [or one horse], "kept and used for team work," does not require that they be kept and used exclusively for team work. *Webster v. Orne*, 45 Vt. 40.

21. Articles appropriate for use as household furniture cannot be legally presumed to be household furniture, and so exempt from attachment, from the mere fact that the owner

had boxed them up and was about to move away. The fact that they were so used, or intended to be used, is matter of affirmative proof. *Bourne v. Merritt*, 22 Vt. 429.

22. A person who had been a hotel keeper owned, and had used in the hotel, 5 carpets, 5 dozen knives, 5 dozen forks, 7 large fluid lamps, 20 small fluid lamps, 2 fluid cans, 5 pails, 12 tumblers, 18 goblets, and certain other articles of household furniture, the whole valued at \$100 and being all the property that he owned. Although he was the head of a family, these articles were not in actual use by him for house-keeping, but they were used by his permission by his successor in the hotel where he boarded, and he was negotiating for the sale of them. *Held*, that they could not be held by trustee process, being exempt from attachment. *Clark v. Averill*, 31 Vt. 512.

23. A piano forte, though in use in the family, is not exempt from attachment and execution as an "article of household furniture necessary for upholding life." *Dunkley v. Edgerton*, 30 Vt. 224.

24. A horse and saddle, belonging to a member of a cavalry company, were *held* not exempt from attachment under the statute exempting the "uniform, arms, ammunition and accoutrements" of a militiaman. *Fry v. Canfield*, 4 Vt. 9.

25. The exemption from attachment and execution of such military arms and accoutrements as the debtor "is required by law to furnish," is of a temporary character, and continues only so long as the debtor remains under this obligation. *Owen v. Gray*, 19 Vt. 549.

26. Such farming tools as are used by hand and are convenient or useful, and are procured by one for his personal use, unless extravagant, and such mechanical tools of like character and use which are indispensable for the repairing of farming implements, are such "suitable" tools "necessary for upholding life" as are by statute exempt from attachment and execution. *Garrett v. Patchin*, 29 Vt. 248.

27. A shovel, spade, dungfork, three pitchforks, a scythe and snath, a potato hook, hog hook, common axe, broad axe, adz, hatchet and five augers, all worth \$10.80, and belonging to one whose principal occupation or trade was *shoemaking*, but who carried on farming to some extent, and lived rather isolated and did his own mending or "tinkering" of sleds, ox-yokes, &c., were *held* to be so exempt. *Ib.*

28. The word *tools*, as used in the statute of exemptions from attachment, is construed as applying to simple instruments, ordinarily used in manual labor, and not as embracing machinery, or an article usually denominated a machine. *Kilburn v. Demming*, 2 Vt. 404. *Spooner v. Fletcher*, 3 Vt. 137. *Henry v. Sheldon*, 35 Vt. 427.

29. Moulds used in the manufacture of paper, also a portable machine called a billy and jenny used for spinning and manufacturing cloth, capable of being worked by hand, or by water power, costing about \$100;—*Held*, not to be *tools*. *Kilburn v. Demming*, 2 Vt. 404.

30. Same, as to a printing press and types. *Spooner v. Fletcher*, 3 Vt. 133.

31. Same, as to a machine for shaving and splitting leather, operated by hand, steam, or water power, costing \$250 and weighing six to nine hundred pounds. *Henry v. Sheldon*, 35 Vt. 427.

32. A wooden boot, hung up at the door of a boot and shoemaker's shop as a sign of the owner's trade, is not exempt from attachment for his debts. *Wallace v. Barker*, 8 Vt. 440.

33. A barber's chair and foot-rest, used by a barber in his business, are exempt from attachment, as being "such suitable *tools*" \* \* as are "necessary for upholding life." *Allen v. Thompson*, 45 Vt. 472.

34. Where property exempt from attachment has been voluntarily sold by the debtor, the debt due therefor or the proceeds of such sale are subject to trustee process and attachment. *Edson v. Trask*, 22 Vt. 18. *Scott v. Brigham*, 27 Vt. 561. *Keyes v. Rines*, 37 Vt. 263. (Altered by Stat. 1865, No. 14.)

35. But where property not subject to attachment is converted into a mere right of action by a proceeding wholly *in invitum*, such right of action and the money collected are also exempt from attachment, the same as the property itself. *Stebbins v. Peeler*, 29 Vt. 289. *Keyes v. Rines*, 37 Vt. 260.

36. Where the plaintiff sued for the taking of his only cow upon an attachment;—*Held*, that this was none the less his only cow, and so exempt from attachment, because he had before disposed of all his other cows by a sale which was fraudulent as to his creditors, providing such sale was not merely colorable but operated as an actual transfer of the property. The creditors might attach the other cows, in case of such fraudulent sale. *Sanborn v. Hamilton*, 18 Vt. 590. *Dow v. Smith*, 7 Vt. 465.

37. The plaintiff owned two cows, one of which the defendant attached. The plaintiff claimed that the cow attached was his only cow, claiming and supposing that the other belonged to his deceased wife's estate. In trespass for the cow attached, it appeared on trial that the other belonged also to the plaintiff. *Held*, that if the plaintiff had, at the time of the attachment, an election which cow he would retain as the "one cow" exempt from attachment under the statute, he had waived the right to elect, and could not recover. *Sumner v. Brown*, 34 Vt. 194.

38. *Debtor's selection.* Under G. S. c.

47, s. 13. exempting from attachment "one yoke of oxen or steers, as the debtor may select," where either one or both yoke are attached in his absence, he may make his selection upon his return. *Haskins v. Bennett*, 41 Vt. 698.

39. The plaintiff sold and delivered to L a yoke of oxen upon credit, the oxen to remain the plaintiff's property until paid for. He also owned and had in his possession another yoke. Under the statute exempting from attachment "one yoke of oxen";—*Held*, that it was the latter yoke that was exempt, notwithstanding the plaintiff's interest, as conditional vendor, in the other yoke, and although L had paid nothing towards the purchase. *Wilkinson v. Wait*, 44 Vt. 508.

40. Where the defendant levied on the plaintiff's three horses, the plaintiff claimed that he owned one (the "Bemis" horse), and that the title to the other two was in A, and whether he had any interest in them or not could not be ascertained until he and A had settled; but the Bemis horse he claimed as his team and as exempt from execution, and declined to make any selection as between the three horses for the reason above stated. On the day of sale, the plaintiff forbade the sale of the Bemis horse, claiming it as his team. It turned out on the trial that the plaintiff did own the three horses; but it did not appear but that he told the truth as to his interest in the two depending on his settlement with A, nor that there was any attempt at concealment, or to mislead the defendant. *Held*, that this was a sufficient "selection" of the Bemis horse to exempt it from the levy. *Plimpton v. Sprague*, 47 Vt. 467.

41. **Team.** Under the exemption of horses used for team work, neither a wagon nor harness, though used and needed with the team, is exempt. *Carty v. Drew*, 46 Vt. 346.

### 3. *Requisites and validity of attachment.*

42. **Taking possession.** To constitute a legal attachment of personal property, the officer must have the custody or control of it, either by himself or his servants, in such way as either to exclude all others from taking the custody of the property, or, at least, to give timely and unequivocal notice of his own custody. *Lyon v. Rood*, 12 Vt. 233. *Burroughs v. Wright*, 16 Vt. 619. *S. C.* 19 Vt. 510. *Adams v. Lane*, 38 Vt. 645. See *Newton v. Adams*, 4 Vt. 445. *Fitch v. Rogers*, 7 Vt. 403. 18 Vt. 457.

43. The plaintiff, an officer, in the course of service of a writ of attachment, went within five or ten rods and in full view of a wagon of the debtor then in the road or field, when the creditor's attorney directed him to attach the

wagon and the plaintiff declared it attached, but did nothing more, and went in pursuit of other property about the premises, and in an hour or so returned and found the defendant in possession of the wagon, who had in the mean time purchased it of the debtor on a *bona fide* debt, not knowing of the doings of the plaintiff. *Held*, that here was no such attachment as entitled the plaintiff to hold the wagon against the defendant. *Fitch v. Rogers*, 7 Vt. 403.

44. Property of a debtor was in the possession of a third person who held it as a security for a debt due him, and notice was given him by an officer having a writ in his hands against the debtor for service that he attached the same, and he returned it as attached upon the writ, but took no possession. *Held*, that this was not such an attachment as entitled the officer to maintain an action for a subsequent attachment and removal of the property. *Blake v. Hatch*, 25 Vt. 555.

45. Where an officer attached goods in a building, locked up the building and took the key, this was *held* a sufficient taking of possession as against later attachments; and any further securing of the building against entry by the attorney of the creditor was treated as done for the officer. *Newton v. Adams*, 4 Vt. 437.

46. An officer, who had the exclusive possession of a room, had permitted W to store certain property therein. He afterwards attached that property without removing it, but locked all the outer doors of the room so as to cut off all public access to it, leaving unfastened an inner door which led into a room occupied by another party. The officer marked the property as "attached," and gave notice of his attachment. *Held*, that the attachment was valid as against a subsequent attachment against W. *Slate v. Barker*, 26 Vt. 647.

47. **Joint property.** Upon an attachment or execution, the officer may seize and retain an entire chattel or the whole property which the debtor owns in common, or as joint tenant or partner, with others. There is no other mode in which the attachment can be made; but the officer can sell only the debtor's interest therein. *Reed v. Shepardson*, 2 Vt. 120. *Whitney v. Ladd*, 10 Vt. 165. 26 Vt. 428.

48. **Attachment of body and property.** A writ, issued as an attachment of the estate, or body of the defendant, with trustee process, was served by summoning the trustee and attaching the body of the defendant. *Held* to be an illegal and unauthorized writ and service, both in the plaintiff and officer, and the writ was quashed. A man may be attached by his body or property, but not by both on the same process. *Cleft v. Hoxford*, 12 Vt. 296.

49. **Mode of service and return.** Where an officer takes possession of personal property attached by valid process, the attachment is

valid, notwithstanding the process, or the service, may be so informal as to be abatable. *Newton v. Adams*, 4 Vt. 437. 23 Vt. 331. *Judd v. Langdon*, 5 Vt. 231.

50. Where property is attached from time to time upon a writ, one copy with full return of service is sufficient. *U. S. Bank v. Taylor*, 7 Vt. 116.

51. The return of the officer upon a writ of attachment, where personal property was attached, concluded—"and delivered him a copy of this attachment and a list of the articles so attached by me,"—in the precise words of the statute. *Held*, on plea in abatement, to be sufficient. *Strickland v. Baldwin*, 23 Vt. 484.

52. **Description of property.** All that is necessary in the way of description of property attached by copy, in order to create a valid lien, is, that the officer's return should have so much precision as may be necessary to identify the property attached. *Fullam v. Stearns*, 30 Vt. 443.

53. Reasonable certainty in the description of property attached is all that can be required in an officer's return, and its sufficiency, in this respect, can only be determined by applying it to the actual state of the debtor's property at the time, as shown by extrinsic evidence. *Bucklin v. Crampton*, 20 Vt. 261. *Fletcher v. Cole*, 26 Vt. 170. *Jewett v. Guyer*, 38 Vt. 209.

54. Where property attached was described in the officer's return as "thirty tons of hay on the premises;"—*Held*, that it would be intended as premises *in the occupation of the debtor*; and that such return was sufficient in an action of trover by the officer against a purchaser from the debtor, there being no evidence of other hay of the debtor to which the description could apply. *Bucklin v. Crampton*.

55. Where an officer attaches an article but misdescribes it in his return, and the appearance and use of the article are such that it may have been naturally and in good faith so misdescribed, such error should not avoid the attachment; and a plea stating such facts was *held* to be a justification. *Briggs v. Mason*, 31 Vt. 433.

56. **Return of writ.** In trespass *de bonis*, the defendant justified the trespass under a writ of attachment served by him as an officer, and averred that this suit was brought before the return day of that. *Held*, on general demurrer, that the plea was good without averring his return of that writ. *Briggs v. Mason*,—citing *Andrews v. Chase*, 5 Vt. 409.

57. **Illegal claim.** Where the same property or debt is attached by different creditors, and the whole or part of the consideration of a single demand of the first attaching creditor is illegal, his attachment is wholly void as

against the subsequent attachment. *Harding v. Harding*, 25 Vt. 487.

58. **Fraudulent.** Where an attaching creditor agreed with the debtor and other attaching creditors not to enter his suit in court, and took his writ from the officer without completion of service by copy to the debtor, but afterwards caused the writ, with such imperfect service, to be entered in court and took judgment by default and issued execution;—*Held*, that the proceedings were so far irregular and fraudulent, that he acquired no lien upon the property attached which he could enforce against other creditors. *Bank of Middlebury v. Edgerton*, 30 Vt. 182.

59. **Property left with debtor.** Where an officer attaches a chattel and leaves it in the custody of the debtor, he so far loses his lien that a second attachment, or purchase of the property, *bona fide*, and not as subject to the attachment, will always prevail against him. *Pomroy v. Kingsley*, 1 Tyl. 294. It has ever since been so held. *Briggs v. Mason*, 31 Vt. 433.

60. The defendant, a deputy sheriff, formally attached property in the possession of the legal owner, as the property of another, but left it with the owner, who insisted on his right but agreed not to dispose of the property nor put it out of the way. While in this situation, the plaintiff, another deputy sheriff, attached the same property as that of the same debtor, and removed it, and while in the plaintiff's possession the defendant seized it and sold it on the execution following his attachment. *Held*, in trespass, that the plaintiff was entitled to recover the value of the property. *Fisher v. Cobb*, 6 Vt. 622. *Royce, J.*, dissenting.

61. **Several attachments by different officers.** Where personal property has been attached by one officer and is in his legal possession and custody, it cannot be afterwards attached by another so as to create a *lien* upon it, but to this end the second writ must be served by the first officer having possession. *Burroughs v. Wright*, 16 Vt. 619. Nor will an agreement between the two officers for the creation of such *lien*, without an actual taking, make it an attachment. *S. C.* 19 Vt. 510. See *Adams v. Lane*, 38 Vt. 645.

62. Where personal property has been attached by an officer, either by taking it into his actual possession, or by leaving a copy in the town clerk's office, no subsequent legal or valid attachment can be made of the same property, except by the same officer, while the first attachment remains in force; and this rule applies the same between the sheriff and his deputies as between other officers. *West River Bank v. Gorham*, 38 Vt. 649; and see *Rogers v. Fairfield*, 36 Vt. 641.

63. **Copy in town clerk's office.** Where per-

sonal property has been attached by one officer by copy left in the town clerk's office, a second officer would be a trespasser by attaching and taking possession of all such property except sufficient to pay the first debt; and would not be bound to do so, without express directions and indemnity from the plaintiff in the writ. *West River Bank v. Gorham*.

64. An attempt to attach personal property by leaving a copy of the writ in the town clerk's office, where the return thereon describes the property as being all of its kind "in the town," and nothing more, is wholly inoperative as an attachment, and creates no lien. *Paul v. Burton*, 32 Vt. 148. *Rogers v. Fairfield*, 36 Vt. 641. *West River Bank v. Gorham*.

65. But where, in such case, the officer takes actual possession of the property, the taking, notwithstanding such return, constitutes a valid attachment. *Paul v. Burton*. *Fletcher v. Cole*, 26 Vt. 170.

66. In attaching property by copy left in the town clerk's office, it is not necessary that the officer should see the property or go near it (*Fullam v. Stearns*, 30 Vt. 443);—nor is it essential to the attachment that a copy should be delivered to the defendant at the time. It is enough that a copy be delivered to him at any time before the time for legal service of the writ has expired. *Putnam v. Clark*, 17 Vt. 82.

67. The leaving of the copy in the town clerk's office, in such case, is the act of attaching and taking possession and giving notice to all concerned, and the officer's possession is from that time legal against all others. *Id.*

68. **Property sold conditionally.** Where property, held by a conditional purchase, is attached under Stat. 1854, No. 12, the attaching creditor will be liable in trespass to the conditional vendor, unless he shall have paid or tendered to the vendor a definite sum, being the amount due upon the vendor's claim, within ten days after the attachment, and shall have brought the money into court. *Hefflin v. Bell*, 30 Vt. 134. (Changed by G. S. c. 33, s. 28.)

69. In order to hold, under an attachment or execution, a chattel sold conditionally, as against the vendor, the purchase money being unpaid, the tender of the unpaid purchase money must be made by the attaching creditor "within ten days after notice of the amount thereof remaining unpaid," although by the terms of the conditional sale the price has not yet fallen due, and although the sum due is in dispute. *Fales v. Roberts*, 38 Vt. 503. (G. S. c. 33, s. 28.)

70. The plaintiffs sold and delivered to M a wagon for \$120, to remain the plaintiffs' property until paid for. The defendant, as constable, attached the wagon as M's property on a writ in favor of P. The wagon was stolen from the

defendant, without his fault, within three days after the attachment, and was never after found. At the time of the attachment, \$60 of the purchase price remained unpaid. Soon after the attachment, the plaintiffs gave the defendant and P notice of their claim and forbade the defendant taking the wagon. No tender or offer of the amount unpaid was within ten days after notice, or ever, made to the plaintiffs, as required by G. S. c. 33, s. 28. Judgment was rendered again M, and execution was issued and delivered in time to charge the property. The value of the wagon at the time of the attachment was \$95. *Held*, by a majority, that the defendant was liable in trover for the full value of the wagon; that by his default for ten days in making the tender, he had lost the right to stand in the place of M as to payment, and stood as a mere stranger as to the plaintiffs. *Duncans v. Stone*, 45 Vt. 118.

#### 71. Property held in common.

See TENANCY IN COMMON.

#### 4. Rights and liabilities of attaching officer.

72. —in making service. An officer who receives an attachment for service is not thereby constituted the agent of the creditor for receiving payment of the demand. If paid to him, he holds the money as agent of the debtor, till paid over to the creditor. *Wainwright v. Webster*, 11 Vt. 576.

73. Where boxes were left at a railroad depot for transportation, containing attachable articles, and some exempt from attachment;—*Held*, that the attaching officer had the right to take possession of the boxes, and open them, and take the attachable articles; but that he was not authorized to remove the boxes from the depot without showing a necessity therefor; and, if he did so, he was liable in trespass for the excess. *Peeler v. Stebbins*, 26 Vt. 644.

74. An officer having legal process against the goods of one may enter the store of another where the goods are, for the purpose of executing the process. He may even break open the door, if refused admittance on request, and may remain there long enough and do whatever is necessary, to take, secure and remove the goods; but he cannot take entire possession of the store and expel the owner therefrom. For so doing, or for remaining longer than necessary, he would be liable as a trespasser. *Fulleton v. Mack*, 2 Aik. 415.

75. A sheriff, or other proper officer, may, either by night or day, break open the outer door of a store or warehouse for the purpose of taking upon legal process the goods of any person therein, after refusal of admittance upon proper demand—as of the person having the custody and care of the key. *Burton v. Wilkinson*, 18 Vt. 186.—using so much force as is

necessary, and no more. *Fullam v. Stearns*, 30 Vt. 448.

**76. — according to the precept.** Where an officer receives for service a writ of attachment, without special instructions as to service, he is bound to serve it according to its precept, by attaching the property of the debtor to the amount and value specified, if such can be found in the exercise of reasonable diligence, and it is not of doubtful ownership. *Hill v. Pratt*, 29 Vt. 119.

**77.** An agreement with an officer to serve a writ for less than his legal fees, was *held* not to vary his duty to serve the writ according to its precept. *Ib.*

**78.** In order to sustain an action against an officer for neglecting to attach property upon a writ, according to the precept of it;—*Held*, that it is not necessary that the plaintiff should have taken out his execution and placed it in an officer's hands within 30 days after judgment. *Ib.*

**79. Directions of creditor.** A sheriff is not liable for refusing to attach property which is pointed out to him by the creditor and directed to be attached, if in fact it belongs to some person other than the debtor, although the creditor may tender the officer a sufficient bond of indemnity. *Hutchinson v. Lull*, 17 Vt. 133. 24 Vt. 260. *Deming v. Lull*, 17 Vt. 398.

**80.** Where a party gave an officer a writ to serve and directed him to attach certain hemlock bark;—*Held*, that it was not the legal duty of the officer, without instructions, to examine the town records to ascertain whether the bark had not already been attached, and, if so, to place the writ in the hands of the first attaching officer. *West River Bank v. Gorham*, 38 Vt. 649.

**81.** Where a sheriff had attached certain hemlock bark by copy left in the town clerk's office, and was afterwards informed by his deputy that he had attached the same property;—*Held*, that the sheriff was not under legal obligation to inform his deputy that the bark had previously been attached by himself, and, without any directions from the creditor, to take the writ from the deputy and himself serve it by attaching the bark. *Ib.*

**82.** A direction to an officer by the creditor, to attach particular property and not to attach other property, does not operate to release the officer from his liability for the safe keeping of such as he did attach. *Austin v. Burlington*, 34 Vt. 506. *Howes v. Spicer*, 23 Vt. 508.

**83. Property exempt.** Trespass lies against an officer for the taking upon attachment, or execution, property which by law is exempt from such process. *Dow v. Smith*, 7 Vt. 465;—or trover. *Sanborn v. Hamilton*, 18 Vt. 590.

**84. Excessive attachment.** In order to

sustain an action for making an excessive attachment, the plaintiff must allege and prove much the same that he would in a suit for a malicious action,—that is, want of probable cause and malice express. *Abbott v. Kimball*, 19 Vt. 551.

**85. Taking receipt.** Where an officer took a receipt for attachable personal property in the possession of a debtor;—*Held*, that this was a sufficient attachment to oblige him to make return thereof upon the process, and for neglect to do so he was held liable to the creditor. *Howes v. Spicer*, 23 Vt. 508.

**86. Special property of officer.** The general property in chattels attached remains in the defendant; but the attaching officer acquires a special property therein, defeasible by the plaintiff's failing in his action, or by not duly charging the same in execution. *Johnson v. Edson*, 2 Aik. 299. *Mussey v. Perkins*, 36 Vt. 690-1.

**87.** An officer can maintain an action for property attached by him, only upon the ground and in case of his liability for it, either to the attaching creditor or the owner. Where the debtor in the attachment consumed the property before the judgment against him, but the creditor failed to charge the property in execution;—*Held*, that the attachment was thereby dissolved, and that the attaching officer could not maintain an action against the debtor for the property. *Collins v. Smith*, 16 Vt. 9; and see *Weeks v. Martin*, 16 Vt. 287.

**88.** In an action by an attaching officer against the general owner of chattels for taking them from the possession of the officer, he can recover only to the extent of his lien, though less than the value of the property. *Houston v. Howard*, 39 Vt. 54.

**89.** The plaintiff, as an officer, attached certain property. The defendant, as an officer, on another writ against the same debtor, afterwards attached and removed the same property. Judgment was first obtained in the second suit, and the defendant sold the property on execution on that judgment. The plaintiff brought trespass, and, pending his suit, judgment was recovered in the first attachment, but no execution issued thereon. *Held*, that the plaintiff could recover nominal damages only with taxable costs; for that he was not liable to the debtor, the property having gone to his benefit; nor to the first attaching creditor, as he had not charged the property in execution. *Goodrich v. Church*, 20 Vt. 187.

**90.** If one of two joint owners of personal property forcibly take it from the possession of the officer who has taken it on legal process against the other joint owner, the officer may maintain trespass therefor. *Whitney v. Ladd*, 10 Vt. 165. (*Phelps, J.*, dissenting.) 12 Vt. 686. 26 Vt. 428.

91. **Copy in town clerk's office.** The attachment of hay, &c., by copy left in the town clerk's office, according to the statute, gives to the officer a sufficient possession to enable him to support trespass or trover for any wrongful taking or conversion of the property. *Lowry v. Walker*, 4 Vt. 76. *S. C.* 5 Vt. 181. *Stanton v. Hodges*, 6 Vt. 64. *Putnam v. Clark*, 17 Vt. 82;—and such action can as well be sustained against the defendant in the attachment as against a stranger. *Blodgett v. Adams*, 24 Vt. 23.

92. Trespass, trover, or replevin will lie against an officer attaching personal property by copy in the town clerk's office, when brought by some person, other than the debtor, having title. *Angell v. Keith*, 24 Vt. 371.

93. **Care of property attached.** An attachment of hay, &c., by leaving a copy in the town clerk's office, gives the officer a special property in the hay, &c., attached, and the legal custody and possession of it; and the degree of care required of him, as to its custody, is the same as if he had taken it into his personal possession. If the property is not forthcoming to answer upon the execution, he is bound to show that it is out of his power to restore it, and that this has happened without any fault on his part. *Fay v. Munson*, 40 Vt. 468. *Smith v. Church*, 27 Vt. 168. *McOrmsby v. Morris*, 29 Vt. 417.

94. Where an officer attaches grain in the straw, it is his duty to thresh it, when that is necessary to preserve it. *Briggs v. Taylor*, 35 Vt. 57.

95. An officer attaching property is liable only for the same degree of care in the keeping of it, as other bailees for pay. *Bridges v. Perry*, 14 Vt. 263. *Smith v. Church*, 27 Vt. 168. *Walker v. Wilmarth*, 37 Vt. 294.

96. *Prima facie*, he is liable to produce the property on execution, but may excuse himself by showing that it is not in his power, and that he has been guilty of no fault. *Bridges v. Perry*. *McOrmsby v. Morris*, 29 Vt. 417. *Fay v. Munson*, 40 Vt. 468.

97. Neither the attaching officer, nor the receptor, is liable for the property attached where it has been injured, or has perished, or been destroyed, without his fault. *Ido v. Fassett*, 45 Vt. 68. *Bridges v. Perry*. *Walker v. Wilmarth*, 37 Vt. 289.

98. In an action on the case against an officer for a neglect to return property attached after the termination of the suit on which it was attached, where it was lawfully attached and holden down to the time of a sale upon the attachment, and at that time it had deteriorated in value by being injured without his fault;—*Held*, that he was liable in such action only for the value of the property at the time of the sale, although such sale, for want of conformity

to the statute, was illegal. *Walker v. Wilmarth*.

99. If a constable, or a town, be sued for neglect of such constable in not keeping the property attached by him so as to be taken on the execution, he is not entitled to have deducted from the claim what he expended in prosecuting to effect his suit against another officer for taking the property from him, unless so taken by irresistible force. It was his privilege and duty to resist, even with force. *Sawyer v. Middletown*, 10 Vt. 237.

101. **Directions of creditors.** Instructions were given by an attaching creditor to the officer in writing, which the court construed to be equivalent to the following, viz:—"You need not attach real estate, and for the personal property you attach you may take receiptors, and before you remove it you may go to the debtor and see if he will furnish receiptors." The officer attached personal property and, without removing it, took receiptors. In an action by the creditor for not safely keeping the attached property, the receiptors having failed;—*Held*, that the officer was not by such directions released from any official responsibility, and was liable for the loss. *Austin v. Burlington*, 34 Vt. 506. See *Strong v. Bradley*, 14 Vt. 55. *Hovess v. Spicer*, 23 Vt. 508. *Mason v. Ide*, 30 Vt. 697.

102. **Charges of keeping, &c.** Where an officer attached a horse, and used it without injury to it, sufficiently to pay for the keeping, and the horse died pending the suit;—*Held*, that the officer could not recover of the attaching creditor for the keeping of the horse, since it was already paid for by the debtor in the use of the horse. *Dean v. Bailey*, 12 Vt. 142.

103. Where property is attached and the defendant recovers in the suit, he is entitled to have his property back without paying any costs or charges for keeping. The attaching officer must look for his charges to the person who employed him. *Aldis, J.*, in *McNeil v. Bean*, 32 Vt. 431. *Johnson v. Edson*, 2 Aik. 299.

104. So too if the suit is settled before judgment, and the attachment is dissolved. *Nelker v. Emerson*, 17 Vt. 101.

105. But if the defendant settle the suit [after judgment] so that no execution comes into the officer's hands, he may recover such charges of the defendant. *Jackson v. Scribner*, 12 Vt. 145. 16 Vt. 655. (See 17 Vt. 102.)

106. Where an officer attaches and makes an official sale of the property, he may retain from the proceeds the expenses of keeping the property, although the debtor has discharged the attachment lien by paying the debt. *Gleason v. Briggs*, 28 Vt. 135.

107. The charges of an officer for keeping attached property during the pendency of the

action are a lien upon the property, and where the property is sold upon execution, the avails must, in the first instance, after paying the costs of levy and sale, be applied in payment of such charges, and the balance be applied on the execution; and it is not necessary that such charges should be taxed and included in the judgment. *McNeil v. Bean*, 32 Vt. 429.

**108. Action against officer for not keeping property attached.** In an action against an officer for not having the property attached by him forthcoming to be taken in execution;—*Held*, that he could show in defense an offer of other property to be levied upon, sufficient to satisfy the judgment. *Hoit v. Barron*, Brayt. 117.

**109.** Where a sheriff's deputy attached property and his receptor converted it;—*Held*, that the defendant in that action, after judgment in his favor, could maintain trover against the sheriff without demand. *Johnson v. Edson*, 2 Aik. 299.

**110.** Several creditors of the same debtor attached the same property in succession, and all, except the last, agreed with each other (the debtor assenting) upon an immediate sale of the property by one of their number, and an application of the proceeds to the satisfaction of all the claims in the order of the attachments. The sale was so made, was fairly conducted, and was for a sum probably greater than would have been obtained by sale on execution. Judgments were obtained in each case and executions issued seasonably to charge the property attached, and the officer applied the whole proceeds of the sale in part satisfaction of the execution of the first attaching creditor. In an action by the last attaching creditor against the officer for neglect to keep the property attached;—*Held*, that he could not recover, the property having been exhausted in satisfying the prior lien. *Munger v. Fletcher*, 2 Vt. 524. 24 Vt. 236. 32 Vt. 767.

**111.** An officer attached the same property on two writs in favor of the same plaintiff against the same defendant, at the same time. In an action against the officer for not keeping the property to respond upon one of the executions;—*Held*, that the damages were the value of the property, less the sum which he had been obliged to pay the plaintiff for a like default as to the other writ and execution, although the return upon neither of the writs stated that the same property was attached on the other. *Southwick v. Weeks*, 8 Vt. 49. *Hutchinson*, J., dissenting.

**112. Evidence.** In an action against a town for the failure of its constable to make a valid attachment, whereby the same property was held upon a later valid attachment by other parties;—*Held*, that it could not be shown in defense, that judgment was confessed in the

first case after the attempted attachment, without the assent of the subsequent attaching creditor; nor that the judgment confessed was for more than the sum due, and so taken with intent to defraud creditors—it cannot be impeached in this collateral manner. *Rogers v. Fairfield*, 36 Vt. 641.

**113.** The fact that an execution was committed to a particular officer is no evidence that he made the original attachment. *Angell v. Keith*, 24 Vt. 371.

#### 5. Rights and liabilities of creditor as to debtor.

**114. Right.** A party who has a lien upon property for advances, where it is afterwards attached by creditors of the general owner, may purchase in the judgments at a discount and bid in the property on the execution without having to account to the general owner beyond the amount of his bid, where this is not done by request of the general owner, nor undertaken for his benefit; and it is immaterial that this was done for the purpose of protecting his lien. *Gordon v. Chase*, 47 Vt. 257.

**115. Liability.** An attaching creditor is not liable in trover to the debtor, after non-suit in his action, for neglect to return on demand property attached upon the writ, although he turned out the property to be attached by the officer, but never had personal possession. In such case, the officer only is liable for a return of the property. *Adams v. Abbott*, 2 Vt. 383.

**116.** Where a suit is brought in good faith, and property attached, though the suit be abandoned, and the property lost or destroyed in the hands of the attaching officer, the party attaching, being in no fault, is not liable for the loss. *Jones v. Wood*, 30 Vt. 268.

#### 6. Requisites for preserving lien.

**117.** Where an attachment of chattels is made by one officer and the execution is delivered to another, it is necessary, in order to a preservation of the lien by a "taking of the property in execution," that the second officer should, within thirty days from the rendering of the judgment, either actually levy upon the attached property, or else demand it of the first officer. *Blodgett v. Adams*, 24 Vt. 23. *Enos v. Brown*, 1 D. Chip. 285. *Clark v. Washburn*, 9 Vt. 302. *Ayer v. Jameson*, 9 Vt. 363. *Collins v. Smith*, 16 Vt. 9.

**118.** But where the execution is delivered within thirty days from the judgment to the same officer who made the attachment, the attached property is thereby charged and the lien of the attachment preserved, although the execution be not actually levied upon the attached property, nor demand be made upon the receiptors, within the thirty days; but this must be



done within the life of the execution. *Strong v. Hoyt*, 2 Tyl. 208. *Enos v. Brown*, 1 D. Chip. 280. *Bliss v. Stevens*, 4 Vt. 88. *Clark v. Washburn*. *Ayer v. Jameson*. *Dewey v. Fay*, 34 Vt. 188.

119. An attachment made by the sheriff's deputy is the same as if made by the sheriff, and the lien is preserved by delivering the execution, within thirty days from the judgment, either to another deputy of the same sheriff or to the sheriff himself. *Bliss v. Stevens*. *Ayer v. Jameson*. See *Flanagan v. Hoyt*, 86 Vt. 565-8.

120. The delivery of process to a deputy sheriff is a delivery to the sheriff; but a delivery to the sheriff is not a delivery to the deputy. Thus, where property is attached by a deputy, a seasonable delivery of the execution to the sheriff does not charge the property without due demand. *Jameson v. Mason*, 12 Vt. 599.

121. A deputy sheriff attached property on a writ and suffered it to remain in the possession of the debtor, who absconded with it out of the county. The execution was delivered to the sheriff seasonably to charge the property, but he made no demand of it of the deputy. *Held*, that the deputy was not liable for not safely keeping the property and having it forthcoming. *Ib.*

122. The defendant, an officer, attached personal property upon three writs, and at the same time levied an execution upon it subject to the three attachments, and took the property into his possession. The executions obtained upon the three writs served were placed for service in the hands of the plaintiff, another officer, leaving the first execution still in the hands of the defendant. *Held*, that the plaintiff acquired and had no right in the property as against the defendant to take it from him, or to retain it after having got it from him by a revocable consent, which was revoked. *Burroughs v. Wright*, 19 Vt. 510. *S. C.* 16 Vt. 619.

123. A judgment and a charging of the attached property in execution are essential to a perfecting of the lien created by the attachment. If the attaching officer suffers the property to pass to an earlier attaching creditor in satisfaction of his debt, and that lien is not so perfected, he is liable to a later attaching creditor who so perfects his lien. *Brandon Iron Co. v. Gleason*, 24 Vt. 228; and see *Wilder v. Weatherhead*, 32 Vt. 785.

124. Sufficiency of the demand. In an action against a town for the default of its constable in not keeping property attached so as to be forthcoming on execution, where the constable had removed from the State, and the officer holding the execution had within the 80 days made demand of the property of the debtors, and of one of the receiptors, of the selectmen

and of the town agent;—*Held*, that the demand was sufficient to charge the property in execution, and to fix the liability upon the town. *Austin v. Burlington*, 34 Vt. 506.

#### 7. Discharge of attachment lien.

125. An officer who takes property on process and delivers it to a third person to keep, taking his receipt and agreement to redeliver, does not thereby part with his lien, but that still continues, and he may retake the property into his possession at any time. *Pierson v. Hovey*, 1 D. Chip. 51. *N. Chip.* 77. 5 Vt. 265.

126. If a chattel be attached and receipted, and pass from the receiptor to a third person, though by purchase, who knows of the attachment and receipt, and gives the receiptor a bond to indemnify him against his receipt, the attaching officer may retake the property at any time during the pendency of the attachment. *Briggs v. Mason*, 31 Vt. 438.

127. Property attached in New York was delivered by the officer there to the creditor for safe keeping, who brought it into this State where it was attached by the defendant in a suit against the same debtor. In trespass by such creditor,—*Held*, that the defendant was liable,—for that the attachment lien was not discharged and the officer's liability continued. *Uiley v. Smith*, 7 Vt. 154.

128. A sale upon mesne process, under the statute, of a part only of the property attached, although for a sum exceeding the plaintiff's claim and exceeding the command in the writ, does not dissolve the attachment as to the remainder, nor impair the creditor's lien. *Marshall v. Town*, 28 Vt. 14.

129. If a plaintiff obtain final judgment against his debtor, his lien by attachment, or by trustee process, is preserved, though the debtor die before the taking out or levy of the execution upon the property attached, or before the proceedings have ended as to the trustee. *Miller v. Williams*, 30 Vt. 886.

130. A lien created by attachment is dissolved by a confession of judgment, out of course—as before a justice, in a suit returnable to the county court; or, in a justice suit, before the same justice, on some other than the return day—and a subsequent attachment thereby becomes first in right. *Hall v. Walbridge*, 2 Aik. 215. *Murray v. Eldridge*, 2 Vt. 388. (Altered by R. S. c. 106, s. 5, and again by G. S. c. 125, s. 5.)

131. Where a suit is commenced by attachment, a confession of judgment does not of its mere force operate to discontinue the suit and dissolve the attachment, although it may furnish matter of defense by a merger of the cause of action; and if, before any steps are taken or

any prejudice suffered by other creditors, the parties enter into a binding agreement to waive the confession and proceed with the original suit, this equally concludes the subsequent attaching creditors and the debtor found the use of such technical defense to the action. *Fletcher v. Bennett*, 36 Vt. 659.

132. A suit is not necessarily discontinued and an attachment dissolved, because a defense has arisen to it—as by a confession of judgment merging the cause of action, or by a judgment in a cross-action embracing the same matter. *Id.*, citing *Whipple v. Walker*. *Id.* 665.

133. One is not in a position to assert the peculiar rights of a creditor as to property of his debtor sold without change of possession, who, after attaching it, abandoned his attachment and suffered his debtor to sell the property and to pay him from the proceeds. *Wooley v. Edson*, 35 Vt. 214.

#### 8. Bailment to receptor.

134. An attaching officer may, if he choose, deliver the property to the creditor for safe-keeping, and may take security for its redelivery. *Gassett v. Sargeant*, 26 Vt. 424.

135. Where an officer, on the attachment of property, took the receipt therefor of the nominal plaintiff in that suit, and of another person;—*Held*, that this was no defense in a suit against him by the same party for not keeping the property attached, so as to have it forthcoming on the execution, where the suit was prosecuted for the benefit of a third party who was the real owner of the claim. *McOrmsby v. Morris*, 29 Vt. 417.

136. A creditor is not bound to take at his own risk the receipt taken by the officer for property attached. *Howes v. Spicer*, 23 Vt. 508.

137. In an action against an officer for not safely keeping property attached, it is no defense that the receptor of the property, who was selected without the procurement or concurrence of the plaintiff, was amply responsible when the receipt was given, and likely to remain so, but had become insolvent, whereby the property could not be restored. *Gilbert v. Grandall*, 34 Vt. 188. *Austin v. Burlington*, 34 Vt. 506. See *Bank of Middlebury v. Rutland*, 33 Vt. 414.

138. **Scope of contract.** The receptor of property attached undertakes to redeliver the property, or to show what will excuse the officer from all liability to any one on account of the property not being surrendered. *Redfield, J.*, in *Adams v. Fox*, 17 Vt. 365.

139. A receipt given to an officer for property attached is a *contract*, which is binding according to its terms, and is not subject to contradiction or explanation like an ordinary

simple receipt; and this whether the action be assumpsit upon the receipt, or trover. *Brown v. Gleed*, 33 Vt. 147. *Soule v. Austins*, 35 Vt. 519.

140. Thus, it is conclusive as to the value stated, within the liability of the officer. *Parsons v. Strong*, 13 Vt. 235.

141. Also, that the property was in fact attached, and in the possession of the officer, and was delivered to the receptor, as stated. *Spencer v. Williams*, 2 Vt. 209. *Lowry v. Cady*, 4 Vt. 504. *Allen v. Butler*, 9 Vt. 122. *Pettes v. Marsh*, 15 Vt. 454.

142. A receipt to an officer for property attached promising to return it on demand, “or pay the debt and costs,” &c., “or indemnify him against all damages, &c.,”—is an absolute undertaking to return the property on demand; the alternative only limiting the extent of the recovery. *Catlin v. Lowry*, 1 D. Chip. 396. *Sibley v. Story*, 8 Vt. 15. *Page v. Thrall*, 11 Vt. 230. *Brown v. Gleed*, 33 Vt. 151.

143. Trover upon an officer's receipt in ordinary form.—*Held*, that it was not admissible in defense, that the receipt was given under an arrangement that the receptors might sell the property attached, and that they had sold it under that arrangement. *Brown v. Gleed*, 33 Vt. 147.

144. The plaintiff, an officer, attached ten “swarms” of bees, and the defendant receipted them by that designation. The bees having died without fault of the receptor;—*Held*, that the defendant was not liable on his receipt for the hives. *Id. v. Fassett*, 45 Vt. 68.

145. The plaintiff, an officer, attached a railroad passenger car which was, in fact, car No. 3, but which in his return he described simply as “one passenger car,” and by the same designation the defendant receipted it. In an action upon the receipt;—*Held*, that the defendant was bound by his receipt to redeliver the very car attached, and that the plaintiff was not bound to receive any other—the defendant having taken no pains or care to inform himself what particular car had been attached. *Bowman v. Conant*, 31 Vt. 479.

146. Where an officer, holding an execution, was induced by the receptor of the property attached to levy upon other property than that receipted, and it was afterwards claimed by other persons and under such circumstances as to create fair and reasonable doubt as to the officer's right to sell it upon the execution, and the receptor declined to give satisfactory indemnity against such claim;—*Held*, that the officer was justified in abandoning his levy, and that the receptor was liable on his receipt. *Id.*

147. **Demand of the property.** By a receipt for property attached promising to return it to the officer on demand, both by the terms of the contract and the very nature of the bail-

ment, there is no duty cast upon the receptor to return the property, and no cause of action arises against him on his receipt, until a demand is made for the property. *Carpenter v. Snell*, 37 Vt. 255. *Page v. Thrall*, 11 Vt. 280. *Bliss v. Stevens*, 4 Vt. 88.

148. The statute of limitations begins to run only from the demand. *Page v. Thrall*.

149. Any officer holding the execution sufficiently represents the attaching officer to make demand of the property attached, so as to entitle the attaching officer, upon neglect to deliver, to maintain an action against his receipt-man. *Davis v. Miller*, 1 Vt. 9.

150. Where an attachment is made by one officer and the execution is delivered to another, it is sufficient to charge the receptor, that proper demand of the property attached be made within the thirty days, by the second officer upon the first, and so as to charge him. The demand need not be made on the receptor within the thirty days. *Allen v. Carty*, 19 Vt. 65. 24 Vt. 28.

151. Where property is attached and a receipt given therefor, a neglect to demand the property of the receptor within the life of the execution will release him from his receipt, where the property is in the hands of the receptor or the debtor, although the property was duly "taken in execution" (G. S. c. 33, s. 94) by demand made of the attaching officer within thirty days from the rendering of the judgment. *Devey v. Fay*, 34 Vt. 138.

152. Where the receptor of property attached died before judgment and an administrator was appointed, and no demand was made of either before the expiration of the execution, and it did not appear that the property had been used or disposed of, or the receptor or his administrator disabled from returning the property if demand had been made;—*Held*, that the estate of the deceased was not liable on the receipt; that in order to perfect a right of action, demand should have been made of the administrator for a return of the property, within the life of the execution; that such demand could not be dispensed with, unless in a case where there was no personal representative at the time when the demand ought to have been made. *Carpenter v. Snell*, 37 Vt. 255.

153. An attaching officer demanded of the receptor the attached property, when it was agreed between them that it should be delivered at a time and place of sale to be thereafter appointed by the officer. The officer did not make the appointment, but without further demand sued the receipt. *Held*, that here was no refusal to deliver, and that the officer could not recover. *Id. v. Fassett*, 45 Vt. 68.

154. Declaration upon the receipt. In an action upon a receipt for property attached, where the breach alleged is the non-delivery of

the property on demand of an officer holding the execution other than the attaching officer, it is material to aver notice to the receptor that the officer making the demand held the execution issued on the judgment rendered in the cause in which the attachment was made. *Walbridge v. Smith*, Brayt. 178.

155. A declaration in assumpsit upon an officer's receipt for property attached, which set forth the plaintiff's title as derived from the attachment, was *held* ill on demurrer, for lack of averring a return of the writ, or any subsequent proceedings. *Cooper v. Cree*, 4 Vt. 289.

156. Party to sue. A sheriff may maintain an action in his own name upon a receipt taken to his deputy, for property attached by the deputy. *Davis v. Miller*, 1 Vt. 9. 2 Vt. 212. 36 Vt. 568.

157. Where a deputy sheriff takes a receipt to himself for property attached, he may sue thereon in his own name. *Spencer v. Williams*, 2 Vt. 209. 6 Vt. 67.

158. A person specially authorized to serve a writ, may maintain an action upon the receipt given him for the property attached. *Marfield v. Scott*, 17 Vt. 634.

159. Evidence. An officer's return upon the execution, that he demanded the property attached, is not evidence of such demand. *Green v. Holmes*, 1 Vt. 12.

160. In an action between an attaching officer and his bailees or receptors, the attaching of the property may be proved otherwise than by the writ and return; the receipt itself, if one be taken, is the appropriate evidence, and, in a suit upon it, is conclusive upon the party executing it. *Lourry v. Cady*, 4 Vt. 504.

161. Where an officer brings suit upon a receipt for property attached by him, he need not show an actual attachment of the property and delivery thereof to the receptor by other evidence than his return and the receipt. *Stimson v. Ward*, 47 Vt. 624.

162. In an action of trover founded upon an officer's receipt;—*Held*, that the words "we being the receptors thereof," used in a written acknowledgment of demand of the property, was not sufficient evidence of the tenor of the receipt, to warrant a judgment; that this was only evidence that a receipt had been given. *Taylor v. Rhodes*, 26 Vt. 57.

163. Damages. The receptor of horses attached, being duly charged by a demand, delivered other horses of the debtor for which the first had been exchanged, and these last were sold upon the execution. In an action upon the receipt;—*Held*, that the rule of damages was the value of the property attached, deducting the price at which the substituted property sold. *Sewell v. Sowles*, 18 Vt. 171.

164. Where the value of all the property attached was expressed in the officer's receipt at one entire sum, and a portion of the property had been withdrawn from the receptor in such way as to release him therefor;—*Held*, that the damages to be recovered of the receptor were the whole assumed value named in the receipt, less, not the actual, but the proportionate, value of the receipted articles for which he was not liable. *Allen v. Carty*, 19 Vt. 65.

165. **Defense.** Where an officer attaches property and takes the ordinary receipt therefor, and afterwards the same officer takes the same property from the possession of the receptor or of the debtor by another process, the receptor is thereby released on his receipt. *Beach v. Abbott*, 4 Vt. 605. *Rood v. Scott*, 5 263.

166. But where property was so attached by and receipted to a sheriff, and it was afterwards taken from the possession of the debtor upon another process against him by a deputy of the same sheriff, but without the consent of the sheriff;—*Held*, that the receptor was not thereby released. *Flanagan v. Hoyt*, 36 Vt. 565.

167. The receptors of property attached by copy left in the town clerk's office which afterwards went to the debtor's use, were *held* not discharged by the fact that the plaintiff in the first suit had, after that attachment and before the giving of the receipt, attached the same property as a deputy sheriff by a like copy, upon a writ in favor of another party against the same debtor. *Mason v. Whipple*, 32 Vt. 554.

168. Where property was attached and receipted to the officer, and, before demand made of the receptors, was sold by the officer at public auction, with consent of all the parties in interest;—*Held*, that this operated to rescind the contract of the receptors, and that no action would lie thereon, although the avails of the sale were paid into the hands of the receptors, and the sale was for their benefit and under their directions,—they thereby incurring a new and different liability. *Kelly v. Dexter*, 15 Vt. 310.

169. In an action upon an officer's receipt given for property attached, it is a defense to the receptor, that the property belonged to himself and that he so informed the plaintiff at the time of the attachment. *Adams v. Fox*, 17 Vt. 361. 24 Vt. 260.

170. A judgment against the receptor of property attached in favor of the sheriff is merely collateral to the debt, and for the benefit and security of the sheriff merely. The payment of the debt discharges the obligation of the sheriff to the creditor, and his right to enforce the judgment for the creditor's benefit. If, after payment of the debt, the creditor seeks

to enforce such judgment, chancery will enjoin him. *Paddock v. Palmer*, 19 Vt. 581.

#### 9. Sale on attachment.

171. Property attached may be sold upon mesne process under G. S. c. 33, before the delivery of a copy of the writ to the defendant. *Marshall v. Town*, 28 Vt. 14.

172. Where application is made for the sale of property attached on mesne process, and the officer has given the proper notice to the debtor of the time and place when and where he will proceed to have appraisal made, it is not necessary to his justification in selling the property, that he should notify the debtor that the appraisal has been had, and the amount of it, although the debtor was not present at the appraisal or sale. *Abbott v. Kimball*, 23 Vt. 542.

173. On a sale of property attached, made on application of the creditor, the officer gave the debtor verbal, but not *written* notice of the application, as required by G. S. c. 33, s. 41;—*Held*, that the sale was illegal; and *held*, that the want of due notice was not, as matter of law, waived by the debtor's presence at the appraisal and sale without objecting to the proceedings. *Walker v. Wilmarth*, 37 Vt. 289.

174. Where attached property becomes, by process of law, converted into money in the officer's hands, and is invested by him so as to produce interest, such interest will belong to the party who may be ultimately entitled to the money, and not to the officer. *Richmond v. Collamer*, 38 Vt. 68.

175. The plaintiff, an officer, sold property on an attachment which was bid in by the defendant as the friend and agent of the debtor, and the defendant gave the plaintiff his note for the purchase upon interest, and suffered the property to go back into the hands of the debtor. The suit was settled, and the creditor directed the plaintiff to surrender to the debtor all the property and securities derived from the attachment. The plaintiff then gave up to the defendant his note, but claimed the accrued interest upon it as legally belonging to him, to which the defendant acceded, and gave the plaintiff his written promise to pay the same. In an action on such promise;—*Held*, that the plaintiff was not entitled to the interest upon the note; that the written promise to pay the same was without consideration, and that the plaintiff could not recover. *Id.*

#### II. ATTACHMENT OF REAL ESTATE.

176. An attachment of a whole town as the property of a defendant will hold all the lands which the defendant owns, as appears of record, in that town. *Young v. Judd*, Brayt. 151; but such attachment will not hold as

against an apparent owner by the record, other than the defendant. *Hoy v. Wright*, *Ib.* 208.

177. Under the act of 1823, it was a sufficient attachment of real estate for the officer to leave a properly certified copy of the writ and return with the town clerk, with a request that he record the substantial part of it, and to pay him the fees therefor. *Huntington v. Cobleigh*, 5 Vt. 49. 28 Vt. 550.

178. An attachment of real estate by a copy left in the town clerk's office, though not recorded as required by the act of 1823, was held to prevail against a subsequent purchaser who saw the copy on file before his purchase. *Ib.*

179. If the copy of an attachment left in the town clerk's office is so wholly defective that the original, if like it, would be altogether void and could not be made good by amendment, this is no notice of a valid attachment—otherwise, if the variance is but trifling. *Ib.* citing *Herring v. Harmon*, 5 Vt. 56. 22 Vt. 331.

180. Ever since the Revised Statutes of 1839 the law has been as it was before the act of Nov. 6, 1823 (Slade's Stat. 108), that an attachment of real estate is effected by the officer's leaving in the town clerk's office a true and attested copy of the attachment with his return thereon. The entry and record required to be made by the town clerk is not essential for the creating of the lien, and it will not be defeated by his omission to make such entry and record. (G. S. c. 33, s. 37.) *Braley v. French*, 28 Vt. 546.

181. The plaintiff's writ against W was served by lodging a copy of it in the town clerk's office with a return properly made and certified to attach W's real estate. The town clerk did not keep it safely, nor make any record of the attachment, and through this failure the copy was soon lost, or taken from the office, and no trace of the attachment was left there. Afterwards, and before final judgment in the suit, W conveyed the premises, for adequate consideration advanced, to other parties, who had no notice of the attachment and believed the title to be as shown of record, and they procured their deed to be recorded. Held, that no lien was created by the attachment as against such purchasers, and that the town was liable to the plaintiff for such default of their town clerk. *Burchard v. Fairhaven*, 48 Vt. 327.

182. Where the return of service of an attachment of lands was complete as to the defendant therein, but showed only a copy of the writ left in the town clerk's office;—Held, that no lien upon the land was created thereby. *Cox v. Johns*, 12 Vt. 65. 22 Vt. 331.

183. An officer attaching real estate acquires no special property therein, and no act or declaration of his can defeat the lien thereby created—as by withdrawing the copy left with the town clerk. Such lien is in the creditor, and he

only can release or discharge it. *Braley v. French*, 28 Vt. 546.

184. An attaching creditor of real estate with notice, either actual or constructive, of the true state of the debtor's title, stands in no better position than a purchaser with the same notice. *Perrin v. Reed*, 35 Vt. 2. *Hackett v. Callender*, 32 Vt. 97. *Hart v. Farm. & Mech. Bank*, 33 Vt. 252.

### III. DEFENSE BY SUBSEQUENT ATTACHING CREDITOR.

185. The statute which gives subsequent attaching creditors the right to appear and defend the earlier suit makes them so far parties, that their right to an appeal follows, as an incident. *Chaffee v. Malarkee*, 26 Vt. 242.

186. A subsequent attaching creditor, coming in to defend against a prior attachment, may set up some defenses which the debtor could not;—as by showing that the first was fraudulent as to other creditors. *Harding v. Harding*, 25 Vt. 487. 36 Vt. 662.

187. G. S. c. 30, s. 44, allowing a subsequent attaching creditor "wishing to contest the validity of the debt or claim on which the previous attachment is founded" to appear and "defend the suit," allows only a defense to the merits, such as the debtor might make, and, in addition, in his right as creditor, that the prior claim is collusive or fraudulent; and he cannot plead in abatement, or make other dilatory objection to the action, or urge any mere technical irregularity. *Farr v. Ladd*, 37 Vt. 156. *Fletcher v. Bennett*, 36 Vt. 659.

### IV. ATTACHMENT AIDED IN CHANCERY.

188. If one acquire a lien upon property by attachment, he may claim the aid of a court of equity to make it available, if he has taken the proper measures to preserve and enforce it. *Rowan v. Union Arms Co.*, 36 Vt. 124. S. C., 45 Vt. 160.

189. Such aid granted, where there was a claim upon the property by a conditional vendor, and an accounting was necessary to ascertain the sum to be tendered upon it, within the ten days limited in G. S. c. 33, s. 28, and the bill was brought within such ten days, and the lien of the attachment was preserved by a judgment afterwards obtained, with stay of execution. *Ib.* See *Fales v. Roberts*, 38 Vt. 503.

### ATTORNEY (AT LAW).

- I. HIS AUTHORITY.
- II. DUTIES AND LIABILITIES.
- III. RIGHTS.
- IV. PRIVILEGED COMMUNICATIONS.

*Rules for the admission of attorneys, and regulating their practice:*

1 Tyl. 2 (1800)—Rule 15 and *seq.* Brayt. 14 (1817).—1 D. Chip. 508 (1824)—1 Aik. 408 (1827).—14 Vt. 565 (1848)—24 Vt. 673 (1853).

I. HIS AUTHORITY.

1. There is, in this State, combined in the character of attorney that of agent to a certain extent; and, *held*, that an attorney, who receives a demand for collection from a creditor who resides at such a distance that he cannot be consulted, and is without express instructions as to the course to be pursued, has a discretion not to have the debtor committed to jail, or to release him from jail after commitment, and is not liable for so doing, provided he believes such course best for the interests of the creditor, and he acts with common prudence; and, in so doing, he may be guided by the apparent circumstances of the debtor, after reasonable examination. *Hopkins v. Willard*, 14 Vt. 474.

2. The attorney of an execution creditor has full authority to direct an officer as to the time and manner of enforcing the execution, short of discharging it without satisfaction—as to proceed, or to suspend proceedings, &c. *Willard v. Goodrich*, 31 Vt. 597. *Kimball v. Perry*, 15 Vt. 414.

3. The fact that the plaintiff's attorney in the original suit acts also as the attorney of the defendant in making a replevin writ to regain possession of the property attached, and draws up and consents to the replevin bond, does not necessarily free the officer serving the replevin writ from liability for the insufficiency of the bond. To have this effect, the officer must be aware that such attorney was the attorney of the plaintiff in the original suit, and the attorney must either act in behalf of such plaintiff in consenting to the bond, or give the officer good reason to believe that he consents to it in such plaintiff's behalf. *Bank of Middlebury v. Rutland*, 33 Vt. 414.

4. The authority of an attorney does not appertain to the station of an attorney's clerk, as such. *Carter v. Talcott*, 10 Vt. 471.

5. Whether an attorney can in any supposable case, without express authority, borrow money to prosecute an action, and bind his client thereby—*quære*. *Held*, in this case, that the credit was in fact given to the attorney. *Bell v. Mason*, 10 Vt. 509. 15 Vt. 321.

6. An attorney who only prosecutes or defends a suit, has no power, as such attorney, to bind his client by the employment of assistant counsel. Whether such authority was given him by his client in the particular case, is a

question of fact. *Paddock v. Colby*, 18 Vt. 485. *Briggs v. Georgia*, 10 Vt. 68.

7. Under peculiar circumstances, as in an unexpected emergency, when the principal is at a distance and cannot be consulted for instructions, such authority might be implied. *Willard v. Danville*, 45 Vt. 98.

8. An attorney, as such, and without special authority, has no power to bind his client by a compromise and settlement of the cause of action, without receiving the full amount of the claim. *Vail v. Conant*, 15 Vt. 314. (*Contra*, *Butler v. Knight*, 2 Law Rep. Ex. 109, in 1867); nor to assign the demand. *Penniman v. Patchin*, 5 Vt. 346. *Carter v. Talcott*, 10 Vt. 471.

9. The appearance for a suitor in court, whether a natural person or a corporation, by an attorney of the court, is evidence of his authority which cannot be questioned by the adverse party;—as by showing the irregularity of the corporate meeting at which he was appointed. *Proprietors, &c., v. Bishop*, 2 Vt. 231.

10. Whether a suit is authorized by the plaintiff is a matter resting between attorney, or solicitor, and client, with which the court never interferes at the suggestion of the respondent. *Doolittle v. Gookin*, 10 Vt. 265.

11. Where the record shows the appearance of a party by attorney, it cannot be controverted. If the attorney entered without authority, the party's remedy is against him. *Coit v. Sheldon*, 1 Tyl. 300. *Abbott v. Dutton*, 44 Vt. 546. *St. Albans v. Bush*, 4 Vt. 58. *Newcomb v. Peak*, 17 Vt. 302. *Spaulding v. Swift*, 18 Vt. 214.

II. DUTIES AND LIABILITIES.

12. It is the duty of an attorney who undertakes the collection of a debt, without special instructions, to pursue it through all the stages, as well against the sheriff and bail as against the principal, till the object is effected; but he is justified in not prosecuting, unless specially directed, in cases where he is influenced by a prudent regard to the interests of the creditor. *Crooker v. Hutchinson*, 2 D. Chip. 117. *S. C.*, 1 Vt. 73. 15 Vt. 421.

13. Thus, he is bound to pursue the bail in due course, though insolvent, where there is a probable cause of action against the sheriff for taking insufficient bail, and that course is necessary to lay the foundation for proceedings against him. *Crooker v. Hutchinson*, 1 Vt. 73.

14. In ordinary cases, where an attorney is employed to take the care and management of a suit, he has a right to consider his employment as continuing to the end of the litigation, unless dismissed by his client, and, indeed, he would have no right to abandon it, without giving the client seasonable notice. *Langdon*

*v. Castleton*, 80 Vt. 285. *Davis v. Smith*, 48 Vt. 52.

15. A suit upon a recognizance given for an appeal is not a branch of the first suit, in such sense that the retainer of an attorney to defend the first suit extends to an employment to defend the second. *Smith v. Dougherty*, 87 Vt. 530.

16. An attorney is not liable, without special undertaking, to pay the fees of his client's witnesses. *Sargeant v. Pettibone*, 1 Aik. 355.

17. From the indorsement by an attorney of his name, as attorney, upon a writ given out for service, the law does not imply a promise on his part to pay the officer his fees for service. *Wires v. Briggs*, 5 Vt. 101.

18. In an action against an attorney for negligence (as for failure to collect a debt), the damages are to be measured by the amount of loss sustained, and not by the amount of the debt; and any fact which may tend to reduce the value of the debt below the nominal amount is proper to be considered. *Crooker v. Hutchinson*, 2 D. Chip. 117.

19. In an action against an attorney for neglect to issue a *scire facias* against insolvent bail, whereby the right of pursuing the officer for taking insufficient bail was lost;—*Held*, that the damages recoverable were the same as if the bail was solvent,—taking into account the right of such bail to surrender the principal in his own discharge. *Crooker v. Hutchinson*, 1 Vt. 73.

20. S, an attorney in a suit, employed H, another attorney, to assist him in its management. H assisted him, and was employed by no one else; nor did it appear that S had any authority from his client to employ H, nor did he profess to employ H in behalf of his client. *Held*, that S was liable to H, without proof of an express promise to pay; that his request was equivalent. *Scott v. Hossie*, 13 Vt. 50.

21. An attorney having a demand to collect, by fraudulently representing its condition and value, purchased it of his client at a discount, and afterwards collected it in full. *Held*, that he was not liable to the debtor for the difference—his liability was to his client. *Marshall v. Joy*, 17 Vt. 546.

### III. RIGHTS.

22. **Compensation.** There is no reason nor authority to distinguish the rule of compensation for the services of lawyers, from that which obtains in every other employment for service;—that is, in the absence of any stipulation as to price, that he should be paid such sum as his services are reasonably worth, or as he reasonably deserves to have, having a proper reference to the nature of the business performed, and his own standing in the profession for learning

and skill, whereby the value of his services are enhanced. *Vilas v. Downer*, 21 Vt. 419.

23. For the purpose of aiding in determining such reasonable compensation, it is proper to receive evidence as to the prices usually charged and received for similar services by others of the same profession, in the same vicinity, and in the same courts. *Id.* 28 Vt. 568.

24. Where a lawyer is employed by one who has a full knowledge of his rate of charges, without stipulating at all as to price, it might fairly be inferred, perhaps, that the client expected to pay at such rates, and might be equivalent to an express contract to pay them; but where a knowledge of the rate of charges, (as by a presentation of a copy of the account,) only comes to the client during the employment, as in prosecuting a suit, his mere silence upon the subject, or suffering the lawyer to complete his then engagements, cannot fairly be construed into such an acquiescence in the amount of the charges, as to estop him from afterwards disputing them. *Id.*

25. An attorney cannot recover for services, which, through his omission or mistake, become of no avail to his client,—as where he neglected to take out an execution in the case and commit it to an officer in season to charge property attached, or so as to afford his client an opportunity to test his claim to a lien. *Nixon v. Phelps*, 29 Vt. 198.

26. —**when demandable.** Where an attorney puts a demand in suit for his client, the law does not imply an agreement that he is, in the first instance, to look to the demand as a means of satisfying his costs; nor that he is to wait for his pay until it shall be determined whether the demand is collectable or not; and there is no such general or settled usage upon the subject as will furnish evidence of an implied contract to that effect. *Nichols v. Scott*, 12 Vt. 47.

27. His retainer being but one employment, continuous and entire, the statute of limitations does not begin to run upon his charges in the suit until the suit is ended, unless sooner discharged. *Davis v. Smith*, 48 Vt. 52.

28. **Legality of contract.** An agreement between attorney and client, that the attorney should be paid a fair compensation for his services and money expended about a suit, and the one-half of what might be recovered, was *held* void as to such excess. *Mott v. Harrington*, 12 Vt. 199.

29. A guaranty given by an attorney to the creditor of a third person, that he will pay the debt, in consideration that the demand be committed to him and be under his control as attorney for the creditor, does not savor of maintenance or champerty, and is upon sufficient consideration. *Gregory v. Glead*, 83 Vt. 405.

30. An attorney or solicitor employed in a cause does not acquire, by the purchase of the interest of the adversary party, the right, as against his client, of such adversary party, and the client may, at his election, treat the purchase as made for himself. *Davis v. Smith*, 43 Vt. 269.

31. Lien for fees, &c. An attorney has a lien upon the judgment recovered by him, to the amount of such fees as are allowed to the party for his term, travel and attorney fee, and for all moneys expended in prosecuting the suit; but not the extra fees of counsel for argument, &c. *Heartt v. Chipman*, 2 Aik. 162. *Walker v. Sargeant*, 14 Vt. 247.

32. Such lien for costs, applies to an award of arbitrators. *Hutchinson v. Howard*, 15 Vt. 544.

33. As between the creditor and his attorney, the money to the amount of the lien of the latter is his, and cannot be assigned by the former. If received by the assignee, the attorney may recover it out of his hands by an action for money had and received. *Heartt v. Chipman*, 2 Aik. 162; and may hold it as against a trustee process. *Hutchinson v. Howard*. (See *Patrick v. Hazen*, 10 Vt. 183.) *Root v. Ross*, 29 Vt. 488.

34. An attorney has no such lien as will prevent the parties settling and abandoning a litigated suit, though notified of the lien. *Foot v. Tewksbury*, 2 Vt. 97.

35. Nor, any such lien previous to final judgment, as to prevent or affect a *bona fide* settlement of the parties. *Hutchinson v. Pettes*, 18 Vt. 614; though a default has been entered and the cause stands continued. *Hooper v. Welch*, 43 Vt. 169.

36. Where an attorney is sued for money upon which he has a lien, he need not plead the lien in set-off, but may urge it in defense under the general issue. *Patrick v. Hazen*, 10 Vt. 188.

37. Where an attorney had in his hands for collection a demand against B, and B gave the attorney a demand against C to collect and apply the avails upon the first demand;—*Held*, that this alone, and without a distinct contract to that effect, did not create a lien upon the last demand in favor of the first; and that an officer was justified in taking the direction of B in the management of his execution against C. *Goodrich v. Mott*, 9 Vt. 395.

38. If an attorney, having a lien for his costs, sue his client therefor and obtain judgment, and assign the judgment, the lien is lost and does not attach to the claim in the hands of the assignee. *Beech v. Canaan*, 14 Vt. 485.

39. A solicitor in chancery acquires no specific lien, for his services and disbursements, upon lands recovered in a suit in chancery. *Smalley v. Clark*, 22 Vt. 598.

40. An attorney's lien will not be protected against pre-existing rights of others,—as, against a set-off. *Walker v. Sargeant*, 14 Vt. 247.

41. If there is any collusion or design in the settlement or payment of the judgment to cheat the attorney of his lien, the debtor is not protected by payment to the creditor, although there is no notice given of the lien by the attorney to the debtor. *Heartt v. Chipman*, 2 Aik. 162.

42. Notice of such lien need not be given in person to the judgment debtor; but knowledge of the intention of the attorney to insist upon his lien, derived from other evidence of such a character as would and ought to obtain credit under ordinary circumstances, is sufficient and binding upon the debtor. *Lake v. Ingham*, 8 Vt. 158.

43. But notice of such lien will not prevent the conclusiveness of a settlement of a contested action sounding in tort, especially where the damages claimed were unliquidated. *Hutchinson v. Pettes*, 18 Vt. 614. *Foot v. Tewksbury*, 2 Vt. 97.

44. An attorney has a general lien upon all papers of his client in his hands, and upon the balances equitably due thereon, not only for the expenses incurred in the particular suit, but for any general balance due him. *Redfield, J.*, in *Hutchinson v. Howard*, 15 Vt. 546.

#### IV. PRIVILEGED COMMUNICATIONS.

45. The general rule is, that all communications which the client makes to his attorney, for the purpose of professional advice upon the subject of his rights or liabilities, are privileged. *Wetherbee v. Ezekiel*, 25 Vt. 47.

46. An attorney's privilege from testifying to communications of his client is the privilege of his client, and not of the attorney, and is limited to such disclosures as are made in confidence by the client to his attorney in the course of his employment. *Dixon v. Parmelee*, 2 Vt. 185.

47. An attorney will not be compelled to produce to a grand jury a paper intrusted to him, in professional confidence, by his client. *State v. Squires*, 1 Tyl. 147; nor to produce it on trial of a cause. *Durkee v. Leland*, 4 Vt. 612.

48. The privilege of refusing to disclose in court confidential communications, does not extend to one who is not an attorney, or attorney's clerk, or counsellor, although he may be studying law and have an office and do business as a lawyer, and may be acting as counsel and attorney for the party when, and in the business about which, the communications are made. *Holman v. Kimball*, 22 Vt. 555.

49. Where a party had a conversation with



an attorney in reference to his matters about which litigation was probable, but where there was no retainer, and nothing to show that the party sought the advice with any view to regulate his future conduct in regard to a pending, or expected, litigation;—*Held*, that his communications were not privileged. The loose practice of the profession of giving gratuitous street opinions, commented upon and condemned. *Thompson v. Kilborne*, 28 Vt. 750.

50. In order that a communication to an attorney be privileged, the relation of attorney and client must exist, and the attorney must for the time being be acting in the character of legal advisor of the party making the communication, or, at least, the party should have good reason to suppose he is so acting, and the communication must be of a confidential and professional character. *Coon v. Swan*, 30 Vt. 6.

51. Where an attorney acted simply as a neighbor in the business of another, but by his request, not charging nor expecting compensation, and this was so understood;—*Held*, that a communication to him by the party employing him was not privileged. *Id.*

52. Communications made to an attorney in a suit by one who is a mere nominal party having no interest, are not privileged from disclosure in evidence by the attorney. *Allen v. Harrison*, 30 Vt. 219.

53. Communications to an attorney, to be privileged, must be made to him confidentially, as counsel; the relation of attorney and client must exist at the time, and the communication be made for the purpose of obtaining counsel, advice, or direction in regard to the client's legal rights. A general retainer in the matter is not necessary, but the attorney must be counsel upon the subject upon which the conference is had, and the communication must be made to him as such counsel. The burden is upon the party who seeks to have his statements suppressed as evidence, to prove the facts which make them privileged. *Earle v. Grout*, 46 Vt. 113.

54. It was offered to be proved by the attorney who assisted a party in confessing a judgment and having an execution issued thereon and sale of property, that such party told him he wanted the property sold so it could not be attached by his creditors. *Held*, that the communication was privileged, and not admissible. *Mazham v. Place*, 46 Vt. 434.

55. The plaintiff's agent, who, as such, had sold the goods in question, went to an attorney to have him bring a suit for the price. The attorney, after hearing the agent's story, declined to bring the suit on the sole ground that he thought a suit could not be maintained, and so advised. *Held*, that the communication of the agent was privileged. *Strong v. Dodds*, 47 Vt. 348.

## AUDITA QUERELA.

- I. WHEN MAINTAINABLE.
- II. WHEN NOT MAINTAINABLE.
- III. NATURE OF WRIT, PARTIES, &c.

### I. WHEN MAINTAINABLE.

1. **Generally.** *Audita querela* lies to vacate a judgment sought to be enforced, where a defense has arisen since the judgment; also where defense to the claim existed before the judgment, but the party had no opportunity to make it for want of notice; or, having notice, was deprived of his opportunity by the fraud of the other party. *Staniford v. Barry*, 1 Aik. 321.

2. It bears solely upon the acts of the opposite party, and not at all upon the judgment of the court. The complaint sounds in tort; the proper plea is not guilty, and damages are recoverable. *Little v. Cook*, 1 Aik. 363.

3. An *audita querela* to vacate a judgment, alleging that the complainant was deprived of his day in court by the fraud of the defendant, was *held* good, without an averment that the complainant had a good defense to the action. *Eddy v. Cochran*, 1 Aik. 359.

4. A writ of error fastens upon errors committed by the court, does them away, and proceeds to do that justice between the parties which the court below ought to have done. An *audita querela* seizes upon the misconduct of the recovering party, as a reason for setting aside an execution for a cause arising after judgment, or for setting aside the judgment, on the ground that the complainant has had no day in court. *Hutchinson, J., in Weeks v. Lawrence*, 1 Vt. 437.

5. It is not the office of an *audita querela* to correct errors in a judgment rendered in a case where the court had jurisdiction. *Lamson v. Bradley*, 42 Vt. 165.

6. It lies to set aside the judgment of a justice of the peace in a cause where he had not jurisdiction of the subject matter—as, in an action of covenant for breach of covenant of title, *Hastings v. Webber*, 2 Vt. 407;—action of slander. *Ball v. Sleeper*, 28 Vt. 573;—replevin of one kind, *Glover v. Chase*, 27 Vt. 533.

7. **Execution.** If an execution has been irregularly issued, although by mistake, and has been delivered to an officer for service, the debtor may proceed by *audita querela* to supersede it, and may pursue his remedy until he knows that he is in no danger from the execution. *Phelps v. Slade*, 13 Vt. 195; and see *Hovey v. Niles*, 26 Vt. 541.

8. It is not necessary that the complainant should be actually in execution, or that an execution should have actually issued. It is sufficient if he is exposed to and is threatened with

an irregular and invalid execution. *Glover v. Chase*, 27 Vt. 538.

9. **Fraud as to notice.** An *audita querela* was held good, which complained that the respondent procured a deputized person to make return of service upon the complainant and took judgment against him, well knowing that such service had not been made, and that the complainant had no notice of the suit. *Stone v. Seaver*, 5 Vt. 549.

10. **Agreement to discontinue.** A judgment of a justice, taken by default, was set aside on *audita querela*, where the complainant failed to appear because he understood that the suit was agreed to be discontinued, and the other party knew that he so understood it. *Perkins v. Cooper*, 29 Vt. 729.

11. **Out of State.** Where the judgment of a justice has been rendered against a defendant who was out of the State at the commencement of the suit, to whom no notice was given and where no recognizance was given for a writ of review, the judgment may be set aside upon *audita querela*. *Martin v. Wilkins*, 1 Aik. 107. *Alexander v. Abbott*, 21 Vt. 476. *Whitney v. Silver*, 22 Vt. 634. *Kidder v. Hadley*, 25 Vt. 544. *Eastman v. Waterman*, 26 Vt. 494.

12. The record in such case must show notice, or else a compliance with the statute requirements in lack of notice, and the giving of a recognizance for a review. Upon the trial of the *audita querela*, notice in fact cannot be proved by parol. *Kidder v. Hadley*.

13. Where there were three trustees of a railroad, one resident and two non-resident, and a trustee process was issued against the three, but was served only by a copy left with the agent for the non-resident trustees appointed under G. S. c. 28, s. 118, and judgment passed by default against those two only, as trustees;—*Held*, that the irregularity was not such as that the judgment could be set aside on *audita querela*. *Hamilton v. Wilder*, 31 Vt. 695.

14. **Execution against body.** An *audita querela* lies to set aside an execution wrongfully issued against the body, instead of against the property only, of the complainant. *Sawyer v. Vilas*, 19 Vt. 43. *Stoughton v. Barrett*, 20 Vt. 385.

15. **Void execution.** It lies to set aside a void execution in the hands of an officer;—as where a justice execution was made returnable in 60 days, which should have been 120 days. *Hovey v. Niles*, 26 Vt. 541;—so, where it misdescribed the judgment as to the amount. *Wilson v. Fleming*, 16 Vt. 649.

16. **Wrongful levy.** It is an appropriate remedy to vacate the levy of an execution on land, where the levy is good upon its face, but the officer set off a different piece of land and of greater value than the one appraised; or where,

by direction of the creditor, more of the debtor's property was set off, on the basis of the appraisal, than was sufficient to satisfy the execution. *Hurlbut v. Mayo*, 1 D. Chip. 387. *Hopkins v. Hayward*, 34 Vt. 474. *Stanley v. McClure*, 17 Vt. 255.

17. So in any case, where, the execution is used in a manner not lawful, and such use is oppressive and burdensome, and where the use of it can be set aside, this is an appropriate remedy. *Fairbanks v. Deveraux*, 48 Vt. 550.

18. **Insane person.** A judgment of a justice of the peace against an insane person under guardianship, where his guardian was not notified of the suit and no guardian was appointed for him by the justice, was vacated on *audita querela*, *Williams, C. J.*, dissenting. *Lincoln v. Flint*, 18 Vt. 247.

19. **Infant.** An *audita querela* lies to set aside a judgment rendered by a justice of the peace against an infant, who had no guardian notified, or appointed by the court. *Judd v. Downing*, Brayt. 27. *Lincoln v. Flint*, 18 Vt. 247. *Sturbird v. Moore*, 21 Vt. 529. See *Blackmer v. Dow*, 18 Vt. 293.

20. But not, where his father and natural guardian was sued jointly with him, and appeared and defended the suit. *Wrisley v. Kenyon*, 28 Vt. 5. *Priest v. Hamilton*, 2 Tyl. 50.

21. Nor, in favor of an officer who suffered judgment by default for neglect to collect an execution against the infant, while the judgment against the infant remained in force. *Soluce v. Downing*, Brayt. 27.

22. A judgment in the county court against an infant, without the appointment or appearance of a guardian, cannot be vacated by *audita querela*, but only by writ of error. *Chase v. Scott*, 14 Vt. 77.

23. **Bankrupt.** *Audita querela* lies to release a certificated bankrupt from close jail. *Comstock v. Grant*, 17 Vt. 512. *Altier*, where he is in the jail liberties on jail-bond. *Gould v. Mathewson*, 18 Vt. 65. 21 Vt. 566.

24. **Refusal of appeal.** By long usage in this state, an *audita querela* is held to be a proper remedy for the party aggrieved by the wrongful refusal of a justice of the peace to allow an appeal. *Tyler v. Lathrop*, 5 Vt. 170.

25. The above case has been followed in cases *precisely identical*, yet we are not disposed to extend it, by a supposed analogy of reasonings, so as to make it an authority for other cases. *Bennet, J.*, in *Spear v. Flint*, 17 Vt. 498. And see *Harriman v. Swift*, 31 Vt. 385.

## II. WHEN NOT MAINTAINABLE.

26. In order to warrant the setting aside of a justice judgment on *audita querela* for refusing an appeal, the complainant must in fact have done everything which the law requires

in order effectually to take an appeal—as, the actual offer of bail, so as to enable or entitle the justice to take the recognizance. It is not enough that he intended to do this, and supposed he had done it, and had actually paid the fees for the appeal. *Harriman v. Swift*, 31 Vt. 385.

27. The complainant had notice of a justice suit against him and sent an agent to appear for him, and to take an appeal. After judgment, the agent paid the fees for an appeal, but, not understanding the law, neglected to enter bail, and thereupon execution issued on the judgment. *Held*, that an *audita querela* could not be sustained. *Finney v. Hill*, 18 Vt. 255.

28. An *audita querela* will not lie to set aside a justice judgment, on the ground that an appeal was improperly denied, where the case was not on the face of the writ nor by the plaintiff's claim appealable, but was made such by the character of the defense set up. The remedy in such case is by petition. (G. S. c. 38, s. 7). *Bradish v. Redway*, 35 Vt. 424.

29. **Chancery.** An *audita querela* does not lie to set aside an execution issued on a decree in chancery. *Garfield v. University of Vt.*, 10 Vt. 536;—or issued in violation of an injunction of chancery. The remedy is only by application to the court of chancery. *Porter v. Vaughn*, 24 Vt. 211.

30. **Other remedy.** It is no objection to an *audita querela* that there is another remedy,—as *habeas corpus*. *Comstock v. Grout*, 17 Vt. 512; or petition, under the statute, to set aside a justice judgment rendered without due notice. *Alexander v. Abbott*, 21 Vt. 476; or for refusing an appeal. *Edwards v. Osgood*, 33 Vt. 224.

31. **Limitations.** An *audita querela* is not within the statute of limitations applicable to a writ of error, or certiorari. *Stone v. Seaver*, 5 Vt. 549.

32. **Error of court.** It does not lie where the matter of complaint is a proper subject for a writ of error, though the statute has prohibited a writ of error in such case. *Tuttle v. Burlington*, Brayt. 27. *Weeks v. Lawrence*, 1 Vt. 433. *Dodge v. Hubbell*, 1 Vt. 491. *Potter v. Hodges*, 18 Vt. 239. *Tittlemore v. Wainwright*, 16 Vt. 173. *Betty v. Brown*, 16 Vt. 669. *Spear v. Flint*, 17 Vt. 497. *Clough v. Brown*, 33 Vt. 181.

33. Nor for any error of the justice in the judgment rendered;—as for assessing damages or excessive damages, on default, upon insufficient evidence, or without evidence. *Dodge v. Hubbell*, 1 Vt. 491. *Foster v. Stearns*, 3 Vt. 322. *Betty v. Brown*, 16 Vt. 669;—or for refusing a trial by jury, *Spear v. Flint*, 17 Vt. 497;—or for an error in the taxation of costs, though alleged to have been induced by the fraudulent practices of the other party. *Har-*

*riman v. Swift*, 31 Vt. 385 (G. S. c. 31, s. 28), overruling *Weed v. Nutting*, Brayt. 28.

34. Nor, where the cause alleged is the fraud or misconduct of the justice. *Tittlemore v. Wainwright*, 16 Vt. 173.

35. An *audita querela* to set aside an execution alleged an error in the judgment, rendered by *nil dicit*—that the complainant had made payments on the note sued, which the defendant had not indorsed, and that he caused the damages to be made up without deducting such payments; also that the clerk in computing the interest had made an error, making the judgment and execution larger than was due. On demurrer, *held* insufficient,—that it presented no ground of complaint whatever, and was brought obviously for delay. *Perry v. Ward*, 18 Vt. 120.

36. A verdict in an action of book account before a justice, that the defendant *did not assume and promise*, was accepted by the court, and judgment thereon. *Held*, not a ground for an *audita querela*. *Mason v. Lawrence*, 2 Vt. 560.

37. An *audita querela* does not lie to set aside a judgment rendered in favor of one as administrator, on the ground that he was not in fact administrator but pleaded profert of letters as such. *Barrett v. Laughan*, 6 Vt. 243.

38. **Discretion.** It is discretionary with a justice whether to recall and vacate a judgment rendered by default, and to revive the action, when applied for within two hours from the rendition of the judgment; and an *audita querela* does not lie for his refusal so to do, although he based his decision upon his want of power. *Potter v. Hodges*, 18 Vt. 239.

39. Where a question, whether of law or fact, is properly within the cognizance of a justice of the peace, his decision cannot be revised by *audita querela*—as, for refusing to allow an appearance for the defendant by one professing to have authority. *Sutton v. Tyrrell*, 10 Vt. 87. *School District v. Rood*, 27 Vt. 214. Or for refusing to continue a cause. *Amidon v. Aiken*, 23 Vt. 440.

40. **Informality.** For mere matters of error and informality, *audita querela* will not ordinarily be sustained, unless the complainant has thereby been subjected to some injustice or wrong. *Aldrich v. Bonett*, 33 Vt. 204.

41. **Extent.** Where a justice, under the statute, issued an extent against a collector of taxes for delinquency, after due notice, appearance and hearing, the matter being within his jurisdiction;—*Held*, that the decision of the justice could not be reversed on *audita querela*. *Griswold v. Rutland*, 23 Vt. 324.

42. *Audita querela* does not lie to set aside an extent for the collection of taxes—as an extent for State taxes from the Treasurer of the State—the same not being a judgment or re-

cord of a court. *Poultney v. Treasurer*, 25 Vt. 168.

**43. Complainant in fault.** Where a party has had a legal opportunity of defense, or the injury of which he complains is to be attributed to his own neglect, he cannot be relieved by an *audita querela*. *Staniford v. Barry*, 1 Aik. 321. 8 Vt. 323.

**44.** On a justice writ dated in December 1840, and made returnable, by mistake, Jan'y. 9, 1840, the justice rendered judgment by default Jan'y. 9, 1841. *Held*, that such judgment was not void, and could not be set aside on *audita querela*;—the complainant not having been misled by the obvious error in the writ. *Betty v. Brown*, 16 Vt. 669.

**45. No wrong done.** A sued B before a justice and B gave him to understand that he should appear and defend. On the return day A appeared, but was unable to remain for a trial, and, supposing B would appear, in good faith applied for and procured a continuance, and on the continuance day took judgment by default. B did not appear on either day, and afterwards brought an *audita querela* to set aside the judgment, claiming that the proceedings on the return day worked a discontinuance. *Held*, that as no wrong was intended and no injury occasioned, the complaint should be dismissed. *Aldrich v. Bonett*, 33 Vt. 202,—qualifying and limiting *Paddleford v. Bancroft*, 22 Vt. 529.

**46.** Although in the copy left with the defendant by the officer serving a writ, the signature of the authority issuing it be omitted, this may have effect as notice of the suit; and where the defendant had actual notice of the time and place of trial, and judgment was rendered against him without appearance;—*Held*, that it could not be set aside on *audita querela*. *Collins v. Merriam*, 31 Vt. 622.

**47. Officer's return.** *Audita querela* cannot be sustained to set aside a judgment for want of notice, where the return of the officer serving the writ shows notice. The return is conclusive. *Hawks v. Baldwin*, Brayt. 85. *Witherell v. Goss*, 26 Vt. 748.

**48. Attorney.** It does not lie to set aside a judgment on the ground that it was commenced by an attorney in the name of the complainant and pursued to judgment, without the complainant's knowledge. *Sheldon v. Kelso*, Brayt. 26.

**49.** Nor, upon the allegation of want of due service of the writ and want of notice, where there was an appearance entered for the party by an attorney of the court. This appearing on the record, the fact of the appearance cannot be traversed in this action. *Spaulding v. Swift*, 18 Vt. 214. *Abbott v. Dutton*, 44 Vt. 546.

**50.** By *Redfield, J.* Doubtless, in some

way, the party affected by a judgment collusively obtained by the fraudulent instrumentality of an attorney, whether the attorney acted willingly, or as a dupe, may obtain relief. But we think it should be by application to the court upon petition, or motion, and possibly by writ of error for error in fact, rather than by *audita querela*. *Ib.*

### III. NATURE OF WRIT, PARTIES, &C.

**51. A judicial writ.** A writ of *audita querela* is a judicial writ to the court having the record. It must issue from the supreme court, if the record is there. *Shumway v. Sargeant*, 27 Vt. 442. (*Phelps v. Slade*, 18 Vt. 195. *Comstock v. Grout*, 17 Vt. 512.)

**52.** The county court has no jurisdiction to issue such writ to vacate a judgment of the supreme court. *Warner v. Crane*, 16 Vt. 79.

**53. Parties.** Like *scire facias*, error, *certiorari*, and all other judicial writs, it must be between all the parties to the former proceeding, and no others. *Gleason v. Peck*, 12 Vt. 56.

**54.** All the parties to a judgment or execution sought to be set aside by *audita querela*, must be made parties to the writ. *Herrick v. Orange Co. Bank*, 27 Vt. 584. *Tittemore v. Wainright*, 16 Vt. 173. *Starbird v. Moore*, 21 Vt. 529.

**55.** Judgment by default against two, without notice to either;—this judgment sued, and served upon one, and a new judgment against him; afterwards the other was sued upon the original judgment. On *audita querela* to set aside the original judgment;—*Held*, that it was properly brought in the name of both. *Godfrey v. Downer*, 47 Vt. 599.

**56.** An *audita querela* to set aside an execution issued upon a judgment in favor of two, may be abated if served upon only one of the two; but a judgment rendered against the one on whom service was made, setting aside the execution but leaving the original judgment in full force, was *held* correct. *Clark v. Freeman*, 5 Vt. 122.

**57. Case of a trustee.** An *audita querela* will not lie in favor of the principal debtor and the trustee jointly, to vacate the several judgments rendered against them respectively in a trustee action. *Johnson v. Plimpton*, 30 Vt. 420.

**58.** Where an *audita querela* was brought to set aside a judgment against the complainant, and a trustee;—*Held*, that the trustee had no such interest in the judgment, as that he could object to a discharge and discontinuance of the *audita* by the complainant. *Braynards v. Burpee*, 27 Vt. 616.

**59.** —of subsequent attaching creditors. Subsequent attaching creditors cannot use the name of the debtor, against his will, in bringing

and sustaining an *audita querela* to vacate a judgment and execution against him in favor of the first attaching creditor, either on the ground that such judgment was rendered upon default and without notice, and such execution was issued without giving the recognizance required by the statute; nor on the ground that such judgment was fraudulent as to creditors; nor on the ground that the first attaching creditor agreed with the others to share with them in the proceeds of his execution, and has violated such agreement. The debtor in such case was allowed to control the *audita querela* brought in his name, and to enter a non-suit against the protest of such subsequent attaching creditors. *Essex Mining Co. v. Bullard*, 43 Vt. 238.

**60. Service.** A writ of *audita querela* against a corporation must be served like any other writ against a corporation. *Clark v. National Hydraulic Co.*, 12 Vt. 435.

**61. Death of defendant.** Where the object of an *audita querela* is to recover damages, and the defendant dies pending the suit and commissioners are appointed, the suit should be discontinued, and the claim be presented to the commissioners. *Warner v. Crane*, 16 Vt. 79.

**62. —of complainant.** An *audita querela*, whose basis is altogether personal, not going to the foundation of the judgment, dies with the complainant, and the recognizance falls with it. In such case, the administrator cannot be cited in to prosecute it. *Conn. & Pass. R. R. Co. v. Bliss*, 24 Vt. 411.

**63. Recognizance.** An action was held to lie on a recognizance taken by a judge on issuing an *audita querela*, though the recognizance had not been returned into court. *Anon.* Brayt. 214.

**64.** Where two judges of the county court were authorized to allow a writ of *audita querela*, taking surety;—*Held*, that such writ allowed by the two, but the recognizance taken by only one, should abate. *Hiecock v. Hiecock*, 1 D. Chip. 133.

**65.** No other recognizance for costs was required by the statute of 1822, than was required by sec. 11 of the judiciary act. *Brown v. Stacy*, 9 Vt. 118.

**66.** Under the judiciary act of 1797, a minute of a recognizance upon a writ of *audita querela*, "to insure costs of prosecution in due form of law," was held sufficient as a minute;—and *quare*, whether the want of a minute is any ground of abatement. *Ponter v. Carpenter*, 11 Vt. 589. But see *Sisco v. Hurlburt*, 17 Vt. 118.

**67.** The minute of recognizance signed by a judge allowing the writ, is matter of record, and cannot be contradicted by parol. *Hinman v. Swift*, 18 Vt. 315.

**68.** An *audita querela* will not be dismissed, because of the neglect of the judge signing the writ and granting the *supersedeas*, to take a copy of the writ and recognizance and to file the same in the office of the county clerk. (G. S. c. 42, s. 8.) *Kidder v. Hadley*, 25 Vt. 544.

**69. Affidavit.** It is not necessary that the affidavit to the truth of an *audita querela* should be annexed to, or become part of, the process. The certificate of the judge allowing the writ, that the facts set forth in it were sworn to, and the production of the affidavit on trial of a motion to dismiss, were held sufficient. *Hinman v. Swift*, 18 Vt. 315.

**70. Supersedeas.** A writ of *audita querela*, with the certificate of the judge signing it, that it ought to operate as a *supersedeas*, will not so operate, if, in the recognizance taken by the judge, a material condition required by the statute be omitted. *Perry v. Ward*, 20 Vt. 92. *State Treasurer v. Wells*, 27 Vt. 276.

**71.** Where an execution is superseded on *audita querela* by the judge of the county court allowing the writ, the *supersedeas*, without some order professing to dissolve it, continues in force, though the suit should be removed into the supreme court on exceptions and during its pendency there. *Perry v. Ward*.

**72.** In an *audita querela*, operating as a *supersedeas*, in behalf of a party standing committed to jail, where the recognizance was conditioned for the redelivery of the execution debtor to the custody of the officer, and the payment of all intervening damages, and, in default thereof, the payment of the debt, damages and costs;—*Held*, that on failure to redeliver the debtor the recognizor was liable for the whole debt, as well as for intervening damages and costs;—that the recommitment in such case would be upon the original execution, and it was no excuse to the recognizor that an *alias* execution had not been issued to commit anew. *Hubbell v. Dodge*, 4 Vt. 56.

## AUTHORITY.

**1. Joint—The rule.** Where several are associated in a public trust, a majority may act and bind their principals; but, in the case of a private trust or agency, the concurrence of all is necessary. *Low v. Perkins*, 10 Vt. 532.

**2.** Where an act granting a lottery required three managers and provided a mode of filling all vacancies;—*Held*, that one alone had no power as manager. *May v. Brornell*, 3 Vt. 463. *Rogers v. Hough*, 4 Vt. 172.

**3.** Where lands were conveyed by will to three persons in fee, and to the survivors or survivor of them, in trust to sell and convey

and pay debts and legacies, and the same parties were named executors;—*Held*, that in order to pass the title, all living, although some had not accepted the executorship, must join in the conveyance, and that the deed of one alone conveyed no title. *Williams v. Matlocks*, 3 Vt. 189. 10 Vt. 571.

4. If an authority, in a matter of mere private concern, be confided to more than one agent, it is requisite that all should join in the execution of the power, and they are jointly responsible for each other; but in matters of public trust, or of power conferred for public purposes, if all meet, the act of the majority will bind. *Hodges v. Thatcher*, 23 Vt. 455.

5. The case of commissioners appointed by the probate court falls under the last branch. *Id.*—also auditors. *Nerrell v. Keith*, 11 Vt. 214. *Thompson v. Arms*, 5 Vt. 546.

6. The case of commissioners appointed by a town to make a subscription for stock in a railroad under an act of the legislature, falls under the first branch, as a matter of private appointment. *Danville v. Montpelier & St. J. R. Co.*, 43 Vt. 144.

7. **Revocation of authority.** The plaintiff verbally requested the defendant, his debtor, to pay a certain sum to D, the plaintiff's creditor, which the defendant verbally promised to do, and the plaintiff afterwards requested D to call upon the defendant for the money. D did so, when the defendant declined to pay. The plaintiff then brought this suit on the original indebtedness, after which the defendant paid D the sum ordered. *Held*, that the bringing of the suit was an implied revocation of the parol direction, or order, and the payment was without authority of the plaintiff and could not be allowed

to the defendant. *Sargent v. Seward*, 31 Vt. 509.

8. —**by death of principal.** The death of the principal instantly terminates the power of the agent, so that all subsequent dealings with the agent are void and of no effect, though the parties were ignorant of such death. *Davis v. Windsor Savings Bank*, 46 Vt. 728.

9. Where a person had given a letter of credit authorizing another to "value" on him to a certain amount within a limited time, agreeing to accept the drafts drawn and to pay them if not paid by the drawee at maturity, the death of such person was *held* to operate, *per se*, as a revocation of the authority thereafter to draw upon him, although the time specified in the letter had not then expired, and although the person for whose security the letter was given had no notice of such death. *Michigan State Bank v. Leavenworth*, 28 Vt. 209.

10. A bill of exchange, with date and time of payment blank, was indorsed by L to R. Afterwards, and after L's death, R presented it to the plaintiff for discount, who, having no suspicion of L's death, and relying upon the indorsement, at the request of R filled the blanks in the bill, dating it as of that date, and discounted it in the ordinary course of business, paying the avails to R. In an action against L's estate to recover the amount of the bill;—*Held*, that upon the face of the bill L was an accommodation indorser; that, as such, the authority given to fill up the bill and pass it was not coupled with an interest and was revocable, and that the death of L operated *per se* to revoke the agency and authority of R, and that the estate of L was not liable upon the bill. *Mich. Ins. Co. v. Leavenworth*, 30 Vt. 11.

See AGENT.

## B.

### BAIL ON MESNE PROCESS.

1. **How to charge bail.** In order to charge bail upon a writ, the execution must be returned into the office from which it issued, with a *non est inventus* return thereon, within the life of the execution. *Turner v. Lowry*, 2 Aik. 72, overruling *Stevens v. Adams*, Brayt. 29.

2. A return of *non est* made upon an execution after it has expired, but dated back within the life of the execution, is a false return, for which the officer is liable to the bail who may have suffered damage thereby. *Cooper v. Ingalls*, 5 Vt. 508.

3. A return of an execution, *non est*, made at any time within the sixty days, is *prima facie* sufficient to charge bail upon the writ;

but if made prematurely, and to the injury of the bail, the effect of the return may be avoided by plea. *Howe v. Ransom*, 1 Vt. 276. 12 Vt. 197.

4. To hold bail on *mesne* process, where the debtor is arrested in a county other than that of his residence, the return of *non est* upon the execution must be made by an officer of the county where the debtor resides. *Fuller v. Howard*, 6 Vt. 561. (*Collamer, J.*, dissenting.)

5. The requirement of G. S. c. 33, s. 63, that a writ of *scire facias* against bail on *mesne* process be brought within one year after the judgment against the principal, is in the nature of a condition, in order to create and establish a claim against the bail, rather than a statute of limitation upon the creditor's remedy to enforce

a right, or duty, already due and fixed upon the bail. *Strong v. Edgerton*, 22 Vt. 249.

6. Where such writ was taken out within the year, but was made returnable before a justice more than sixty days after the expiration of the year, so that it could not be legally served within the year;—*Held*, that this was not a *bringing of the writ* within the year, and that the bail was discharged. — *Id.*

7. **Pleading.** A declaration in *scire facias* against bail, upon a writ in an action upon contract, must aver that the execution issued against the body of the principal. *Blood v. Crandall*, 28 Vt. 396. *Davis v. Dorr*, 30 Vt. 97.

8. **Officer may become bail.** An officer serving *mesne* process may himself become bail for the debtor, by indorsing the writ as such; and, in an action against him as such bail, he is estopped from averring that no bail was in legal effect taken by him. *Merriam v. Armstrong*, 22 Vt. 26.

9. **Action for neglect to take bail.** In an action for the neglect of an officer to take bail upon a writ, it seems not necessary that there should be a formal return, if any, of *non est inventus* upon the execution. *Orois v. Isle La Motte*, 12 Vt. 195. 18 Vt. 456.

10. —**for taking insufficient bail.** In an action against a sheriff for taking insufficient bail on *mesne* process, it is no defense that the bail was apparently good when taken. He must make it appear that the bail was "amply sufficient,"—that he possessed a substantial responsibility in point of property, and such as would probably continue. *Hazard v. Slade*, 1 D. Chip. 199. *Harrington v. Bogue*, 15 Vt. 179. *Bank of Middlebury v. Rutland*, 33 Vt. 427.

11. **Privity of bail.** Persons standing as bail are so far privies to a judgment against their principal, that they cannot avoid it for any irregularity in the proceedings upon which it was obtained. *Stedman v. Ingraham*, 22 Vt. 346. 27 Vt. 213. *Parkhurst v. Sumner*. 23 Vt. 538. *Chamberlain v. Godfrey*, 36 Vt. 880.

12. **Release.** Before the Statute of 1818;—*Held*, that the death of the principal after a return of *non est inventus* did not release the bail on the back of the writ. *Boardman v. Stearns*, Brayt. 35.

13. *Held*, that the bail was excused from surrendering his principal where the principal was confined in the State's prison of another State, before the bail had become fixed by a *non est* return upon the execution. *Hall v. Stearns*, 13 Vt. 35.

14. **Surrender of principal.** After judgment rendered by a justice, the application by the defendant to be admitted to the poor debtor's oath was continued to a future day. *Held*, that the surrender of the principal by his bail

on such adjourned day was seasonably made. *Chase v. Holton*, 11 Vt. 347.

15. Bail can only surrender his principal *into court*, i. e. while the court is in session. It cannot be done after the adjournment of a justice court, although within the two hours of the time set for trial. *Converse v. Washburn*, 43 Vt. 129.

16. The surrender of the principal by his bail should be pleaded as matter of discharge, and not of performance; but if pleaded as performance, this is but a defect of form, and, upon general demurrer, the court will give the facts pleaded their legal operation as a discharge of the recognizance. *Gray v. Fulsome*, 7 Vt. 452.

17. **Release on motion.** Where one privileged from arrest is arrested and gives bail, it is within the general discretion of the court where the suit against either the principal or the bail is pending, to enter an *exoneretur* on the bail bond, on motion of either the principal or the bail. Where this is done, it is conclusive upon the parties and all interested. *Washburn v. Phelps*, 24 Vt. 506.

18. **Defense to scire facias.** Under Vermont practice, wherever bail are entitled to be discharged in the original action, the same facts may be pleaded as a bar to a *scire facias*. *Van Ness v. Fairchild*, 1 D. Chip. 153. *Mattocks v. Judson*, 9 Vt. 343. *Aiken v. Richardson*, 15 Vt. 500. 17 Vt. 365. 20 Vt. 610. *Belknap v. Davis*, 21 Vt. 409. *McFarland v. Wilbur*, 35 Vt. 342.

19. Where the surrender of the principal could not be legally followed by further proceedings against his body, his bail may be released, and are not liable upon a *scire facias*—as, where no execution could legally issue against the body by reason of a defect in the original affidavit. *Aiken v. Richardson*, 15 Vt. 500.

20. So, where the principal after the original arrest has been discharged in bankruptcy. *Belknap v. Davis*, 21 Vt. 409. See *Comstock v. Grout*, 17 Vt. 512.

21. So, where the principal by enlisting as a soldier had, by act of the legislature, (1861 No. 8), become privileged from arrest. *McFarland v. Wilbur*, 35 Vt. 342.

22. In *scire facias* against bail on *mesne* process, a plea averred, that in consideration that the defendants would cause their principal to attend at the trial, the plaintiff promised that he would release them as bail, and that they did cause him so to attend;—Plea *held* good on general demurrer. — *Id.*

## BAILMENT.

## I. IN GENERAL.

## II. PARTICULAR BAILMENTS, AND NEGLIGENCE THEREIN.

## I. IN GENERAL.

1. **As distinguished from a sale.** Where property, as cattle, sheep &c., are left to another under a contract that he should return the same or others of equal value, or shall return the same or pay a certain sum in lieu thereof, such alternative is not inconsistent with the continued ownership of the bailor, nor necessarily converts the bailment into a contract of sale, or bailment with a power of sale. *Downer v. Rowell*, 22 Vt. 347. *Smith v. Niles*, 20 Vt. 315. *Grant v. King*, 14 Vt. 367.

2. The plaintiff delivered certain sheep to the defendant for which he executed his receipt agreeing to keep the sheep, or cause them to be kept, for "the full term of three years, and return the same, or others in their place as good as they are, at the expiration of the three years." *Held*, that this was not a sale, nor bailment with power of sale; and that on the defendant's neglect on demand at the end of the term to return the sheep, he was liable in trover. *Downer v. Rowell*.

3. The plaintiff delivered to the defendant a quantity of palm leaf, for which the defendant gave a written receipt and agreement to get it worked into hats, or return it when called for, and, if used, to account for it at specified prices. *Held*, as to the leaf not worked into hats, that this was not a sale, but a bailment, and that the defendant was liable for lack of ordinary care in the preservation of the leaf. *Brown v. Hitchcock*, 28 Vt. 452.

4. **Power of sale.** A bailment of property with a power of sale, is a personal trust which the bailee cannot delegate. *Hunt v. Douglass*, 22 Vt. 128.

5. Where one bails property to another to sell, or to use with a power of sale, this does not authorize an exchange; but if the bailee in such case makes an exchange, the property procured by the exchange does not, as matter of law, become the bailee's. This depends upon whether the bailor, within a reasonable time, adopts or repudiates the exchange, as to which he has an option. The bringing of an action for the original property would be a repudiation; while a suit for the property got by the exchange would be a ratification—ordinarily. *Strong v. Adams*, 30 Vt. 221. *Hunt v. Douglass*.

6. **Misappropriation—Conversion.** If the bailee of an article for use sells it without authority, the owner may recapture it from the possession of the purchaser,—not committing

a breach of the peace. *Heacock v. Walker*, 1 Tyl. 338.

7. Any misuse or abuse of the thing bailed or leased, in the particular use for which the bailment was made, will not enable the general owner to maintain trespass or trover against the bailee. But if the thing be misappropriated or put to a different use from that for which it was bailed, by consent of the bailee or lessee—as where it is sold—such act determines *ipso facto* his right of possession, and revives the right of the bailor to immediate possession, and he may maintain trespass, trover or replevin. *Swift v. Moseley*, 10 Vt. 208. *Briggs v. Oaks*, 26 Vt. 138. *Briggs v. Bennett*, 26 Vt. 146. *Gray v. Stevens*, 28 Vt. 1.

8. In case of a conditional sale, without power of sale given, the very act of sale by the conditional vendee terminates the bailment and gives the conditional vendor the right of immediate possession—although part of the purchase price has been paid—and the right to retain the property until the balance is paid. *Dunham v. Lee*, 24 Vt. 432.

9. The plaintiff let to the defendant a carriage suitable to be drawn by two horses, to be used in the village of B, and not to be run out of that town. The defendant, without the plaintiff's knowledge, sent the carriage, with two pairs of horses attached and heavily laden, twelve miles out of the town, and the carriage was injured in such use. *Held*, that the defendant was liable in trover for the value of the carriage; and that the offer of the defendant, even after he had got the carriage repaired, to return it to the plaintiff, did not go in mitigation of damages;—that the defendant could not compel him to take it back. *Hart v. Skinner*, 16 Vt. 138.

10. **Use as a conversion.** As to the right of a bailee to use the property bailed, no general rule of universal application can be laid down, but, generally, cases must be governed by their own particular circumstances, in the absence of any contract on the subject of the use. *Peck, J.*, in *Atwood v. Davenport*, 43 Vt. 30.

11. A horse and wagon were left by P with the defendant, to be kept at P's charges for eight or ten days, when he would call for them. P left and never returned, nor was heard of afterwards. The defendant became satisfied, after a time, that P did not own the property, but had abandoned it and was acting in bad faith towards the owner. The defendant did not know who or where the owner was. He continued to keep the property for about five years, and after a time used it in his business. *Held*, that, under the circumstances, the defendant had a right to use the property moderately and prudently, to the extent of compensating him for his charges; and that he was not answerable to the owner therefor as for a conversion. *Id.*



12. In an action on the case, the declaration alleged the bailment of the plaintiff's mare to the defendant to be kept through the winter, and that the defendant, without consent of the plaintiff, rode, drove and used the mare, and by such use the mare was greatly injured and miscarried her foal; but did not set up any contract or breach of contract as to the use of the mare;—*Held*, that the plaintiff had by his declaration tied himself up to a recovery upon the ground of an *injury* to the mare by the use of her, and that, without proof of such injury, he could not recover. *Graves v. Seeverens*, 40 Vt. 636.

13. **Joint conversion.** The wrongful sale of property by a bailee is a conversion in both the seller and the purchaser—a joint conversion—for which the bailor may maintain trover against both jointly. *Buckmaster v. Mower*, 21 Vt. 204. *Grant v. King*, 14 Vt. 367.

14. The owner of cattle leased them, with a farm, for four years, under an agreement that at the expiration of the four years the lessee might return the cattle, or pay a stipulated price [an under price] for them. Before the expiration of the term the lessee sold the cattle from the farm, and the lessor, within the term, brought trover therefor against both the lessee and the purchaser. At the end of the term, the lessee tendered the stipulated price. *Held*, that by such sale the right of possession was restored to the plaintiff, and that the lessee forfeited his own accruing rights under the contract; and that the plaintiff was entitled to recover, as against both defendants, the value of the cattle at the time of the sale, and interest thereon. *Grant v. King*.

## II. PARTICULAR BAILMENTS, AND NEGLIGENCE THEREIN.

15. **Measure of diligence—In general.** The true measure of liability in all cases of bailment [as, of an officer in case of property attached] is, that the bailee is bound to that degree of diligence which the manner and the nature of his employment make it reasonable to expect of him, as a *prudent* and *careful* man. *Redfield, C. J.*, in *Briggs v. Taylor*, 28 Vt. 180; and see *Folsom v. Underhill*, 36 Vt. 591.

16. **Mutual benefit.** Where the defendant injured the plaintiff's sulky while driving it for the mutual gratification and pleasure of both parties, as a means of recreation and amusement;—*Held*, that the defendant's liability was to be measured by the rule of common or ordinary care—common prudence—and he was liable for ordinary neglect. *Carpenter v. Branch*, 13 Vt. 161.

17. **Deposit.** Money deposited with another for safe keeping, and for the sole benefit of the bailor, without any special undertaking

on the part of the bailee, and without compensation offered, asked or expected for keeping the money, constitutes a simple *depositum* or naked deposit. In a bailment of this nature, the bailee is bound to exercise only slight diligence, and is responsible only for gross neglect. *Spooner v. Mattoon*, 40 Vt. 300.

18. In such case, the county court, on a trial by the court, found that the defendant, the bailee, "was not only lacking in the exercise of *ordinary* care, but was chargeable with *actual* negligence," but without finding it to have been *gross* negligence; and having, on such finding, rendered judgment against the defendant;—*Held* erroneous, and the judgment was reversed. (Different degrees of care and of negligence, as legal rules, recognized.) *Ib.*

19. On a review of facts and evidence reported;—*Held*, that the loss of money held by a bailee as a naked deposit, and lost through a brief forgetfulness in the keeping of the money on his way to return it, is not necessarily gross negligence, since this is consistent with an honest intention and effort to return the money. *Ib.*

20. A mere depositary of money is not liable to an action for the money, unless his relation has been changed to that of a debtor, by a refusal to pay over the money upon proper request, or by a wrongful appropriation of it. *Jackman v. Partridge*, 21 Vt. 558.

21. **Pledge.** The general property in a chattel pledged remains in the pledgeor, and only a special property passes to the pledgee. It is essential to the validity of a pledge, that it be accompanied by delivery of possession; and if allowed to go back into the possession of the pledgeor, the special property created by the bailment is determined and gone. *Fletcher v. Howard*, 2 Aik. 115.

22. By the mortgage of a chattel the general property passes, whereas by a pledge only a special property passes. Possession by the pledgee is essential to a pledge, whereas, in case of a mortgage, the mortgagor may, as between the parties, retain possession. The same terms which create a pledge, if possession passes, will generally be held to create a mortgage, if possession is retained. *Connor v. Carpenter*, 28 Vt. 237, and see *Wood v. Dudley*, 8 Vt. 480. *Atwater v. Mower*, 10 Vt. 75. *Coty v. Barnes*, 20 Vt. 78. *Blodgett v. Blodgett*, 48 Vt. 82.

23. A pledgee may convey such title as he has in the pledge. *Bullard v. Billings*, 2 Vt. 309.

24. A pledgeor has the right of redeeming the pledge at any time before a foreclosure or sale; and he is not a trespasser by peaceably taking possession of the pledge after a tender of the amount due, although after the day fixed for payment. *Taggart v. Packard*, 89 Vt. 626.

25. The holder of a promissory note, right-

fully holding the same as collateral security, is entitled to retain the note until payment of, or offer to pay, the full amount for which it is held as security. *Benoir v. Paquin*, 40 Vt. 199.

26. A, the owner of a mowing-machine, by his writing certified that he "pledged, pawned and delivered" the same to B as security for the payment of his note to B. The writing contained a stipulation, that A "has the right to sell said machine at any time, by paying B the said note and interest." A, without paying the note, and against the prohibition of B, sold the machine. *Held*, that A had the right of selling the machine only by paying the debt secured by the pledge, and that he was liable to B in trover for such sale. *Prescott v. Prescott*, 41 Vt. 131.

27. Where W turned out or pledged goods to B, with the understanding that they should be sold through a named factor, and that B should credit W the proceeds of the sale deducting the factor's commissions, and B committed the goods to the factor to be sold, taking a receipt therefor to himself;—*Held*, in a suit by B against W, that it was not a sufficient accounting for B to credit W the proceeds of the sale as reported by the factor, where the amount so reported was much less than the market price of the goods; that, the factor being liable to that extent, B was the proper party to call him to a just accounting, in case W should not assume to do so himself, and where B had not, on reasonable notice to W, abandoned in his behalf any further claim on the factor. *Bigelow v. Walker*, 24 Vt. 149.

28. Where one is liable to account for property rightfully taken and disposed of, he is liable only for the amount actually realized, where he has acted with good faith and common prudence and due diligence; and where he receives, as collateral security, the property in such an unfinished state that chancery would have ordered it finished by a receiver, and he finishes it with his own means, he is entitled in equity to have such expenses allowed him in accounting for the property; and the right of an attaching creditor of the general owner is subordinate to such equity. *Rowan v. State Bank*, 45 Vt. 160.

29. **Livery stable keeper.** Livery stable keepers, and others who let horses and carriages for hire, are answerable to the hirer for an injury which happens by reason of a defect in the carriage, which might have been discovered by the most careful and thorough examination; but not for an injury which happens by reason of a hidden defect, which could not, upon such an examination, have been discovered. *Hadley v. Cross*, 84 Vt. 586.

30. **Warehouseman.** Although a wharfinger or warehouseman receiving goods to keep, cannot, ordinarily, in a suit against him, dis-

pute the title of his bailor, yet if the bailor claims the goods by an illegal title, and they are taken out of the custody and care of such bailee by authority of law, the latter may show this in excuse for not delivering them. *Burton v. Wilkinson*, 18 Vt. 186.

31. **Wharfinger.** A delivery of goods on a wharf is not necessarily a delivery to the wharfinger. *Blin v. Mayo*, 10 Vt. 56.

## BANK.

1. **Directors.** If a particular line of procedure has been resolved upon, or is necessarily incident to the business of a bank, it is not essential that every expenditure of money, or engagement of service, or other item within the line so marked out, should receive the consideration of all the directors outside a meeting, or that a meeting of the board should act upon it; nor does all the executive business pertaining to a bank come solely within the province of the cashier. So *held*, where the contract for service to a bank having five directors was concluded by two directors and subsequently approved by a third, but without formal vote or conference with the other two directors, and without their knowledge or that of the cashier, but not designedly concealed. *Bradstreet v. Bank of Royalton*, 42 Vt. 128.

2. **Cashier.** *Held*, that a bank was bound by the representations of its cashier, made in the ordinary course of business, as to the payment of a note in the bank, upon the faith of which the maker of the note acted. *Manufacturers' Bank v. Scofield*, 39 Vt. 590.

3. The defendant signed a writing addressed to the person, by name only, who was cashier of the plaintiff bank, saying: "I wish you to discount a note," &c., and guaranteeing its goodness and payment. The bank, on the credit of the guaranty, discounted the note. *Held*, that an action on the guaranty lay in the name of the bank, counting upon a promise to the bank. *Woodstock Bank v. Downer*, 27 Vt. 482.

4. Notice to the attorney of a bank, or to the cashier, while acting in the matter of attaching land for the benefit of the bank, of an equitable right in a third person—as, by a defective deed on record,—is notice to the bank. *Vt. Mining Co. v. Windham Co. Bank*, 44 Vt. 489.

5. The forfeiture of \$500, imposed by Stat. 1865, No. 6, s. 5, upon cashiers of banks for failing to transmit to town clerks a list of shareholders, seems to be a fixed compensation to the town for the wrong done, and an exclusive remedy. *Newman v. Waite*, 48 Vt. 587. So *held*—*Brattleboro v. Wait*, 44 Vt. 459.

6. An action by the town to recover such forfeiture is remedial, not penal, and is not barred by the two years' limitation of G. S. c. 62, s. 5. *Id.* See *Burnett v. Ward*, 42 Vt. 80.

7. **Certifying checks.** The business of advancing *certified* or *accommodation* checks by banks to brokers beyond their deposits, to be made good during the day, is one in which the strictest and utmost confidence and good faith are understood and expected, and scrupulous fidelity and punctuality are required; and it is a fraud in the drawer to procure his check to be certified after he has become to his knowledge insolvent, and unable to make his check good, as agreed. *Bank of Republic v. Baxter*, 81 Vt. 101.

8. S, being insolvent, fraudulently procured the certification of his check on Bank A, which he deposited in Bank B to the credit of Bank C for the use of H, to whom he was indebted in the same sum. H had previously directed S to deposit that sum for him in bank, but had had no communication with Bank B on the subject. On receiving the deposit, Bank B addressed a letter to Bank C, informing them of such deposit and credit, but, before receipt of the letter, notified them by telegraph, by procurement of Bank A, not to make payment upon this credit as there was something wrong. H was also informed by telegraph from S that payment of the check had been stopped, and these telegrams were received as early, at least, as H received notice of the deposit, and before he had in any way acted upon it. Bank A, before becoming fully informed of the fraud, had paid the money on the check to Bank B. On a bill in chancery brought by Bank A;—*Held* (*Bennett, J.*, dissenting), that Bank B was not the agent of H, so that the reception of the money by that Bank was in law a payment to him, and that Bank A was entitled to reclaim the money. *Id.*

9. **Bank stock.** The return of payments made on subscriptions for bank stock, such return being made in the form of loans to the subscribers upon private security, was *held* a violation of a bank charter; but, on information for this cause, the court in their discretion refused to vacate the charter. *State v. Essex Bank*, 8 Vt. 489.

10. Where the banking law prohibited the votes, either personally or by proxy, of stockholders residing out of this State;—*Held*, that such stock could not be voted upon by residents of this State to whom it had been regularly transferred upon the books of the bank, but only for the purpose of enabling them to vote upon it, and who held it only in trust for the non-resident real owner. *State v. Hunton*, 28 Vt. 594.

11. There was a provision in a bank charter that no transfer of stock should be valid unless

recorded in a book to be kept by the bank for that purpose, and unless the person making the transfer should have previously discharged all his debts to the bank. A, a stockholder, without consideration and for the purpose of increasing the vote upon his stock at elections, transferred upon the book certain shares to B, but A afterwards, for years, wholly controlled the shares and took the dividends, and then B purchased the shares of A. Before such purchase, A became indebted to the bank, upon the faith that he was the owner of the shares, and after such purchase, but without knowledge thereof by the bank, the bank attached and sold the shares upon the debt of A. *Held*, that B, under the circumstances, was bound to make inquiries as to the state of the title before he purchased, and that as between him and the bank his title did not accrue until he had given notice of his purchase, whereby he had become the beneficial owner; and that the title of the bank must prevail. *Sabin v. Bank of Woodstock*, 21 Vt. 358.

12. The *bona fide* purchaser of bank stock of one in whose name the shares stand on the books of the bank acquires good title against the world. The mode of transfer pointed out in the charter is the only mode which the public are bound to regard as conveying the title; and all persons, unaffected with notice to the contrary, are at liberty to act upon the faith of the title being where it appears on the books of the corporation to be. *Redfield, J. Id.*

13. **Law regulating interest.** A bank incorporated in this State cannot recover more than six per cent. interest for its loans, nor upon securities taken therefor, though the loans may be made and the securities executed in another State where a higher rate of interest is allowed by law. *Farmer's Bank v. Burchard*, 33 Vt. 346.

14. In this State, since the statute of 1836, the contracting by an incorporated bank for interest upon loans or discounts exceeding the rate prescribed by the laws of the State, whether this be treated as aviolation of its charter and the laws governing its existence and acts, or as *ultra vires*, as the term is technically used, has no other effect upon the contract than to render it void as to such excess. *Id.* *Bank of Middlebury v. Bingham*, 33 Vt. 621.

15. **Law restricting loans.** Where the statute prohibited banks from loaning more than ten per cent. of their capital to one person and subjected the directors consenting thereto to a penalty, and to an action for damages therefor;—*Held*, that neither the party who had obtained such loan, nor his surety, could set up in defense such violation of the statute. *Farmers' Bank v. Burchard*.

16. **"Bank fund."** Under the safety fund

bank act of 1831 (C. S. c. 84).—*Held*, that such part of the safety fund as had been contributed by a particular bank could not be withheld from appropriation for payment of the debts of an insolvent bank, although such bank became insolvent before the other came into existence. *Ethood v. State Treasurer*, 23 Vt. 701.

17. To a bill by the receiver of an insolvent bank brought to charge the "bank fund," the State Treasurer is a proper party defendant. *Danby Bank v. State Treasurer*, 37 Vt. 541.

18. The Danby Bank was in business several years without contributing to the "bank fund," the directors giving bonds instead. In 1856 no bonds were given, and for 1856 and 1857 the bank contributed to the "bank fund," and became insolvent. *Held*, that the liability of the "bank fund" for payment to the bill holders attached at once upon the failure to give the bonds. *Ib.*

19. Under the Bank Act (C. S. c. 84).—*Held*, that the giving of bonds for redemption, according to s. 87, did not authorize a bank to withdraw, or the State treasurer to pay to it, any part of the fund previously deposited, except upon the expiration of its charter. *Held*, also, that the "bank fund" was the property of the banks contributing to it, and was not absorbed by the State as part of its general assets, but was to be kept separate and be managed by the treasurer; and hence, though reduced by the wrongful act of the treasurer in paying it back to other banks not entitled to it, the order by *mandamus* should not require him, as treasurer, to pay to the receiver of an insolvent bank, which had contributed to the fund, any money of the State as distinguished from the "bank fund." *Miner v. State Treasurer*, 39 Vt. 92.

20. Payment in bills of the bank. In an action to recover a debt to an insolvent bank brought in the name of the bank by an equitable assignee, where the defendant had notice of such interest before suit brought;—*Held*, that, under the charter, the debt could be paid in the bills of the bank, but not the costs of the suit. *Bank of Bennington v. Booth*, 16 Vt. 360.

21. Negotiable paper, not made payable upon its face or by direct indorsement to a bank, was *held* not subject to C. S. c. 84, s. 82, after the bank had ceased to be the owner of it;—the act providing, that the bills of a bank shall be received by the bank in payment of all demands "made payable to, or the property of, the bank." *Bruce v. Hawley*, 31 Vt. 643.

22. National banks. *Held*, that the proviso to Sec. 41 of the national banking act of June 3, 1864, allowing the assessment and taxation of shares in a national bank against the owner "imposed by or under State authority at the place where such bank is located, and

not elsewhere," is not in conflict with the statute requiring such shares to be set in the list of the town where the owner resides, being other than that where the bank is located;—that this proviso merely requires that the tax, to be valid, shall be imposed under the State authority existing at the place where the bank is thus located, and does not limit the place of assessment. *Clapp v. Burlington*, 42 Vt. 579.

23. The cashier of a National Bank is subject to the penalty imposed by act of 1865, No. 6, for neglect to return to town clerks the names of the stockholders residing in such town. *Newman v. Wait*, 46 Vt. 689.

24. The taking of special deposits to keep, merely for the accommodation of the depositor, is not within the authorized business of banks organized under the National Banking Act of 1864; and their cashiers have no power to bind them to any liability on any express contract accompanying, or any implied contract arising out of, such taking. *Wiley v. National Bank of Brattleboro*, 47 Vt. 546.

25. Savings bank. A deposit in a savings bank stated in the depositor's "deposit book," not made payable to order or bearer, cannot be assigned so as to enable the assignee to maintain an action therefor against the bank. *Howard v. Savings Bank*, 40 Vt. 597.

## BANKRUPTCY.

### I. U. S. BANKRUPT ACT OF 1841.

### II. U. S. BANKRUPT ACT OF 1867.

#### I. ACT OF 1841.

1. Act of bankruptcy. A conveyance or assignment by a trader in embarrassed circumstances, of all his property to a particular creditor, whether made voluntarily or under pressure of legal process, or whether made with the intention of taking the benefit of the bankrupt act or not, is an act of bankruptcy under the Act of 1841. *Gassett v. Morse* (U. S. D. C.), 21 Vt. 627.

2. Preference. To constitute a preference, the prevailing doctrine seems to be, that a payment, where it consists of an appropriation of a part only of the debtor's property, must be made in contemplation of bankruptcy, and must be voluntary. Both must concur. Something more must appear than mere insolvency; and to be voluntary, the payment must originate with the debtor, the first step being taken by him and not by the creditor. *In re Rowell* (U. S. D. C.), 21 Vt. 620. *Ib.* 631.

3. A man may be insolvent, and yet go on with his business and with the *bona fide* inten-

tion and expectation of saving himself from breaking or failing, and of being able to pay his debts; and a payment or transfer under such circumstances, though voluntary, would not be a preference within the meaning of the Bankrupt Act. *In re Pearce* (U. S. D. C.), 21 Vt. 611.

4. **Lien.** *Held*, that where property was attached before the alleged act of bankruptcy was committed, and judgment was obtained and the property seized in execution before the filing of the petition, though after the act of bankruptcy, this created a *lien*, in the absence of fraud or collusion, which was protected by the Act; yet where the creditor had notice of the act of bankruptcy before his attachment, or of the debtor's intention to take the benefit of the act, the attachment was a fraud upon the act and did not create a lien; and that the pendency of the petition was itself notice such as to defeat the attachment. *Downer v. Brackett* (U. S. D. C.), 21 Vt. 599. *Hovess v. Spaulding* (U. S. C. C.), 21 Vt. 610.

5. Under the Bankrupt Act, where a creditor has acquired a lien by an attachment which is protected, he is entitled to have judgment in his suit, and to take execution against the property attached. *In re Rowell* (U. S. D. C.), 21 Vt. 620.

6. The term *lien*, in common acceptation, is understood and used to denote a legal claim or charge on property, either real or personal, for the payment of any debt or duty, although the property be not in the possession of him to whom the debt or duty is due. Thus an attachment is denominated a *lien* in the statutes of this State, and the term is used in this sense in the U. S. Bankrupt Act of 1841. *Downer v. Brackett* (U. S. D. C.), 21 Vt. 599.

7. Such *lien* by attachment is protected under that Act. *Id.* *In re Rowell*, 21 Vt. 620. *In re Reed*, 21 Vt. 635.

8. **Claim assigned.** Where one, prior to his petition in bankruptcy, absolutely assigns a chose in action, an action thereon may, after such petition, and after his discharge, be maintained either in his own name for the benefit of the assignee of the demand, or in the name of the assignee in bankruptcy. *Stedman v. Gassett*, 18 Vt. 346. *Hayden v. Rice*, 18 Vt. 553, and note.

9. The plaintiff before his bankruptcy made, for good consideration, an equitable assignment of a chose in action [a book account]. *Held*, that this claim did not pass to his assignee under the Bankrupt Act; and that having purchased it back after his certificate of discharge, he could sustain an action in his own name to recover it. *Blin v. Pierce*, 20 Vt. 25.

10. **Remedy under State laws.** *Held*, that a creditor who had not proved his debt might, before the bankrupt had procured his

discharge, pursue such remedies against the bankrupt as were afforded by the State laws; and the U. S. District Court in bankruptcy refused, before such discharge, and in such case, to discharge the bankrupt from imprisonment under State process. *In re Comstock* (U. S. D. C.), 22 Vt. 642.

11. **Injunction.** *Held*, that the District Court could grant an injunction in behalf of the assignee of a bankrupt, where the proceedings in bankruptcy were instituted and the estate was being administered in another District. *Moore v. Jones* (U. S. D. C.), 23 Vt. 739.

12. **Debts provable.** A judgment in an action of tort is a debt provable against the estate of the bankrupt, and, although not proved, is barred by the final discharge, although the cause of action arose from the wilful and malicious act of the defendant, and was so adjudged and certified. *Comstock v. Grout*, 17 Vt. 512. *In re Comstock* (U. S. D. C.), 22 Vt. 642.

13. *Held*, that debts of the bankrupt, originating between the filing of the petition and the decree of bankruptcy, were provable under the commission, and, although not proved, were barred by the certificate of discharge. *Spalding v. Dixon*, 21 Vt. 45.

14. **Discharge.** *Held*, that a judgment obtained pending the bankruptcy proceedings, for a provable debt, was barred by such certificate, not only as to the debt, but the costs also. *Harrington v. McNaughton*, 20 Vt. 293. *Downer v. Rowell*, 26 Vt. 897.

15. Discharge refused, by reason of a fraudulent preference, upon the facts stated. *In re Chase* (U. S. D. C.), 22 Vt. 649.

16. The objection to a bankrupt's discharge, on the ground of concealment of his property, involves not only a charge of gross fraud, but also the crime of false swearing, and therefore ought to be substantiated, either by direct testimony, or by such facts as afford unequivocal circumstantial evidence of it. *In re Pearce* (U. S. D. C.), 21 Vt. 611.

17. Where all the property of a bankrupt was under an attachment when he filed his petition;—*Held*, that it was no objection to his discharge, that he had consented to the sale of his personal property on the attachment under the statute of this State, nor that he had confessed judgment in the suit—it appearing that the debt was *bona fide* and due—nor that he had executed to the creditor a quitclaim deed of all his interest in the real estate—it being previously incumbered by mortgage to nearly its full value. *In re Reed* (U. S. D. C.), 21 Vt. 635.

18. **Impeachment of discharge.** A discharge in bankruptcy cannot be impeached for any instances of fraud which were urged in the U. S. District Court in objection to the dis-

charge; but may be, for further and other instances of fraud. *Downer v. Rowell*, 25 Vt. 386.

19. In answer to a plea of discharge in bankruptcy under the Act of 1841, the plaintiff may, under the 4th section, give written notice specifying the several fraudulent acts or concealments relied upon to avoid the plea; but if, instead of so doing, the plaintiff adopts the form of a special replication, thereby calling for a rejoinder and special traverse, his replication must be single; and where it set up more than one distinct transaction, it was held ill on special demurrer. *Downer v. Rowell*, 26 Vt. 397.

20. The effect of a discharge in bankruptcy, as to a particular debt, is not avoided by the omission of the bankrupt to state such debt in his schedule, unless such omission involved a fraudulent concealment. *Downer v. Dana*, 22 Vt. 337.

21. **Effect of discharge.** A discharge in bankruptcy is not a bar to an action against the sureties of the bankrupt upon a jail bond, for an escape committed between the decree in bankruptcy and the final discharge. *Dyer v. Cleveland*, 18 Vt. 241.

22. A note discharged by a certificate in bankruptcy is *functus officio* and ceases to be negotiable. The indorsee cannot recover thereon by force of a new promise made to the payee. It is the new promise alone which gives the action, and this is not negotiable. The action must be in the name of the person to whom the promise is made. *Walbridge v. Hurroon*, 18 Vt. 448.

23. A discharge in bankruptcy was held to be no bar to an action for contribution by a co-surety on account of a payment made after the discharge, upon a liability for the principal which existed before the bankruptcy. *Swain v. Barber*, 29 Vt. 292.

24. An *audita querela* lies in behalf of a debtor confined in close jail, against the creditor who refuses to release him after he has received his discharge in bankruptcy. *Comstock v. Grout*, 17 Vt. 512. 21 Vt. 566.

25. *Aliter*, where the debtor is admitted to the jail liberties upon jail bond. In such case he must judge for himself, and the creditor is not bound to do any act to ratify the discharge. *Gould v. Mathewson*, 18 Vt. 65. 21 Vt. 566.

26. **Pleading.** A plea alleging the decree in bankruptcy, and the subsequent discharge of the defendant and certificate thereof without setting forth the previous proceedings, and concluding with a verification, was held sufficient. *Downer v. Chamberlin*, 21 Vt. 414.

27. In an action on a promissory note against several, with a joint plea of the general issue, the plaintiff put in evidence the discharge in bankruptcy of one of the defendants, with

his consent but against the objection of the other defendants, and verdict and judgment were rendered in favor of that defendant but against the others. Held not erroneous. *Miner v. Downer*, 20 Vt. 461.

28. A joint contractor who has obtained his discharge in bankruptcy must, nevertheless, be joined as defendant in an action upon the contract. For non-joinder in such case, the writ was abated. *Roberts v. McLean*, 16 Vt. 608.

29. A surety, after the discharge of his principal in bankruptcy, not having proved his contingent claim in bankruptcy, paid the debt. Held, that he could recover of the principal therefor in an action of *indebitatus assumpsit* upon an implied promise. *Wells v. Mace*, 17 Vt. 508. (*Reversed in U. S. Sup. Ct.*, 7 Howard, 272.) 26 Vt. 785.

30. The plaintiff went into bankruptcy having an account against the defendant; but this account was not included in his schedule, nor acted on by his assignee, and was not before the court in bankruptcy. Held, that such facts did not toll the plaintiff's right to maintain an action therefor. *Steele v. Towne*, 28 Vt. 771.

31. **New promise.** The moral obligation and duty of a discharged bankrupt to pay his debt contracted before his bankruptcy, afford a sufficient consideration to sustain a new promise to pay it; and such promise need not be in writing. *Farmers' & Mechanics' Bank v. Flint*, 17 Vt. 508.

32. A promise to the creditor, or to his agent, to pay the debt, with an intent to confirm the original demand, is sufficient to remove the bar of a discharge in bankruptcy. *Hill v. Kendall*, 25 Vt. 528.

33. The defendant promised to pay a debt, discharged in bankruptcy, when he should become of sufficient ability. Held, that the promise was conditional, depending upon a condition precedent, viz., his ability to pay. *Sherman v. Hobart*, 26 Vt. 60.

34. The defendant, after his discharge in bankruptcy, stated an account with the plaintiff and agreed upon a balance due, which account was of items which accrued before the bankruptcy. Held, that from the naked fact of so stating the account the law did not imply an obligation to pay it, but that such obligation must rest upon an express promise; and where the promise was to pay this balance by his share in the avails of certain demands in the hands of the plaintiff;—Held, that the plaintiff must be content with that and could not recover such balance in an action, since the debt had been legally discharged in bankruptcy. *Warren v. Bishop*, 23 Vt. 607.

35. The discontinuance by a debtor of his petition and proceedings in bankruptcy, under the Bankrupt Act of 1841, is a sufficient con-

sideration to sustain a written contract by his creditors to give further time of payment. *Loomis v. Wainright*, 21 Vt. 520.

## II. U. S. BANKRUPT ACT OF 1867.

**36. Exemptions.** Property exempt from attachment by the State law does not pass to an assignee in bankruptcy, nor is the title of the bankrupt thereto impaired or affected by the bankrupt act. *Wilkinson v. Wait*, 44 Vt. 508.

**37.** The defendant, as constable, attached a yoke of oxen of the plaintiff which were exempt from attachment. While so held, the plaintiff was adjudged a bankrupt, and the defendant was enjoined by the bankrupt court (simply) from selling the oxen. The assignee in bankruptcy afterwards demanded the oxen of the defendant, and he delivered them, under protest, to the assignee, who sold them and held the proceeds. In trover for the oxen;—*Held*, that the plaintiff was entitled to recover their full value; that the proposition that the assignee, of his own motion, without any order of court, had a right to take the property, and compel the plaintiff to abandon his remedy against the defendant and follow him, the assignee, into the U. S. District Court, is untenable. *Id.*

**38. Discharge.** A judgment rendered in an action declaring upon a contract is not "a debt created by fraud," within the meaning of the U. S. Bankrupt Act, although in fact the contract declared upon was induced by fraud. The action in that form and judgment therein are a waiver of the fraud; and the court will not go behind the record. Hence, the debtor's discharge in bankruptcy is a bar to an action on such judgment. *Palmer v. Preston*, 45 Vt. 154.

**39.** A discharge in bankruptcy will not defeat a lien created by trustee process more than four months before the commencement of the proceedings in bankruptcy, but such lien may be enforced in chancery by a special decree *in rem*. *Stoddard v. Locke*, 43 Vt. 574.

**40.** A discharge in voluntary bankruptcy is not a bar to an action to recover a provable claim, where the debtor fraudulently deprived the creditor of notice of any proceedings in bankruptcy. *Batchelder v. Low*, 43 Vt. 662.

**41.** A promise to pay a debt discharged in bankruptcy is valid though made by parol, and may be proved by parol, and by the plaintiff himself, where he is made a general witness by statute. *Barron v. Benedict*, 44 Vt. 518.

**42.** The claim of a conditional vendor for an illegal sale by the vendee is not barred by the vendee's discharge in bankruptcy, although the vendor has proved his claim in bankruptcy for the contract price:—his lien is preserved. *Johnson v. Worden*, 47 Vt. 457.

**43.** Plea in bar, that since the commencement of the suit the defendant had been adjudged a bankrupt, that the plaintiff had proved his debt in bankruptcy and that the bankrupt proceedings were still pending, was *held* ill on general demurrer,—the debt not being extinguished without a discharge, and the proceedings only operating to suspend final judgment. *Brandon Mfg. Co. v. Frazer*, 47 Vt. 88.

**44.** A bankrupt who purchases of his assignee a claim originally due himself can sue thereon in his own name. *Udall v. School District*, 48 Vt. 588.

## BASTARDY.

**1. Bastard—Right of inheritance.** Under the statute of 1821 (Slade's Stat. c. 44, s. 77), a bastard can inherit from another bastard of the same mother. *Burlington v. Fosby*, 6 Vt. 83; but not from a legitimate child of the same mother. *Bacon v. McBride*, 32 Vt. 585.

**2.** The adoption of an illegitimate child by the putative father, under G. S. c. 56, s. 6, legitimates the child only "as respects such father," and does not render the child capable of inheriting through the father as his representative. *Safford v. Houghton*, 48 Vt. 236.

**3. Bastardy prosecution—A civil suit.** A prosecution for bastardy is in effect but a civil suit, though conducted under some of the forms of a criminal proceeding. *Robie v. McNiece*, 7 Vt. 419. *Gray v. Fulsome*, 7 Vt. 452. *Gaffery v. Austin*, 8 Vt. 70. *Holcomb v. Stimpson*, 8 Vt. 141. *Allard v. Bingham*, 8 Vt. 470. *Coomes v. Knapp*, 11 Vt. 543. *Spears v. Forrest*, 15 Vt. 435.

**4.** It requires no minute of the true day, &c., when the complaint was exhibited. *Spears v. Forrest*.

**5.** Defects of form in a bastardy prosecution are cured by verdict, this being a civil proceeding. *Robie v. McNiece*, 7 Vt. 419; as, that the complaint was not signed by the complainant; and that the justice returned to the county court copies instead of the original papers. *Ramo v. Wilson*, 24 Vt. 517.

**6.** In a bastardy prosecution, costs are to be taxed in favor of the defendant, where he is discharged, whether the judgment be rendered on a verdict, or on demurrer, or on quashing the proceedings, or on non-suit,—as in other civil suits. *Allard v. Bingham*, 8 Vt. 470.

**7.** A prosecution for bastardy is not such a "civil cause" as is reviewable under the statute. *Robinson v. Dana*, 16 Vt. 474. *Sweet v. Sherman*, 21 Vt. 23.

**8. When maintainable.** A bastardy prosecution may be maintained in the name of a married woman, where the child was born be-

fore her marriage,—her husband in such case joining in the request and prayer for a warrant. *Sisco v. Harmon*, 9 Vt. 129. But not where the child was conceived and born during her coverture, even by proof of non-access of the husband. *Gaffery v. Austin*, 8 Vt. 70. 9 Vt. 133.

9. A bastard child born out of this State, its mother having at the time no domicile within this State, cannot be affiliated, or its maintenance charged upon the father, under our statute. *Graham v. Monsergh*, 22 Vt. 543. *Egleston v. Battles*, 26 Vt. 548.

10. But if the mother at the time of the birth is *bona fide* an inhabitant of this State, the birth of the child out of the State, by accident or during a temporary absence from this State, will not deprive her of the statute remedy against the father. *Egleston v. Battles*.

11. **Where brought.** A bastardy prosecution may be brought where the mother resides, irrespective of the place where the child was begotten. *Allen v. Ford*, 11 Vt. 367.

12. **Complaint.** A bastardy complaint must be in writing, and this implies *signing* by the complainant, by herself, or by some person for her, by her authority. *Graves v. Adams*, 8 Vt. 130.

13. It is not necessary that the complainant should swear she is a single woman. It is sufficient that she appears before the justice as such, and in that character makes her complaint. *Robie v. McNiece*, 7 Vt. 419.

14. A bastardy complaint by J G, alleging that the defendant did beget a child on *one J G*, &c., was *held* insufficient—"one J G" implying a third person. *Graves v. Adams*, 8 Vt. 130.

15. The complaint alleged the proceedings to be under a statute which was in fact repealed, but it was good under other statutes. *Held*, that this was of no importance; no reference to any statute was necessary, since the court takes notice of the general statutes of the State. *Blood v. Morrill*, 17 Vt. 598.

16. **Warrant.** An objection for defect in the service of the warrant in a bastardy case, if not made before the justice, is waived and cannot be taken in the county court. *Quow v. Conlin*, 31 Vt. 620.

17. **Copies.** Under the practical construction of the Bastardy Act, copies of the proceedings before the magistrate, instead of the original papers, have been sent up and used in the county court, which is, perhaps, the proper course. *Sisco v. Harmon*, 9 Vt. 129.

18. Although in bastardy proceedings the statute in terms requires the justice to return the original papers to the county court, yet where he returned copies instead;—*Held*, after verdict, that no objection for this cause lay;

that it was the same as if copies had been substituted by order of the court. *Ramo v. Wilson*, 24 Vt. 517. 32 Vt. 629.

19. G. S. c. 83, s. 11, authorizing the filing of a new declaration in case of the loss, &c., of "the writ and declaration," does not apply to a prosecution for bastardy, where the original complaint, justice's record and warrant are lost. *Bingham v. Marcy*, 32 Vt. 278.

20. **Interposition by overseer of the poor.** By the Bastardy Act of 1822 (Slade's Stat. 366, s. 5), where the overseer of the poor neglected for three months to take the control of a bastardy prosecution commenced;—*Held*, that it might be settled and released by the complainant. *Hurd v. Seeker*, 12 Vt. 364. (The law is since changed.)

21. A bastardy proceeding cannot be commenced in the name of the overseer of the poor, under G. S. c. 74, s. 17, where the woman had, before her delivery, commenced a prosecution in her own name, and during its progress had compromised it and given a discharge. *Norwich v. Yarrington*, 20 Vt. 473.

22. Where the overseer of the poor had taken charge of a bastardy prosecution according to the statute, and the mother had afterwards released the respondent, and the town was afterwards secured or indemnified against the support of the child;—*Held*, that such release was a good defence to the further prosecution of the complaint. *Humphrey v. Kason*, 26 Vt. 760.

23. In a prosecution against the mother of a bastard, under G. S. c. 74, s. 17, no certificate of the overseer of the poor of his intent to prosecute, as under s. 13, is necessary. *Hale v. Turner*, 29 Vt. 350.

24. **The mother's right.** In settlement of a bastardy prosecution commenced by the mother, the father of the child gave her his promissory note, but was afterwards prosecuted by the overseer of the poor and was compelled to give a bond to indemnify the town against the support of the child. The mother always supported the child. *Held*, that the note was on good consideration, and a recovery by her was had thereon. *Knight v. Priest*, 2 Vt. 507.

25. Money received by the overseer of the poor in settlement of a bastardy prosecution controlled by him and paid into the town treasury, may be recovered of the town by the mother of the bastard, who supported him until he became old enough to support himself. It was the duty of the overseer, under the statute, to apply the money "solely for the support of the child." *Drake v. Sharon*, 40 Vt. 35.

26. **Settlement.** The discharge or compromise of a bastardy prosecution is a sufficient consideration for a note to the complainant.



*Hoen v. Hobbs*, 1 Vt. 238. *Knight v. Priest*, 2 Vt. 507. *Holcomb v. Stimpson*, 8 Vt. 141.

27. A settlement made with the mother of a bastard by the putative father, or her release executed to him, operates only as a satisfaction or release of her own claim, and does not, unless made with the consent of the overseer of the poor, defeat his right to commence or control a prosecution in the name of the mother, or to commence one in her own name. *Sherman v. Johnson*, 20 Vt. 567. 26 Vt. 764. 29 Vt. 353.

28. Nor will the consent to such settlement by the overseer of the town where the mother resides, avail against a prosecution by the overseer of the town where she has her legal settlement, and to which she becomes chargeable. *Hale v. Turner*, 29 Vt. 350.

29. Satisfaction by intermarriage. The intermarriage of the parties to a bastardy prosecution, although after the birth of the child, and although control of the prosecution has been assumed by the overseer of the poor, abates and terminates the prosecution. *Gordon v. Amidon*, 36 Vt. 735.

30. Evidence. The declarations of the plaintiff in a bastardy prosecution are evidence against her in chief, though made after the overseer of the poor has taken control of the prosecution. *Sterling v. Sterling*, 41 Vt. 80.

31. In a bastardy prosecution, evidence tending to show sexual intercourse between the plaintiff and others than the defendant, and acts of indecent familiarity with them, outside of the time within which according to the course of nature the child could have been begotten, was held inadmissible, either as independent evidence, or as contradicting what the plaintiff had, as a witness, denied on cross-examination. *Id.*

32. So, also, evidence that the plaintiff endeavored to procure an abortion. *Id.* See *Sweet v. Sherman*, 21 Vt. 23.

33. Default. An order of affiliation, and other orders, in a bastardy prosecution, may be made upon default of the defendant to appear. *Blood v. Morrill*, 17 Vt. 598.

34. Recognizance. The original recognizance entered into before the justice in a bastardy prosecution, conditioned that the defendant shall appear in the county court to answer the complaint and abide the order of the court (G. S. c. 74, s. 3), stands as a security for the performance of the orders of the court, unless there be a surrender of the principal, or a new recognizance be entered into. *Simmons v. Adams*, 15 Vt. 677. *Freeman v. Batchelder*, 36 Vt. 13.

35. The liability of bail on such recognizance taken before the justice may be discharged by a surrender of the principal, at the term of the county court when he is required to appear. *Mather v. Clark*, 2 Aik. 209. *Gray v.*

*Fulsome*, 7 Vt. 452. *Simmons v. Adams*, *Supra*. 35 Vt. 15. *Humphrey v. Kasson*, 26 Vt. 760.

36. In order to the discharge of a surety on such recognizance, it is not enough that the principal appear in the county court and defend the suit, but there must be a formal surrender of the principal into the custody of the court, and an *exoneretur* entered upon the record. *Blood v. Morrill*, 17 Vt. 598. *Humphrey v. Kasson*.

37. It is no defense to an action against the surety upon such recognizance, that by reason of the sickness of the principal he could not be surrendered in court. *Humphrey v. Kasson*.

38. A recognizance under the bastardy act to perform the order of the court, which order included an installment over-due at the time the recognizance was taken, was held valid as to the whole. *Hand v. Allen*, 25 Vt. 103.

39. Enforcement of order. The mode of enforcing the orders of the court in a bastardy case, upon the recognizance taken by the justice, is the same as is prescribed as to a substituted recognizance in the county court (G. S. c. 74); and a judgment in *scire facias* upon such original recognizance, for the present worth of the sums by the order made payable in future, was held erroneous. *Freeman v. Batchelder*, 35 Vt. 13.

40. A judgment in the Supreme court against a surety on the recognizance given in a bastardy case falls within G. S. c. 30, ss. 65-7, and, by s. 68, a *scire facias* thereon may be brought in the county court. *Freeman v. Batchelder*, 36 Vt. 292.

As to legal settlement of bastard, see PAUPER, II. 2.

## BILL OF LADING.

The indorsement and transfer of a bill of lading as collateral security for the payment of a draft drawn upon the faith of it, was held to transfer the title to the cargo. (This applied to goods transported by railroad.) *Tilden v. Minor*, 45 Vt. 196, and see *Davis v. Bradley*, 24 Vt. 55. 28 Vt. 118.

## BILLS AND NOTES.

- I. FORM, OPERATION AND VALIDITY.
- II. PRESENTMENT AND ACCEPTANCE OF BILLS.
- III. EFFECT WHERE NOTE IS GIVEN FOR A SUBSISTING CLAIM.
- IV. TRANSFER.

### 1. Mode.

### 2. Time of transfer; Holder bona fide—for value.

3. *Effect as to cutting off defenses and equities.*

4. *Demand and notice to charge indorser.*

#### V. ACTION.

1. *Note payable in specific chattels.*

2. *Lost note.*

3. *Parties.*

4. *Pleadings.*

5. *Defenses.*

#### I. FORM, OPERATION AND VALIDITY.

1. **Signing.** The payor of a note is bound by his signature affixed thereto by the nominal payee by the payor's request. The person so affixing the signature is regarded not so much an agent, as an instrument used by the payor to perform the act by which he binds himself. *Haven v. Hobbs*, 1 Vt. 238. *Bellows v. Weeks*, 41 Vt. 608.

2. **Delivery.** The maker of a promissory note took it from the payee for the purpose of obtaining the signature of a surety, but, after obtaining such signature, refused to redeliver the note. *Held*, that for want of delivery the surety was not bound by the note. *Chamberlain v. Hopps*, 8 Vt. 94. 30 Vt. 25.

3. A note given under an agreement not to be used unless signed also by certain others, is not effective in the hands of any person who takes it with knowledge of such agreement, unless fully signed as agreed. *Harrington v. Wright*, 48 Vt. 425;—and see *Farm. & Mech. Bank v. Hathaway*, 36 Vt. 539. *Holmes v. Crossett*, 33 Vt. 116.

4. **Void for uncertainty.** A note promising to pay J B "sixteen the first day of March next with interest," was *held* void for uncertainty, and that parol evidence was not admissible to explain it; and that a recovery could be had, counting on the original consideration. *Brown v. Bebee*, 1 D. Chip. 227.

5. The same was *held*, where the note was to pay "J. & Wainwright" (a sum named) "in one from the first of Oct. next, in cattle or merch'ble grain by the first of January following, with use." *Wainwright v. Straw*, 15 Vt. 215.

6. **Marginal memorandum.** A memorandum made at the bottom or in the margin of a written contract at the time of signing it—and this will be presumed unless the contrary appears—which forms an important qualification of the contract, and especially when this is for the ease of the maker, has the same effect as if inserted in the body of the contract. Whether such memorandum of the place of payment merely is to be considered a part of the contract—*quære*. *Fletcher v. Blodgett*, 16 Vt. 26.

7. A promissory note payable in cash one day after date, had a memorandum in the mar-

gin "Payable in merchantable fulled cloth in one year, &c." *Held*, that the note was payable according to the memorandum. *Fletcher v. Blodgett*.

8. A memorandum on the margin of a note specifying certain items of property at certain sums—as "Stove \$26," &c.—the sum total of which, as added, equalled the sum expressed in the note, was *held*, in an action for money had and received, to be too uncertain to be relied upon to determine that the consideration of the note was other than money. *Cummings v. Gassett*, 19 Vt. 308.

9. A condition written on the back of a note was treated as if incorporated in the note. *Henry v. Colman*, 5 Vt. 402. 16 Vt. 29.

10. In an action on a note, upon which an indorsement of part payment appeared erased;—*Held*, that the note might be read in evidence without first explaining the erasure, such indorsement being no part of the note. *Kimball v. Lamson*, 2 Vt. 138.

11. **Canadian instrument.** A writing, signed by the defendant, acknowledging before two notaries in Canada an indebtedness to the plaintiff for value received, and promising to pay that sum to him or order with interest, was *held* to be a promissory note which could be declared upon as such in this State. *Hitchcock v. Cloutier*, 7 Vt. 22.

12. **Negotiability not essential.** An open letter of request from one to another to pay a third person a certain sum of money—as, in this case, an order—is a bill of exchange; and it is not essential to the validity of a bill of exchange, or promissory note, that it should be negotiable. *Arnold v. Sprague*, 34 Vt. 402.

13. **Payable in specific articles.** A contract in the form of a promissory note, payable in specific articles, is treated in this State as a promissory note, as to the form of declaring upon it, and the necessity of proof of consideration. *Denison v. Tyson*, 17 Vt. 549. *Brooks v. Page*, 1 D. Chip. 340. *Devey v. Washburn*, 12 Vt. 580.

14. It is so treated with reference to the statute of limitations as to promissory notes witnessed. *Meed v. Ellis*, Brayt. 203;—although no consideration be expressed in it. *Leonard v. Walker*. *Id.* *Bragg v. Fletcher*, 20 Vt. 351.

15. A recovery can be had on such note in assumpsit, under the common counts for money had and received. *Perry v. Smith*, 22 Vt. 301. *Reed v. Sturtevant*, 40 Vt. 521.

16. The indorsee of such a note, though not negotiable, must, in order to charge the indorser, follow the rules of the law merchant with respect to negotiable paper in the matter of due demand and notice. *Aldis v. Johnson*, 1 Vt. 136.

17. Where a note is payable in collateral

articles at a time and place fixed, the maker must, at the time and place fixed, designate the articles he offers in payment. If payable on demand and a demand is made, he must deliver the articles so as to place them at the disposal of the payee. *Wood v. Beeman*, Brayt. 227.

18. **Writing name on the back.** One who writes his name on the back of a promissory note, not before being a party to it, assumes, *prima facie*, the obligation of maker, and may be sued as such, the same as if he had signed the note on its face. But, the indorsement being in blank, parol evidence may be given of the real obligation intended to be assumed—as, of guarantor, indorser, &c. *Barrows v. Lane*, 5 Vt. 161. *Knapp v. Parker*, 6 Vt. 642. *Flint v. Day*, 9 Vt. 345. *Nash v. Skinner*, 12 Vt. 219. *Sanford v. Norton*, 14 Vt. 228. *S. C.* 17 Vt. 285. *Strong v. Riker*, 16 Vt. 554. *Sylvestre v. Downer*, 20 Vt. 355. 23 Vt. 163.

19. Where the defendant, not a party to a promissory note, wrote his name on the back of it in blank long after it was made, and after it had passed from the payee without his indorsement;—*Held*, that the defendant could be sued as maker, in the name of the payee, for the benefit of the holder. *Strong v. Riker*.

20. Where the defendant, in the State of New York, put his name upon the back of a promissory note signed by A and made payable to the plaintiff in New York, for the purpose of enabling A to purchase therewith property of the plaintiff, and the note was so used;—*Held*, that the defendant was liable thereon as an original promisor; and that this liability was not limited by a declaration of the defendant, at the time he put his name upon the note, that he would stand by such signature only as a second indorser, where this declaration was not brought to the knowledge of the plaintiff. *Nash v. Skinner*, 12 Vt. 219. 17 Vt. 292. 31 Vt. 320.

21. **Other forms.** Where in the body of a promissory note the language was: "We the subscribers, jointly and severally, each one for himself, as *principal*," &c., but one of the signers attached to his signature the word *surety*;—*Held*, that he must be treated as surety. *People's Bank v. Persons*, 30 Vt. 711. Otherwise, in like case—except that the word *surety* was not added to the signature. *Claremont Bank v. Wood*, 10 Vt. 582.

22. A promissory note in the terms following: "We, in behalf of the First Methodist Episcopal Society in Middlebury, promise," &c., and signed by the defendants in the usual form without any additions, was *held* to be, at least *prima facie*, the note of the defendants and their personal obligation. *Pomeroy v. Slade*, 16 Vt. 220.

23. The purchaser of the plaintiff's goods of the plaintiff's factor gave his note therefor payable to his own order, and simultaneously indorsed it in blank. *Held*, that this was in effect a note to the plaintiff, and not to the factor. *Blackman v. Green*, 24 Vt. 17.

24. The validity of a negotiable promissory note, or the payee's title thereto, is not impeached by the fact that it appears to have been indorsed in full to a third person, but with such indorsement erased. *Tappan v. Nutting*, Brayt. 137.

25. In cases of promissory notes and bills of exchange, a promise to the agent, naming him and not his principal, although the word agent, or cashier, be added to his name, is a promise to the agent as an individual, and the addition is simply descriptive of the person. *Johnson v. Catlin*, 27 Vt. 87.

26. A negotiable promissory note given for a patent right, without the words, "Given for a patent right" inserted, as required by Stat. 1870, No. 68, is good in the hands of a *bona fide* holder for value, who takes it before maturity without notice of what it was given for. *Pendar v. Kelley*, 48 Vt. 27.

27. So, it is good without these words in the hands of an assignee, though with notice of the consideration, if the patent right was good and formed an adequate consideration for the note,—the statute not declaring such note void, but being designed only to prevent the transfer to innocent and *bona fide* purchasers. *Streit v. Waugh*, 48 Vt. 298.

28. **Condition.** Where a note was given, subject to the condition that it should not be enforced unless there should be a failure of title in C to certain lands by him mortgaged;—*Held*, that the question of title could be determined in an action on the note, so far as respected the obligation of the note. *Reed v. Field*, 15 Vt. 672.

29. **On demand.** There is no difference between a note payable "when demanded," and *on demand*. In either case, the note is due immediately, and may be sued without demand, and the statute of limitations begins to run from its date. *Kingsbury v. Butler*, 4 Vt. 458.

30. A note given by one who is a constable, to an attorney, made payable "in officer's fees, as constable," without more, is by legal construction payable on demand or on request. *Thrall v. Mead*, 40 Vt. 540.

31. **Grace.** A note dated Aug. 25 and payable, with grace, four years from date, falls due Aug. 28. *Ripley v. Greenleaf*, 2 Vt. 129.

32. **Place of payment.** Where a promissory note is made payable generally, no particular place of payment being named therein, the place where it was made is the place of payment, without regard to the residence of the

parties or the place of date. *Blodgett v. Durgin*, 82 Vt. 861, and see *Bryant v. Edson*, 8 Vt. 325.

33. Where a note is made payable at a particular place—as at a bank—the holder may recover against the maker for non-payment, without averring or proving a presentment and demand. A deposit of the money there, when due, would be a payment of the note. *Hart v. Green*, 8 Vt. 191.

34. A note made payable to (not at) a bank, like a note payable to an individual person, is, whether negotiable or not, payable wherever it may be in lawful custody. *Bank of Newbury v. Richards*, 85 Vt. 281.

35. Consideration. The compromise without fraud of a doubtful claim, or contingent liability—as the settlement of a bastardy prosecution—is a sufficient consideration to support a promissory note, and it cannot be avoided by proof that the maker was not in fact or law originally liable. *Holcomb v. Stimpson*, 8 Vt. 141.

36. Chancery will not relieve the maker of a promissory note given to compromise a pending action for slander, where it does not appear that the action was maliciously brought, or that there was such overreaching and fraud on the part of the payee as makes it unconscionable for him to retain the note. *Paris v. Dexter*, 15 Vt. 370.

37. Information given in good faith to a party litigant, and disclosing the names of important witnesses in his suit, may be a good consideration for a note. *Chandler v. Mason*, 2 Vt. 193.

38. The consideration of a note was a quitclaim deed of land of which the grantor had no title, but of which he fraudulently pretended to have title. *Held*, a good defense to the note. *Hawley v. Beeman*, 2 Tyl. 288.

39. A note given for a patent right may be defended against, on the ground that the patent was void by reason of its not being for a new invention, although the patent remains unrepealed, and although the pretended patent was conveyed by deed with covenant. *Parot v. Farnsworth*, Brayt. 174.

40. The right of raising money by a lottery, once granted by the State, but dormant for about thirty years and without regularly appointed managers, was *held* not to furnish a good consideration for a note given for a purchase of the right. *Rogers v. Hough*, 4 Vt. 172.

41. A promissory note, the only consideration of which, however expressed, is love and affection, cannot be enforced at law or in equity against the maker or his estate. *Holley v. Adams*, 16 Vt. 206. *Smith v. Kittredge*, 21 Vt. 288.

42. A and B executed, each to the other, a note of \$2,000, and placed the notes in the hands of a third person under a condition, that

if A did not drink more than three glasses [of liquor] a day during his natural life, B's note was to be obligatory; but if A drank more than that number, then his note was to be in force. A forfeited the condition [of course] and his note was delivered to B by the holder. *Held*, that the note could not be enforced. *Conant v. Jackson*, 16 Vt. 385.

43. L, being indebted to the plaintiff, procured H to sign a note with him, as his surety, running to the plaintiff, payable in 60 days, which the plaintiff received in payment of L's debt. In procuring the signature of H to the note, L represented to him that he wished to use the money in an operation that he could make immediately profitable, and he had found a friend who would let him have the money on the note. L was wholly destitute of property, insolvent, and so remained. H signed the note, relying upon these representations and that L would realize from his operation and pay the note. In an action against L;—*Held*, that he was liable on the note. *Quinn v. Hard*, 43 Vt. 375.

44. *Held*, also, there being nothing in the facts to create a suspicion of notice to the plaintiff of any fraud, or any suspicion of bad faith on his part, that it was for the defendant, if he imputed any such thing, to prove it. *Id.*, 380.

45. The legal intendment is, that the payee of a note takes it upon the faith of the persons whose names appear upon it as makers. *Smith v. Hill*, 45 Vt. 90.

46. Illegal. A note given in whole or in part for the compounding of penalties or suppressing of a criminal prosecution is void, the consideration being illegal. *Hinesburgh v. Sumner*, 9 Vt. 23. *Woodruff v. Hinman*, 11 Vt. 592. *Bowen v. Buck*, 28 Vt. 308.

47. A note given for the suppression of a criminal prosecution for obtaining goods by false pretences, is upon an illegal consideration and void; and this, although the representation that such prosecution had been commenced was false, but was acted upon as true, and although the note given is only for the amount of the debt justly due. *Bowen v. Buck*.

Further as to consideration, see CONTRACT, I.

48. Guaranty of genuineness. A person giving a security in payment, or procuring it to be discounted, vouches for its genuineness; but this rule has not been extended to the case where the party, when receiving or discounting the paper, is presumed from his relation to it to have the means of correct knowledge as to its genuineness, or where it has been kept an unreasonable time without notice to the other party of its spurious character. *Bank of St. Albans v. Farm. & Mech. Bank*, 10 Vt. 141. 11 Vt. 520. 19 Vt. 206.

49. On the sale of a promissory note, though indorsed "without recourse," a warranty of its

validity is implied. *Hunnum v. Richardson*, 48 Vt. 508.

**50. Recognition.** The indorsement of part payment upon a note by the holder, without proof of actual payment, has no tendency to prove the maker's recognition of the validity of the note. *Brown v. Munger*, 16 Vt. 12.

**51.** Where the purchaser of property, for which he has given his promissory note, insists upon holding the property under his purchase, this operates as an affirmation of the contract in all its particulars, and he cannot question either the validity or the amount of the note. *Harrington v. Lee*, 33 Vt. 249.

**52. Negotiability of notes.** An action does not lie in favor of an assignee of an instrument, in form a negotiable promissory note, but sealed—it being a specialty. *Read v. Young*, 1 D. Chip. 244.

**53.** A note payable to order, or bearer, in *current bills*, cannot be sued in the name of an indorsee—the same not being payable “in money.” *Collins v. Lincoln*, 11 Vt. 268.

**54.** A note was made payable to “M, or bearer, on demand, after a lease shall be given up from M to O, dated,” &c. In the absence of any proof as to the length of time the lease was to run;—*Held*, that the note was payable upon a contingency, and therefore not negotiable, and could be sued only in the name of M. *Downer v. Tucker*, 31 Vt. 204.

**55.** The negotiability of a note or bill, or certificate of deposit, is not destroyed by a contingency which depends on an event which necessarily must happen, so that the only contingency, or uncertainty, is as to time; nor, if the contingency, as to time of payment, depends on an act to be done by the holder in reference to the instrument itself, to hasten or fix the time of payment; as if made payable a given number of days after presentment and demand. In such case, the instrument imports an absolute indebtedness. *Peck, J.*, in *Smilie v. Stevens*, 39 Vt. 315. *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377.

**56.** But where the contingency is collateral to the instrument, and depends on an act to be done, on the performance of which the liability of the party sought to be charged depends, it is not negotiable;—and so *held*, where a certificate of deposit, in form negotiable, was made payable on the return of a certain outstanding guaranty, given by the signer of the certificate, of a certain note of the payee of the certificate. *Smilie v. Stevens*.

**56.** The plaintiff, as bearer, brought suit upon the following note: “Brandon, March 14, 1868. For value received I promise to pay Barzillai Davenport, or bearer, seventy-five dollars, one year from date with interest annually; and if there is not enough realized by good management in one year, to have more time to

pay in the manufacture of the plaster bed on Stearn's land. S. A. Capron.” *Held*, that the note was payable in money, and not upon a contingency but at all events, and was negotiable; the uncertainty as to time of payment being made certain by the law, viz: reasonable time after the expiration of the year, “if there was not enough realized.” *Capron v. Capron*, 44 Vt. 410.

**57. Deposit certificate.** A certificate of deposit made payable to the order of the depositor, “on the return of this certificate,” or “on the presentation of this certificate properly indorsed,” is negotiable. *Smilie v. Stevens*, 39 Vt. 315. *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377.

**58. County order.** An order drawn by the judges of the county court upon the county treasurer, payable to A B, or order, is not negotiable so as that an action will lie upon it in the name of an indorsee. *Hyde v. Franklin County*, 27 Vt. 185.

**59. Town order.** A town order, negotiable in form, was *held* negotiable in *Datrymple v. Whittingham*, 26 Vt. 345. *Cook v. Winhall*, 43 Vt. 434. *Contra*, *Taft v. Pittsford*, 28 Vt. 288.

**60. Time of negotiating, &c.** A note originally negotiable ceases to be so by the death of the maker and an adjudication thereon by the commissioners. *Jarvis v. Barker*, 3 Vt. 445.

**61.** As it relates to the negotiability of notes payable on demand, and in questions between the indorsee and indorser, and between the indorsee and the maker, they are to be considered as payable in a reasonable time; and what is a reasonable time is a question of law to be decided by the court, on the facts which may be found by the jury. *Dennett v. Wyman*, 13 Vt. 485.

**62.** The defendants were partners, and K, one of them, furnished money to be used in the partnership business and took a note therefor, payable to himself or order, signed by himself and the other defendants individually. K's wife became owner of the note and sent it to the plaintiff by K for collection, and K indorsed it to the plaintiff for collection merely. K made no defense. *Held*, that the plaintiff could recover against all the defendants. *Ormabee v. Kidder*, 48 Vt. 361.

**63. Place of payment—Lex loci.** A promissory note payable generally, that is, where no particular place of payment is mentioned, is to be treated as a note of the place or country where made, and to be payable there; and the rights, duties and obligations growing out of it, and matters in discharge of it, are to be determined by the laws of that place, or country. *Peck v. Hibbard*, 26 Vt. 698.

**64.** The liability of the maker of a promissory note and to what person liable, whether the

payee, indorsee, or a creditor under an attachment by the trustee process, is to be determined by the laws of the State which determine the obligation of the contract. *Emerson v. Patridge*, 27 Vt. 8. *Chase v. Houghton*, 16 Vt. 594. *Worden v. Nourse*, 36 Vt. 756. *Wheeler v. Winn*, 38 Vt. 122.

65. If the *situs* of the debt is here, the subject matter being within this jurisdiction, the validity and effect of a judgment, wherever pleaded in defense, would be determined by our law, and not by the law of the foreign forum. So held as to an attachment by trustee process. *Ib.* See *Baylies v. Houghton*, 15 Vt. 626.

66. The maker, resident in this State, of a negotiable promissory note drawn and made payable in this State, though to a resident citizen of another State, may be held as trustee of the payee under the trustee process. *Chase v. Houghton*, 16 Vt. 594.

67. This is so, although, by the laws of the State where the payee resides, such paper is not subject to the trustee process, and although the payee may have transferred the note before its maturity to another resident citizen of that state, if the indorsee fail to give notice of such transfer to the maker before service of the trustee process. *Emerson v. Patridge*, 27 Vt. 8. *Worden v. Nourse*, 36 Vt. 756. *Wheeler v. Winn*, 38 Vt. 128.

68. So, under like circumstances, where no place of payment was specified in the note, but the note was executed and delivered in this State, for a debt contracted in this State, and in part settlement of a business which continued down to the service of the writ;—*Held*, that the note must be taken to be payable in this State; that the *situs* of the debt was here, and the law of this State controls; and the maker of the note was held chargeable as trustee of the payee. *Worden v. Nourse*.

69. A negotiable promissory note, executed by a citizen of this State in the State of Massachusetts, and payable and delivered to a citizen of that State, but without place of payment specified, was held, by intendment, as payable in Massachusetts, and not subject in this State to attachment by trustee process for the debt of the payee, it being exempt from such process by the law of Massachusetts. *Baylies v. Houghton*, 15 Vt. 626. Approved, *Worden v. Nourse*, 36 Vt. 760; but the place of execution ought not to be decisive. *Peck, J. Ib.*

70. Where a promissory note was executed in the State of New York between parties resident there, and was there negotiated while current, but was paid by the maker before maturity, and suit was afterwards brought thereon in this State in the name of the *bona fide* holder for value;—*Held*, that the law of New York furnished the rule of decision; and that the

maker could not set up such payment in defense, although by the law of this State, as it then was, such payment would have been a defense if this had been a Vermont contract. *Harrison v. Edwards*, 12 Vt. 648.

71. Where a promissory note was executed and dated in the State of New York and made payable generally with interest, and from the circumstances attending the transaction it appeared reasonably certain that the parties contemplated and understood that it was to be paid in Vermont;—*Held*, in an action by an assignee who took the note overdue, that interest should be cast at the Vermont rate, six per cent. *Austin v. Imus*, 23 Vt. 286. [The circumstances were these: The payee, residing on his farm in Addison, Vt., sold the farm to the maker, then residing at Moriah, N. Y. The deed of the farm and this mortgage note with others given therefor, were executed and dated at Moriah, the payee, by the deed, reserving the use of part of the dwelling house on the farm, and part of the fruit, for himself and family, for a time extending beyond the maturity of the notes;—the note read: "For value received in Moriah," &c.]

72. The law of the place of payment of a promissory note determines as to days of grace. *Blodgett v. Durgin*, 32 Vt. 361. *Bryant v. Edson*, 8 Vt. 825.

73. The plaintiff residing in New Hampshire, sold to D in Massachusetts where he resided, cattle, and took D's note therefor dated in Massachusetts, payable generally in 15 days from date. The plaintiff brought the note to Vermont where the defendant resided, and the defendant there signed it. *Held*, that the note was payable in Massachusetts, and the defendant was entitled to grace under the law of Massachusetts. *Bryant v. Edson*.

74. Upon notes and drafts drawn in this State and payable in New York the current rate of exchange, as customary and legal in that State, was allowed in making up the judgment. *Farmers' Bank v. Burchard*, 33 Vt. 346.

Further as to the *law of place*, see CONTRACTS, II. INTEREST, 27 and seq.

## II. PRESENTMENT AND ACCEPTANCE OF BILLS.

75. The holder of a bill of exchange made payable in any specified time *after sight*, or *after demand made*, must present it for acceptance within a reasonable time; but where the bill is made payable at a given time *from the date*, he is not bound to present it for acceptance until the day named for payment. *Bank of Bennington v. Raymond*, 12 Vt. 401.

76. There is no rule requiring that a bill of exchange must be actually shown to the drawee, in order to a valid and binding acceptance. It

is enough, if, when applied to for acceptance, he is enabled by seeing the bill, or otherwise, to give an intelligent answer. *Fisher v. Beckwith*, 19 Vt. 31.

77. A contract to pay an order to be drawn upon a party, binds him to pay it according to the contract, and he cannot change it by a qualified acceptance of the order when presented. *Havens v. Griffin*. N. Chip. 42.

78. A parol acceptance of a bill of exchange is binding. *Fisher v. Beckwith*, 19 Vt. 31. *Bank of Rutland v. Woodruff*, 34 Vt. 93. *Arnold v. Sprague*, 34 Vt. 402.

79. At common law a parol or oral acceptance of a bill is binding. It is not within the statute of frauds, nor is it void for want of consideration;—for the common presumption is, that the bill was drawn on account of some indebtedness from the drawee to the drawer, and so the acceptance is an undertaking by the drawee to pay his own debt. *Fisher v. Beckwith*. *Arnold v. Sprague*.

80. A parol acceptance of a draft is binding; and such acceptance, varying the time of payment from the time specified in the bill, is as binding as if absolute according to the terms of the bill, if the holder receives this as an acceptance. *Vt. Marble Co. v. Mann*, 36 Vt. 697.

81. The defendants, residing in New York, were drawees of two bills of exchange to which the drawer and indorser were parties only for the accommodation of the drawees. The defendants presented the bills to the plaintiff's agent resident in New York to be forwarded by him to the plaintiff's bank in Vermont for discount for their use, assuring such agent that the bills should be paid, but they did not accept the bills in writing, as required by the statute of New York. The agent presented the bills at the bank in Vermont, and upon his report of what had taken place between him and the defendants in New York, the bank discounted the bills, and the proceeds were sent to the defendants in New York and were used by them. *Held*, that the plaintiff was entitled to recover upon the common counts as for money loaned, treating the bills as collateral security;—also, *semble*, this might be treated as a valid parol acceptance in Vermont, and a recovery be had on the special count for an acceptance. *Bank of Rutland v. Woodruff*, 34 Vt. 89.

82. The acceptance of a bill by the drawee is *prima facie* evidence of his having in his hands effects of the drawer to the amount of the bill. Hence, such acceptance and payment will not, of themselves, sustain a count in assumpsit against the drawer for money paid to his use. *Chittenden v. Hurlburt*, 2 Aik. 183. 19 Vt. 84.

83. A debt due from the drawer of a bill of exchange to the payee is a good consideration for the acceptance of the bill by the drawee;

and the acceptor cannot set up, as against the payee, that, as between himself and the drawer, there was no consideration. *Arnold v. Sprague*, 34 Vt. 402.

84. Where a bill of exchange is drawn upon the party personally, and he accepts it in his own name, he is bound personally although he is in fact agent of another, and this known to the payee. *Ib.*

85. Where a bill for value is accepted, the acceptor is the party primarily liable, and the drawer is but his surety, or guarantor. The release of the drawer, in such case, by the holder, is a relinquishment merely of so much of his security, and does not affect the liability of the acceptor. *Farm. & Mech. Bank v. Rathbone*, 26 Vt. 19.

86. Where a bill of exchange was drawn and accepted at the time when the drawer had an open account with the acceptor for goods which the drawer was in course of sending to the acceptor for sale, with the apparent understanding that the bill was to be paid by the acceptor and charged in the general account;—*Held*, that the bill should be treated as drawn for value, and not as an accommodation bill, and imposed upon the acceptor the primary obligation to pay it; and that its legal character, in this respect, was not affected by any subsequent alteration in the balance of the account, nor by the fact, afterwards ascertained, that the drawer was indebted to the acceptor at the time of the acceptance. *Ib.*

### III. EFFECT WHERE NOTE IS GIVEN FOR A SUBSISTING CLAIM.

87. **Prima facie payment.** A promissory note, either of the debtor or of a third person, given in settlement of an account or for a previous debt, is *prima facie* payment, so that a suit cannot be maintained upon the original indebtedness, whether the note be paid or not. *Hutchins v. Olcott*, 4 Vt. 549. *Torrey v. Baxter*, 13 Vt. 452. *Farr v. Stevens*, 26 Vt. 299. *Collamer v. Langdon*, 29 Vt. 32. *Wait v. Brewster*, 31 Vt. 516. 46 Vt. 460.

88. Such presumption may be rebutted by evidence that the note was not received as payment, and whether so received is a question of fact dependent upon the contract or understanding of the parties. *Follett v. Steele*, 16 Vt. 30. *Fare v. Stevens*. *Collamer v. Langdon*. *Wait v. Brewster*. *Dickinson v. King*, 28 Vt. 378.

89. Where the creditor accepts either the promissory note of his debtor, or of a third person, in settlement of a previously unsettled matter of account or dealing, this, *prima facie*, is payment. But if the debtor's note be by mistake defective, so that no recovery can be had upon it, or if such note, or bill, of a third person prove unavailable, without the creditor's

fault, he may resort to his original demand. *Torrey v. Baister*, 13 Vt. 452. 29 Vt. 42-3.

**90. Otherwise in case of fraud, &c.** Though a promissory note be received in payment of an account or debt, yet if so received by fraud or misrepresentation, or misapprehension as to facts, the creditor supposing other parties to be bound by it who are not, or there be any infirmity in the note by reason of which it cannot be enforced, the intention to receive it as payment is rebutted, and the creditor may sue upon the original debt. *Hutchins v. Olcott*, 4 Vt. 549. *Torrey v. Baister*. *Farr v. Stevens*, 26 Vt. 299. *Wait v. Brewster*, 31 Vt. 516. *Wemet v. Missisquoi Lime Co.*, 46 Vt. 458.

**91. Partnership debt.** The taking of the note of one member of a firm on account of a copartnership debt, and receipting the account, is *prima facie* a satisfaction of the debt against the firm. *Stephens v. Thompson*, 28 Vt. 77.

**92.** But this presumption may be rebutted by proof that the note was not received as in satisfaction. *Spaulding v. Ludlow Woolen Mill*, 36 Vt. 150.

**93. Payment only in qualified sense.** Where a promissory note is given for an existing debt, the debt still exists although evidenced by the note. In an action for the collection of the debt the creditor, in form, is confined to his remedy on the note; and in this sense, and for this purpose, it is often said in this State that the giving of a promissory note for an existing debt is *prima facie* payment. But it is not a payment in the sense of extinguishing the debt so as to discharge the creditor's claim upon collateral securities for the original debt, unless so agreed. *Pinney v. Kimpton*, 46 Vt. 80.

**94. Taken as a security.** Where a note is taken for an account, but not as payment, a recovery can be had upon the account without a surrender of the note, provided the note remains in the custody or power of the party. But if negotiable, and it has been negotiated, it must be surrendered before the plaintiff can have execution upon his judgment. *Street v. Hall*, 29 Vt. 165.

**95.** A promissory note taken in payment of a pre-existing debt, as a former note, is taken upon a valuable and valid consideration; and it is not essential to payment, that the former note should be surrendered. *Dixon v. Dixon*, 31 Vt. 450.

**96. New York law.** By the law of New York the taking of a note, either of the debtor or of a third person, for a pre-existing debt, is no payment, unless so expressly agreed. *Rosseau v. Cull*, 14 Vt. 83. *Street v. Hall*, 29 Vt. 165.

**97.** The defendant's account with the plaintiffs was settled by giving therefor the note of a third person, and the plaintiffs receipted the bill as follows: "Received payment by D.

Platt's note at three months, payable at Missisquoi Bank." The whole was a New York transaction. *Held*, that the receipt, by the law of New York, imported nothing more than that the plaintiffs had received the note, which, if paid, would be payment of the account. *Street v. Hall*.

**98.** The plaintiff had an account against the defendants, H & M, as partners, also one against H individually, and another against H & Bro., partners, and settled them all with H, by taking his individual note therefor, payable in four months. M objected to the settlement of H & M's account in that way, preferring that it should be kept separate, and to pay their own debts; but the plaintiff insisted, for the reason that it stood on the ledger to M's account and that he was acquainted with H and was not afraid to trust him. The plaintiff credited the note received and balanced all the accounts so settled, and H charged H & M the amount of their account so included in the note. Two months afterwards, M requested the plaintiff to send him a statement of his account against the then late firm of H & M, and the plaintiff sent one embracing only those items which had accrued since the said settlement. The note was not paid. In an action of book account against H & M to recover the items included in the note, the auditor reported the special facts, and that he "did not find that the plaintiff did expressly agree to accept the note in payment of the account." The court assumed this to be a New York transaction and to be governed by the law of New York, viz., that the taking of a note for a pre-existing debt does not, *prima facie*, discharge such debt, but that to have such effect, it must appear affirmatively to have been taken with an express agreement that it should be in payment, or discharge, of the debt; and—*Held*, that there was here such *express agreement*—that is, an agreement as matter of fact, the result of the mutual understanding and meeting of minds of the parties as distinguished from an agreement which the law implies; and that the account was paid by the note. *Robinson v. Hurlburt*, 34 Vt. 115.

**99.** The giving of a note on settlement of a claim does not preclude the party from impeaching the consideration by proof of facts then supposed to exist, but of which he then knew no evidence. *Middlebury College v. Williamson*, 1 Vt. 212.

**100. Statute.** After judgment upon a promissory note given for a pre-existing account, for the purpose of determining whether the defendant could be admitted to the poor debtor's oath, the contract was *held* to have been "made and entered into" at the date of the note. *Bookwith v. Houghton*, 11 Vt. 602.

**101. Consideration.** Where a bill or note is taken as a collateral security for a debt, the



antecedent debt is a sufficient consideration for the transfer, and the party giving it cannot withdraw it at will; but whether, in such case, the consideration is sufficient to cut off all equities between the original parties to the collateral, where there is no agreement to give time upon the original debt—*quære*. *Austin v. Curtis*, 31 Vt. 64. See *Atkinson v. Brooks*, 26 Vt. 569.

## IV. TRANSFER.

## 1. Mode.

**102. By indorsement.** The administrator of the payee of a negotiable promissory note may indorse the same, and his indorsee may sustain an action thereon in his own name, as indorsee. *Grinwald v. Barnum*, 5 Vt. 269. *Cahoon v. Moore*, 11 Vt. 604.

**103.** An indorsement of a promissory note made and signed with a lead pencil was held good. *Closson v. Stearns*, 4 Vt. 11.

**104.** The words *value received* are not essential to the validity of an indorsement, in order to pass the legal property and right of action to the indorsee of a note, so long as no terms are employed which tend to negate or restrict his right—as, by directing payment to be made to the indorser's use, or to the use of a third person; nor can the maker defend in an action by the indorsee on the ground of a mere want of valuable consideration for the indorsement, in the absence of illegality and fraud. *Snow v. Conant*, 8 Vt. 301.

**105.** Where a promissory note payable to A B, or order, was indorsed, "pay to C D";—*Held*, that such indorsement was not restrictive, but was in legal effect the same as if indorsed to C D, *or order*, in terms; and that the indorsee of C D could maintain an action against A B as indorser. *Hodges v. Adams*, 19 Vt. 74.

**106.** A promissory note, payable to the order of the payee, was negotiated and indorsed in these words: "Mr. Keyes [the maker], Sir,—please pay the bearer the within without recourse to the indorser," and this signed by the payee. *Held*, that this was a sufficient indorsement to enable the assignee to maintain an action upon the note in his own name, as indorsee. *Keyes v. Waters*, 18 Vt. 479.

**107.** The firm of A, B & Co., a partnership consisting of A, B and C, was dissolved by the death of C. The defendant afterwards executed a promissory note made payable to "the late firm of A, B & Co." B sold his interest in the note to A, and then A indorsed the note, without recourse, in the name of A, B & Co., to the plaintiff. *Held*, (1), that the note was legally payable to the surviving partners, A and B; (2), that it could be legally indorsed by use of the same names to whom it was in terms made

payable, "A, B & Co."; (3), that A being sole owner of the note, could sell and indorse it, and by such indorsement had transferred the legal interest to the plaintiff as indorsee. *Douglass v. Hall*, 22 Vt. 451.

**108.** An indorsement of a negotiable promissory note in this form: "I warrant this note collectable when due," is sufficient to transfer the legal title to the note and enables the assignee to sue as indorsee by adding to it an order to pay to himself; but this does not create the same liability as a general or blank indorsement, but is limited and restricted according to the terms used. *Benton v. Fletcher*, 31 Vt. 418. *Hammond v. Chamberlin*, 26 Vt. 406. See *Partridge v. Davis*, 20 Vt. 499.

**109.** A blank indorsement of a promissory note may be filled up according to the real obligation created by it. But this is mere form and may be made at any time, and, if made wrong, may be corrected at any time; and it is just as well if not made at all. *Sylvestor v. Downer*, 20 Vt. 355.

**110.** An indorsement of a blank note, or bill of exchange, without sum, date or time of payment, will bind the indorser to pay any sum, payable at any time, which the person to whom the indorser intrusts it may choose to insert. *Mich. Ins. Co. v. Leavenworth*, 30 Vt. 11.

**111. By delivery.** By force of the common law without the aid of any statute, a promissory note payable to A B, or bearer, may be sued in the name of a *bona fide* bearer, as such, without indorsement. *Matthews v. Hall*, 1 Vt. 816, *Skinner, C. J.*, dissenting. 3 Vt. 542. 6 Vt. 249. 10 Vt. 162.

**112.** The actual possession of a promissory note payable to A B, or bearer, is evidence of title in the holder, and of such legal interest as to entitle him to maintain a suit upon it in his own name—the note being transferable by delivery, which is equivalent to an indorsement and passes the legal interest. *Fletcher v. Fletcher*, 29 Vt. 98. *Boardman v. Roger*, 17 Vt. 589.

**113. Deposit.** The case of depositing a note with a third person, upon the terms that he have one-half he can collect upon it, is not understood to vest any interest in the note in such depository, or as precluding the owner from collecting it himself, if he have an opportunity. *Manwell v. Briggs*, 17 Vt. 176.

**114. Re-transfer.** Where a party to a promissory note has, after negotiating it, paid and taken it up, he has, as to all parties prior to him to whom he has the right to look for payment, the same right, and to again transfer it, that he had originally. *Norton v. Downer*, 33 Vt. 26.

2. Time of transfer; holder *bona fide*, for value.

**115. Presumption.** In the absence of proof as to the time when a note was indorsed, the

legal presumption is that it was indorsed before due and while current. *Washburn v. Ramsdell*, 17 Vt. 299. *Leland v. Farnham*, 25 Vt. 553.

116. So, a note payable to bearer, passing by delivery, is presumed to have come to the party claiming as bearer, before its maturity. *Harri-son v. Edwards*, 12 Vt. 648.

117. Where a note payable on demand appeared to be indorsed, and there was no proof of the time of the indorsement;—*Held*, that it should be presumed to have been indorsed at a time earlier than five months after its date, and while current. *Leland v. Farnham*, 25 Vt. 553.

118. Note payable on demand. A negotiable promissory note, payable on demand with interest, indorsed ten months after its date, was *held* past due when indorsed, and subject to all defenses that would be available, if the suit had been brought by the original payee. *Morey v. Wakefield*, 41 Vt. 24.

119. Such a note indorsed two months after date, was *held* to have been past due when indorsed. *Camp v. Clark*, 14 Vt. 387.

120. Otherwise, where a note payable on demand was indorsed two days after date. *Den-nett v. Wyman*, 13 Vt. 485.

121. As relates to the negotiability of notes payable on demand, and in questions between the indorsee and indorser and between the indorsee and maker, they are to be considered as payable in a reasonable time, and what is a reasonable time is a question of law, to be decided by the court on the facts which may be found by the jury. *Id.*

122. Holder for value. Recognized, as the law of New York, that a negotiable promissory note passed in payment or as security of a precedent debt, is not received "in due course of trade," so as to cut off defenses as against the payee. *Russell v. Buck*, 14 Vt. 147.

123. Where a negotiable bill or note is assigned and delivered before its maturity, as collateral security for a debt which is created at the time of the assignment, the assignee becomes a holder for value. *Griswold v. Davis*, 31 Vt. 890.

124. The purchaser of a negotiable note, who gives his own note for the purchase price, is a holder for value in the commercial sense. *Adams v. Soule*, 33 Vt. 588.

125. One who takes a bill or note indorsed while current, in payment and extinguishment of a pre-existing debt, is regarded as a holder for value. *Atkinson v. Brooks*, 26 Vt. 574. *Dixon v. Dixon*, 31 Vt. 450. *Quinn v. Hard*, 43 Vt. 375. *Russell v. Splater*, 47 Vt. 273.

126. The plaintiff, a tenant in common with W, in land, requested W to sell it. W sold and conveyed it as his own to the defendant, and took the defendant's notes therefor payable to W's wife or bearer, and was guilty

of a fraud in the sale in respect to the boundaries. The plaintiff afterwards conveyed his half of the land to W, and received from W therefor one of said notes while current, and without notice of the fraud of W. *Held*, that the plaintiff was not a holder for value in the sense of the commercial rule; that this was not a purchase of the note for value, but a division of the avails of the sale of the land, and that the note was subject to the defense existing against it in the hands of W. *Kelly v. Pember*, 35 Vt. 183.

127. —*bona fide*. The purchaser of negotiable paper must exercise reasonable prudence and caution in taking it. If the circumstances are such as ought to excite the suspicion of a prudent and careful man, as to the validity of the paper as between the parties to it or the propriety of the transfer, and the purchaser takes it without inquiry, he does not stand in the position of a *bona fide* holder, but in the position of the party from whom he takes it, though he may have paid value for it. *Roth v. Colwin*, 32 Vt. 135. *Gould v. Stevens*, 43 Vt. 135. See *Sandford v. Norton*, 14 Vt. 234.

128. A, one of a partnership doing business as wharfingers at Port Kent, N. Y., there made three promissory notes in the name of his firm, but beyond the scope of the partnership, amounting to \$2,500, payable to the order of C, and delivered them to C without consideration and for the accommodation of C in his business. C indorsed these notes while current to the plaintiff in Troy, N. Y., who discounted them, supposing them to be business notes; but C was then largely indebted to him, and he knew C to be insolvent. In purchasing the notes he relied almost entirely upon N, who, as he was informed and the fact was, was one of the firm and owned considerable property and lived at Burlington, Vt., and the plaintiff did not know the responsibility of the other members of the firm. He made no inquiry as to N's knowledge of the making of the notes, nor whether they were business or accommodation notes. In an action upon the notes the referee reported the above facts, and added: "The referee is of opinion from the facts here found and submitted, that the plaintiff ought, in good faith towards N, to have inquired before taking these notes of C, whether N had authorized the making of them, and was wanting in due and reasonable diligence in not making any inquiry of N, or C, whether the same were accommodation notes merely, and, if so, whether they were authorized by the defendant." *Held*, that this statement of the opinion of the referee was to be treated as a finding of the fact of a want of due care and diligence on the part of the plaintiff in the purchase of the notes, and as such was conclusive; that the special facts detailed legally tend to support such finding of the re-

feree, and that the plaintiff could not recover against N. *Roth v. Colvin*.

129. The plaintiff purchased, before due, a negotiable promissory note, at a discount of \$50, of a stranger who professing to be the payee's agent. He refused to guaranty payment of the note, but the plaintiff knew the maker, and that he was apparently good. He did not know the payee, and had no communication with him, nor with the maker, nor inquired as to the consideration of the note, but supposed there was no defense to it. The note was in fact without consideration. In an action upon the note, the court directed a verdict for the plaintiff. *Held* erroneous; that these facts were sufficient to put the plaintiff upon inquiry, and that the case should have been submitted to the jury, to determine whether the plaintiff, on reasonable inquiry, could have ascertained that the note was without consideration. *Gould v. Stevens*, 48 Vt. 125.

130. Consideration of indorsement. The indorsement of a negotiable promissory note, although as collateral security for a smaller sum due, is irrevocable, and vests the title in the indorsee, and he may recover against the maker the whole amount of the note, holding the surplus, after payment of his claim, in trust for the indorser; and, in such suit, the maker cannot set up in defense any claims of the indorser against the indorsee in respect to the note, the maker being a stranger thereto. *Tarbell v. Sturtevant*, 26 Vt. 513.

131. The maker of a note cannot defend an action upon it by an assignee, on the ground that the assignee took it of the payee in payment for liquors sold him in violation of law. *Streit v. Waugh*, 48 Vt. 298.

### 3. Effect as to cutting off defenses and equities.

132. Statute of 1798. Where the maker of a promissory note, payable to A B, or bearer, is sued by one as bearer, no demand can be pleaded in set-off except a demand against the plaintiff in the action;—distinguished from the case of an action by an indorsee under the Stat. of 1798. *Parker v. Kendall*, 3 Vt. 540.

133. The statute of 1798, allowing indorsees of notes to maintain actions thereon in their own names, had a proviso securing to defendants such rights of set-off as they had against the original payee before notice of the indorsement. The Stat. Nov. 17, 1836, repealed this proviso, but provided that the act should not impair any right which had accrued under the former act. *Held*, that the right of set-off as against the original payee, for a breach of the covenant against incumbrances before the passage of the act of 1836 and before notice of the assignment, was saved by that act, and that

this right extended to payments in extinguishment of the incumbrance made after the passage of that act, and after notice of the assignment. *Alden v. Parkhill*, 18 Vt. 205.

134. While the statute of 1798 was in force, allowing the maker of a note to make the same defense against an indorsee as against the payee, the defendant gave his negotiable note, payable in one year, to J, and received therefor from J a deed, and a written agreement to deliver up the note to the defendant whenever the defendant should re-deed or deliver said deed to him, which should be in full payment of the note, and the note be void. J indorsed the note to the plaintiff before due and absconded. Upon notice thereof, the defendant exhibited the contract to the plaintiff and offered to rescind the trade, and to re-deed, and insisted on his right to do so. The plaintiff declined to take a conveyance, and the defendant procured the deed to him to be recorded. *Held*, that this was a defense to the action by the indorsee. *Goodall v. Rich*, 13 Vt. 602.

135. Notice given by the payee of a note to the maker, that he had indorsed it, is sufficient notice under the statute of 1798 to protect the indorsee against any after payment or credit to the payee. *Stewart v. Barnum*, Brayt. 178. 30 Vt. 704.

136. At common law—Transfer before due. In an action by the holder against the maker of a promissory note made payable to bearer, and presumably transferred before due;—*Held*, that a payment made before the note fell due, but not indorsed, could not be shown in defense. *Potter v. Bartlett*, 6 Vt. 248.

137. By *Williams*, C. J. It is not necessary for the holder to show that he paid any consideration for the note, unless the maker can in some way impute force or fraud to him, and the note is not subject to any offset or equitable considerations between the original parties thereto. If the maker shows that the note was put in circulation by fraud or force and throws suspicion upon the title of the holder, or shows that he took it after it became due, he may compel the holder to prove that he paid a consideration for it, or took it in the regular course of business. *Id.*

138. Where a negotiable promissory note has been assigned before due, the payment of it to the payee, though made in good faith and without notice of the assignment, will not avail against the holder. In such case, if the maker does not find his note in the hands of the payee when it falls due, he should presume, as the law presumes, that it has been transferred, and should pay it when and where he finds it. Notice of such assignment is required for no purpose, except, under the statute, to protect the note from attachment by trustee process for the debt of the payee. *Grinwald v. Davis*, 31 Vt. 390.

139. The maker of a negotiable promissory note became surety for the payee upon another note, and promised to pay the latter before notice of the transfer of the first, but paid the second after such notice. *Held*, that such payment could not be applied in set-off as against the first in the hands of the indorsee. *Sherwood v. Francis*, 11 Vt. 204.

140. The indorsement of a negotiable promissory note, for a valuable consideration while current, by the payee thereof who holds the same in trust, will pass a good title, as against the *cestui que trust*, to an indorsee who has no notice of the trust. *Keyes v. Wood*, 21 Vt. 381.

141. Illegality, fraud, duress, want or failure of consideration, is no defense to a negotiable promissory note negotiated before due, and in the hands of a *bona fide* holder for value. *Powers v. Ball*, 27 Vt. 663.

142. Knowledge of defense. A promissory note assigned to a party with knowledge of its consideration, though taken before due, is subject to any defense, as respects the consideration, which might be made to it if taken when overdue. *Thrall v. Horton*, 44 Vt. 386.

143. The consideration of a promissory note was land sold, and the note was assigned by the payee, while current, to the plaintiff having knowledge of the consideration. *Held*, that a suit then pending against the payee, which affected the title of the land, was not constructive notice to the plaintiff, that the consideration of the note had failed. *Sawyer v. Phaley*, 33 Vt. 69.

144. Burden and order of proof. Where the plaintiff sues as indorsee of a note or bill, the indorsement in common form imports, *prima facie*, a *bona fide* transfer for value, and he is not bound to show, in opening his case, how he came by the note or bill, even where notice to that effect has been served upon him before trial. But where the defendant, either by calling witnesses or cross-examining the plaintiff's witnesses, makes out a case upon which none but a *bona fide* holder for value is entitled to recover against him, it then becomes incumbent upon the plaintiff to show that he is entitled to the advantage of suing in such a character:—as, that he paid value, and that he was guilty of no want of ordinary care in taking it. *Sanford v. Norton*, 14 Vt. 228. See *Roth v. Colvin*, 32 Vt. 125. *Potter v. Bartlett*, 6 Vt. 250.

145. *Held*, that where a bill has been indorsed for value before due and without knowledge that it was an accommodation bill, the holder may treat all parties to it as liable to him according to their relative positions on the bill, and this right is unaffected by any subsequent knowledge that the bill was given for accommodation. Hence, in such case, the release of the drawer will not discharge nor

affect the primary liability of the acceptor; and, by *Isham, J.*, the rule is the same in equity;—and, *quære*, whether the rule is not the same, where the indorsee had knowledge, at the time he received the bill, that it was given for the accommodation of the drawer. *Farmers' & Mechanics' Bank v. Rathbone*, 26 Vt. 19.

146. Transfer after due. A negotiable note not indorsed, but assigned by parol after due, is subject to all the equity existing at the time in the maker. *Foot v. Ketchum*, 15 Vt. 258.

147. A promissory note indorsed or assigned when overdue is subject in the hands of the assignee to all equities between the original parties arising out of the note transaction itself, and to the application of all payments thereon, and of any demands due the maker from the payee where there was an agreement to that effect before the transfer;—as, an agreement to apply another note which the maker held against the payee. *Britton v. Bishop*, 11 Vt. 70;—an account found due the maker on settlement after the note was given. *Walbridge v. Kibbee*, 20 Vt. 543. 28 Vt. 384;—a like agreement, made at the time the note was given, to apply an existing account, the balance to be thereafter ascertained. *Pecker v. Sawyer*, 24 Vt. 459.

148. In an action by the holder of a promissory note assigned after it fell due by its terms, a contract made with a former holder to extend the time of payment beyond its terms, and beyond the time of the commencement of the suit, of which the plaintiff before he became owner of the note had notice, was used as a defense. *Paddock v. Jones*, 40 Vt. 474.

#### 4. Demand and notice to charge indorser.

149. Law merchant. The law merchant, as applied to negotiable promissory notes, was *held* not applicable to the general circumstances and situation of this State. *Rhodes v. Risley*, N. Chip. 84. 1 D. Chip. 52. (1791.)

150. In an action by the indorsee against the indorser of a note not negotiable, and indorsed after due;—*Held*, that the defendant might prove that it was agreed by parol, at the time of the transfer, that he should be liable only in the event that the holder should be unable to collect the note by suit against the maker. *Miner v. Robinson*, 1 D. Chip. 392.

151. The law merchant, as applicable to demand and notice to charge the indorser of a promissory note, was first adopted in *Nash v. Harrington*, 2 Aik. 9. *Ib.* 265. (1826.)

152. In general. There must be due demand and notice back, to charge an indorser, although the maker be insolvent. *Ib.*

153. What is reasonable notice to an indorser of a note in order to charge him, is purely a question of law, where the facts are found. *Ib.*

154. To charge the indorser of a note, the holder must present it for payment on the day it falls due and give notice to the indorser of non-payment within a reasonable time; which, according to the general rule, if he resides in the same place, must be on the same, or, at farthest, by the next day, or, if in a different place, by the next post. If the holder gives time to the maker, the indorser is discharged. *Whittlesey v. Dean*, 2 Aik. 263.

155. The indorsement of a note waiving notice is not a waiver of demand upon the maker; and if demand be not duly made, the indorser will be discharged. *Buchanan v. Marshall*, 23 Vt. 561.

156. Place of demand. A note was dated Bennington, Vt., Dec. 29, 1838, payable April 1, 1840. At the time the note was executed, the maker resided at Wrentham, Mass. At the time it was indorsed, viz., the spring of 1869, he came to Bennington with a son and daughter, leaving his wife in Wrentham, and began to keep house with his son and daughter, his housekeeper, and was engaged in business there, and remained there personally until July following, when he returned to Wrentham and continued to reside there ever after, but left his son and daughter living in the same house, the son being his agent and a partner in his business at Bennington. *Held*, that demand of payment made at the maturity of the note, of the daughter at the house, in the absence of the son, was sufficient to charge the indorser, it not appearing that the maker had abandoned his residence in Bennington, or given up the idea of returning to his house there. *Sanford v. Norton*, 17 Vt. 285.

157. Where a promissory note, executed in the State of New York between parties resident there, but made payable at "Orwell, Vt.," was indorsed to the plaintiff who, as the maker knew, resided at Orwell;—*quare*, whether any formal demand of payment was necessary to charge the indorser, as the maker had no domicile or place of business at or near the place of payment; but, if so;—*Held*, that presentation and demand at the Bank of Orwell, the most public banking-house, which was also the plaintiff's principal place of business, were sufficient. *Austin v. Wilson*, 24 Vt. 630.

158. A note payable at a bank may be presented there for payment at any time during banking hours on the day of its maturity, and if not paid when so presented, the holder is at liberty to treat it as dishonored; and notice thereof, given on the same day, will charge the indorser. *Thorpe v. Peck*, 28 Vt. 127.

159. Where a promissory note was made payable "at any bank in Boston;"—*Held*, that

demand made at any bank which the holder might elect, was sufficient to charge the indorser—the maker having made no election. *Brickett v. Spalding*, 33 Vt. 107.

160. Notice, how given. Notice of the dishonor of a bill or note, in order to charge a party, must be addressed to him at the place of his residence, unless he is shown to have a private business place elsewhere. *Commercial Bank v. Strong*, 28 Vt. 316.

161. Where the defendant resided at Rutland, but was president of a corporation having its office at Poultney, and it was not shown that he had any place of private business at Poultney;—*Held*, that notice addressed to him at Poultney of the dishonor of a bill of which he was indorser, was not sufficient. *Ib.*

162. The law does not require that the fact, that notice to an indorser was seasonably deposited in the postoffice, should be proved by a single witness who can swear positively to the fact; but all, who had anything to do about the matter of depositing the notice, should be called. There is no such rule of proof, as that the fact must be established by positive evidence and cannot be left to inference or presumption, although the law requires very great certainty of proof. *Ib.*

163. Notice of the dishonor of a bill or note addressed to the indorser and directed by mail to the town postoffice in the town where he resides, is sufficient to charge him, notwithstanding there is another postoffice in the town, nearer his residence, and at which he does his postoffice business. *Bank of Manchester v. Slason*, 13 Vt. 334.

164. If the holder of a note does not know, and cannot by diligent inquiry ascertain the residence of the indorser, it is sufficient to charge him if the holder give notice of presentment and non-payment at the first opportunity. *Blodgett v. Durgin*, 32 Vt. 361.

165. Case of transfer after due. A note indorsed after due is to be treated, as to demand and notice to charge the indorser, as if it fell due on the day when indorsed. *Nash v. Harrington*, 2 Aik. 9.

166. Where a note was indorsed after some months due, the indorser and indorsee living in the same village and the maker about two miles distant;—*Held*, that in order to charge the indorser, demand should have been made in a day or two at the farthest, and notice given to the indorser on the same day of the demand. *Ib.*

167. Indorsement of paper not negotiable. The assignee of a note not negotiable, who takes upon himself to pursue the maker in the first instance, or the holder of a note in trust, must, in order to charge the assignor, demand payment as in case of a note indorsed, and, if not paid, must forthwith attach the estate of the debtor if to be found, and if not, to

attach his body,—unless the maker should abscond leaving no effects, or become bankrupt. *Whittlesey v. Dean*, 2 Aik. 268. (1827.)

168. The assignee by indorsement of a note payable in specific property demanded payment of the maker at the time and place fixed, but without having the note present, and the maker refused to pay it. *Held*, that the indorser was thereby discharged. *Eastman v. Potter*, 4 Vt. 313.

169. As to paper not negotiable and not designed for commercial purposes, as an order for payment in specific articles, a demand of payment and notice of non-payment is sufficient to charge the drawer, if he has sustained no damage in consequence of the demand and notice not having been sooner made and given. *Hawkins v. Barney*, 27 Vt. 392.

170. Void note. The indorsee of a note void in its creation, as for want of consideration, may, upon a proper declaration, recover of the indorser without proof of demand. *Chandler v. Mason*, 2 Vt. 193. (1829.)

171. Waiver of demand and notice. If the indorser with knowledge of the existence of facts which discharge him, as want of proper demand and notice, promise the holder to pay the note, this operates as a waiver of demand and notice, and is binding. *Blodgett v. Durgin*, 32 Vt. 861.

172. Such promise is *prima facie* binding, and if the indorser would exonerate himself therefrom the burden is on him to prove his ignorance of the facts. *Nash v. Harrington*, 1 Aik. 39.

173. Part payment by the indorser, a promise to pay, or an acknowledgment of liability, after the note becomes due, is *prima facie* evidence, not only of notice, but of presentment. *Bank of U. S. v. Lyman* (U. S. C. C.), 20 Vt. 666.

174. The indorser of a note had notice of non-payment, before the expiration of the day on which the note fell due, and thereupon promised to pay it. *Held*, that this was a waiver of further notice. *Seeley v. Bisbee*, 2 Vt. 105.

175. The drawer of a bill, five days before its maturity, gave the holder a mortgage to secure the payment of it four months afterwards. *Held*, that this was a waiver of demand on the acceptor, and satisfied the usual averment of demand and notice in a declaration on the bill against the drawer. *Farm. & Mech. Bank v. Catlin*, 13 Vt. 39.

176. A written admission by the indorser of a bill, made out of court, that he received due notice of dishonor, is evidence of the fact, but not conclusive. He may show that the writing was signed by mistake, or under a misapprehension of facts. *Commercial Bank v. Clark*, 28 Vt. 325.

## V. ACTION.

### 1. Note payable in specific chattels.

177. Demand. The payee of a note, payable in cattle at the house of the maker on a day certain, called for the cattle at the time and place named, but, at the request of the maker, he agreed to defer the payment and call another day and take the cattle. In a few days after, he did call at the maker's house to take the cattle on the note and made known his business, but the maker was not at home to turn out the cattle. The payee afterwards saw the maker and told him he had called for the cattle as he had agreed. *Held*, that it was the duty of the maker, after such information, to pay the cattle forthwith on the note; and that having neglected so to do for three months, he was subject to an action and recovery upon the note. *Pike v. Mott*, 5 Vt. 108.

178. The payee of a note for so many dollars payable in hemlock bark on demand and dated in February, during the summer following,—the summer being the proper time for peeling such bark,—demanded payment of the note, of the maker, requesting him to have the bark peeled that summer and delivered the next winter,—winter being the most convenient time for delivering the bark; all which the maker agreed should be done. *Held*, that this demand was the most appropriate for such a note, and, that the maker by failing to answer it as he promised, had become liable to pay the note in money, and under the common counts in assumpsit. *Read v. Sturtevant*, 40 Vt. 521.

### 2. Lost note.

179. Lost or destroyed. A promissory note lost or destroyed will not be treated as a merger of the original consideration, so as to prevent a recovery counting upon the original indebtedness. *Lazell v. Lazell*, 12 Vt. 443.

180. Where a note not negotiable, or, if negotiable by being payable to order, not negotiated, is lost, an action at law may be maintained on the note, on proof of its loss, to recover its contents. To defeat such action, it should appear affirmatively that such lost note was negotiable and had been in fact negotiated, or else was payable to bearer, so as to pass by delivery. But if the note is shown to have been negotiable and actually negotiated, and so (probably), if made payable to bearer, and the evidence shows merely the loss of the note and not its destruction, the remedy is in chancery, and the court will require an indemnity to be given before granting relief. *Ib. Hough v. Barton*, 20 Vt. 455; and see *Miller v. Rut. & Wash. R. Co.*, 40 Vt. 399.

181. On a bill in equity to enforce the

payment of a lost promissory note not negotiable, or, if negotiable, not negotiated, an affidavit of the loss is essential to the jurisdiction; but not so an offer of indemnity;—this may be left for the defendant to move. If the note has been negotiated, indemnity should be required. The court, in this case, decreed payment of a lost note without an indemnity, and where the orator had refused to give one—the claim being barred by the statute of limitations at the date of the decree. *Hopkins v. Adams*, 20 Vt. 407.

182. In an action of *indebitatus assumpsit* brought to recover for a lost promissory note, in the name of the original payee, by a party to whom he had transferred his interest;—*Held*, that the fact that the name of the payee was written across the back of the note, at the time he transferred it, did not prove that the note was made payable to order, or bearer, and was therefore negotiable. *Hough v. Barton*, 20 Vt. 455.

183. **Surrendered.** A party may, under certain circumstances, recover upon a promissory note, counting upon the note which he has voluntarily given up to be cancelled. *Edgell v. Stanford*, 6 Vt. 551.

184. If a debtor, by false and fraudulent representations as to his solvency, induce his creditor to give up his note upon part payment, he may still be sued upon it and compelled to pay the balance. *Reynolds v. French*, 8 Vt. 85. 29 Vt. 415.

185. **Mode of declaring.** It is not necessary to declare specially on a lost promissory note, as lost. *Viles v. Moulton*, 11 Vt. 470.

186. **Venue.** A negotiable note may be sued in the town where the indorsee resides, although the consideration was for goods sold in some other town. (Slade's Stat. c. 12, No. 4.) *Ellis v. Kelly*, Brayt. 202.

### 3. Parties.

187. **Plaintiff's title.** In an action upon a note, not negotiable, no measure of interest in a third person can affect the right of action in the name of the payee—he not dissenting. *Sanford v. Huxley*, 18 Vt. 170.

188. In an action upon a promissory note, by one having apparent right to sue, the defendant is allowed to raise the question as to the plaintiff's title only for the purpose of protecting himself from a subsequent suit in the name of some one having a better title, and who has not acquiesced in the present suit. *Hackett v. Kendall*, 23 Vt. 275.

189. In an action upon a promissory note, the defendant cannot contest the plaintiff's apparent legal title and right to sue upon it, provided that the payment, or recovery upon it,

will bar any further claim on the note by others. *Fletcher v. Fletcher*, 29 Vt. 98.

190. Where the plaintiff of record is by the terms of a promissory note a proper party to sue upon it, and assents to the use of his name by the real owner for the purpose of the suit, the action cannot be defeated by denying the plaintiff's title, although in fact the note had never been delivered to the plaintiff, and his name was used in the note without his consent. *Boardman v. Roger*, 17 Vt. 589. *Smith v. Burton*, 3 Vt. 233. *Hackett v. Kendall*, 23 Vt. 275. *Bank of Burlington v. Beach*, 1 Aik. 62. *Keith v. Goodwin*, 31 Vt. 268. *Bank of Montpelier v. Joyner*, 33 Vt. 481. *Bank of Newbury v. Richards*, 35 Vt. 281. *Bank of Middlebury v. Bingham*, 33 Vt. 633.

191. And where the real owner has a right to use the name of such plaintiff for the purposes of a suit, the suit cannot be defeated by refusing assent to the prosecution; but an indemnity against costs may be required. *Farmers' & Mechanics' Bank v. Humphrey*, 36 Vt. 554.

192. The owner and holder of a negotiable promissory note may maintain a suit thereon in the name of another who, at the time the suit was brought, was neither owner nor holder, nor had possession of or any interest in the note, but consents that his name be used as plaintiff, and produces the note on trial. *Austin v. Birchard*, 31 Vt. 589.

193. Where a joint and several negotiable promissory note had been indorsed in blank, and judgment thereon had been recovered against one of the signers in the name of a certain indorsee;—*Held*, that an action lay against the other signer in favor of another indorsee upon the same indorsement—both suits being for the benefit of the payee who made the indorsement. *Sawyer v. White*, 19 Vt. 40.

194. **Plaintiff's interest—legal or beneficial.** No person, although in fact a principal or partner, can sue or be sued upon a bill or negotiable note, unless he appears upon its face to be a party to it. Where a note was made payable to "Samuel Javdon, Esq., cashier, or order";—*Held*, that an action upon it did not lie in the name of the Bank of the U. S., of which he was cashier. *Bank of U. S. v. Lyman (U. S. C. C.)*, 20 Vt. 666. 23 Vt. 732.

195. It is the settled law of this State (contrary to general commercial law and as held in *Bank of U. S. v. Lyman*, in *U. S. C. C.*, *supra*), that an action upon a promissory note may be maintained in the name of the party beneficially interested, where the note is in terms made payable to his agent—as, treasurer, cashier, &c. *Rutland & Burlington R. Co. v. Cole*, 24 Vt. 33. *Arlington v. Hinds*, 1 D. Chip. 431. *Farms. & Mechs.' Bank v. Day*,

18 Vt. 86. *Bank of Manchester v. Slason*, 18 Vt. 834. *Vt. Central R. Co. v. Claves*, 21 Vt. 80, and see *Perkins v. Bradley*, 24 Vt. 66.

196. The action may also be maintained in the name of the person to whom the note is in terms and by name made payable. *Binney v. Plumley*, 5 Vt. 500. 24 Vt. 89. *Johnson v. Catlin*, 27 Vt. 87.

197. Upon a note payable to A, "guardian of B," the action must be in the name of A. *Wheelock v. Wheelock*, 5 Vt. 488.

198. An action upon a promissory note payable to A and B, "Trustees of the Newmarket and Kingston Wesleyan Academy," was held well brought in the name of A and B. *Binney v. Plumley*, 5 Vt. 500. 24 Vt. 89.

199. An action cannot be sustained by a town treasurer, *as such*, upon a note given to him as "town treasurer." *Hinds v. Stone*, Brayt. 280. See 1 D. Chip. 481.

200. The defendant executed his note of the following tenor: "Arlington, Sept. 27, 1808. For value received I promise to pay Luther Stone, Town Treasurer, or his successors in office, eighty-four dollars." It was proved that Stone was Town Treasurer of Arlington, and that the consideration of the note moved from the town. Held, that an action upon the note lay in the name of the town. *Arlington v. Hinds*, 1 D. Chip. 481. 5 Vt. 488. 8 Vt. 395. 21 Vt. 87. 24 Vt. 89. 27 Vt. 89.

201. A note was allowed against the estate of the maker of a promissory note in favor of "Andrew T. Hall, President of the Tremont Bank." Held, that this was no defense to an action against the indorser brought by the Tremont Bank. *Tremont Bank v. Paine*, 28 Vt. 24.

202. Where one named *agent*, or *cashier*, is the payer of a bill or note which is accepted or given for value, he may, in an action in his own name against the acceptor or maker, recover the sum due upon the common money counts. *Johnson v. Catlin*, 27 Vt. 87.

#### 4. Pleadings.

203. **Declaration—suit by payee.** In declaring upon a note payable in specific articles at a given time and place, it is not necessary to aver that the plaintiff was ready at the time and place to receive pay, since the maker may discharge his contract by a tender at the time and place, and is bound to do so, whether the payee attends or not. *Devey v. Washburn*, 12 Vt. 580. *Barney v. Bliss*, 1 D. Chip. 399. (*Brooks v. Page*, 1 D. Chip. 840, overruled on this point.)

204. Where a promissory note, or bill of exchange, is made payable at a specified time and place, it is not necessary that it should be there and then presented, in order to charge the maker, or acceptor. If presentment be aver-

red in the declaration, this is surplusage and need not be proved. It is matter of defense, that the party was ready there and then to pay the debt, and on proof of this fact and bringing the money into court, he will be discharged of the damages and costs, as in case of a tender. *Terbell v. Downer*, 27 Vt. 509. *Hart v. Green*, 8 Vt. 191. 16 Vt. 29.

205. In declaring upon a promissory note, it is sufficient to declare simply upon the promise to pay contained in the note, without raising thereupon a liability to pay and a further promise based upon such liability. *Binney v. Plumley*, 5 Vt. 500. 12 Vt. 580.

206. The defendants were summoned "to answer to the Bank of Montpelier, at," &c., "in a plea of the case for that the defendants by their promissory note dated at Richmond, May 12, 1858, for value received, jointly and severally promised the President, Directors and Company of the Bank of Montpelier to pay them the sum of five hundred and seventy dollars in three months from date, which is unpaid, though demanded." This declaration was held good on general demurrer. *Bank of Montpelier v. Russell*, 27 Vt. 719.

207. A declaration upon a promissory note payable to A B, or bearer, in which the only averment of the transfer and of the plaintiff's title was, that the plaintiff "is the *bona fide* owner and bearer of said note," was held sufficient on general demurrer. *White v. Tarbell*, 27 Vt. 573.

208. Such declaration, not alleging any time of payment, was held good on general demurrer;—the presumption being, that the note was declared upon according to its terms, and therefore, according to its legal effect, as payable immediately, or on demand. *Ib.*

209. In an action upon a joint and several promissory note signed by four persons, the original declaration counted against the four. The writ having been served only on three, with a *non est* return as to the other, the plaintiff filed additional counts against only the three on whom service had been made. On demurrer, the declaration was held ill for misjoinder of counts. *Claremont Bank v. Wood*, 12 Vt. 252.

210. —**by indorsee.** The indorsee of a negotiable promissory note may recover against the maker under the general money counts. *Brigham v. Hutchins*, 27 Vt. 569; and this, although he holds the note only in trust for the purposes of collection. *Chase v. Burnham*, 18 Vt. 447.

211. Whether an indorsee can recover on the money counts in assumpsit against a mere accommodation indorser, known to be such when the note was negotiated,—*quære*. *Austin v. Burlington*, 34 Vt. 506.

212. In an action by the indorsee, a concise



statement of the indorsement is sufficient;—as that the payee did *indorse* and deliver the note to the plaintiff—this being a technical word having in law a distinct meaning. *Brooks v. Edson*, 7 Vt. 351.

213. In a declaration as indorsee of a promissory note indorsed by an administrator, it is not necessary to make profert of the letters of administration, nor to aver by whom they were granted. An averment that the appointment was duly made is sufficient. *Cahoon v. Moore*, 11 Vt. 604. *Grinwald v. Barnum*, 5 Vt. 269.

214. In an action by the indorsee of a promissory note against the maker, the declaration averred that the defendant made his note in writing payable "to the order of the Treasurer of the Burlington Mill Company, and that said Treasurer indorsed said note before payment to the plaintiff," &c., not otherwise describing said Treasurer or Mill Company. Upon special demurrer, "that said declaration does not set forth to whom the said note was made payable, nor by whom indorsed,"—*Held*, that it was sufficient. *Perkins v. Bradley*, 24 Vt. 66.

215. **Evidence.** In an action by indorsee against indorser, the declaration averred demand of payment and notice of non-payment. *Held*, that the declaration was sustained by proof of waiver of demand and notice. *Farm. & Mech. Bank v. Day*, 13 Vt. 36.

216. —**under general issue.** In an action upon a promissory note given for the purchase of land, the defendant cannot, under the general issue, give in evidence the breach of a covenant contained in the deed against incumbrances. *Alden v. Parkhill*, 18 Vt. 205.

217. **Witnessed note.** In a declaration counting upon a promissory note in common form, and adding the common money count, the defendant pleaded to the whole action the statute of limitations of six years. The replication, professing to answer the whole plea as to both counts, averred that the action was brought to recover only the note mentioned in the special count, and that that was a witnessed note. On demurrer;—*Held*, that the replication was ill, as being no answer to the plea as to the common count. *Carpenter v. McClure*, 38 Vt. 375. The plaintiff then entered a *nolle prosequi* as to the common count, and amended his replication by averring that the note was a witnessed note;—*Held*, that the defendant's plea, as applicable to the common count, fell with it, and that the amended replication answered the plea. *S. C.*, 40 Vt. 108.

218. To bring a case within the privilege of the statute of limitations of fourteen years, in a suit "brought on a promissory note signed in the presence of an attesting witness," the declaration must count specially upon the note. If the declaration be in the common counts, a plea of the common limitation of six years is a

sufficient bar, though the witnessed note be filed as a specification. *Lapham v. Briggs*, 27 Vt. 26. *Carpenter v. McClure*, 38 Vt. 375. *S. C.*, 40 Vt. 108. *Dana v. McClure*, 39 Vt. 197.

219. A witnessed note may be counted upon in common form, and, upon a plea of the statute of limitations of six years, the plaintiff may reply, that it was a witnessed note, and this is a good answer to the plea and is no departure. *Carpenter v. McClure*. *Bragg v. Fletcher*, 20 Vt. 351.

#### 5. Defences.

220. **Payment.** In an action by the payee against the maker of a promissory note made payable at a certain day at a certain bank, and in a form to be negotiated at such bank, the defendant offered to prove that the plaintiff told him at the time of the execution of the note that he might mail the money to the plaintiff and he would take up the note for him; and that on the day after the note fell due, he deposited in the mail a letter, containing the money, properly addressed to the plaintiff. The county court excluded the evidence offered. *Held*, (1), that the defense was not objectionable as tending to vary the terms of the note; that the proposition was a separate and distinct matter from the contract described in the note; that being without consideration it was revocable at will before performance, but that if performed, the note would have been discharged; that if the money had been mailed in due season, its reception would have been at the risk of the plaintiff. But, (2), not having been mailed in season for taking up the note on the day it fell due, the risk was the defendant's, and that, without showing the arrival and reception of the money, the note would not be discharged. Judgment for plaintiff affirmed. *Follett v. Eastman*, 16 Vt. 19.

221. It was agreed between the parties to a promissory note that the note might be paid by paying certain debts of the payee. *Held*, that such payments were a defense to an action upon the note by the administrator of the payee. *Gilson v. Gilson*, 16 Vt. 464.

222. The maker of a negotiable promissory note will be protected in paying or settling it with a holder who has the apparent legal title, where the maker acts in good faith and there is nothing to awaken suspicion of the holder's title. *Ellsworth v. Fogg*, 35 Vt. 355.

223. It is no defense to an action against the indorser of a promissory note, that it has been allowed against the estate of the maker, nor that the probate court has ordered a dividend to be paid upon it. *Tremont Bank v. Paine*, 28 Vt. 24.

224. The defendant gave the plaintiff a promissory note, taking back a writing that he

was only surety, and that the note was for the plaintiff to pay. The parties afterwards settled, and the defendant on good consideration agreed by parol to pay the note. In an action on the note, the defendant set up the writing in defense. *Held*, that evidence of the subsequent parol agreement was admissible and was effective against the writing, to reinstate the note according to its terms. *Norton v. Downer*, 88 Vt. 26.

**225. Statute.** The fact that a note was purchased for the purpose of putting the same in suit and thereby harassing the defendant, is not a defense to an action thereon brought in the name of the original payee. *McOrmsby v. Gilman*, 24 Vt. 437. (G. S. c. 125, s. 13.)

**226. Note to wife.** Where the vendor of property takes a note therefor to his wife, from whom no consideration moves, it is subject to the same defenses as if made payable to himself. *Kelly v. Pember*, 35 Vt. 183.

**227. Failure of consideration.** It is a good defense to a note given as payment of a judgment, that the judgment was afterwards set aside on *audita querela*. *Dennison v. Brown*, 3 Vt. 170.

**228.** Where the sale of a patent right for a mowing machine constituted the sole consideration of a promissory note given therefor;—*Held*, that it was a good defense to the note, as a total failure of consideration, that the patent right was of no value because of a defect in the principle of construction, so that the machine could not be made to work as a mowing machine, although the letters patent were authentic and not vacated. *Clough v. Patrick*, 37 Vt. 421.

**229. Williams v. Hicks**, 2 Vt. 86, which is seemingly *contra*, criticized and limited. *Id.*

**230.** Where a promissory note was given for the patent right of a broad cast seed-sower to be used by horse power, and the machine was entirely worthless as such;—*Held*, that the failure of consideration was total, although it was afterwards discovered that the machine was capable of being cut down and varied in its construction, so as to be operated by hand, —a substantially different thing, and not that for which the purchaser bargained. *Craigin v. Fowler*, 34 Vt. 326.

**231. Partial failure.** A partial failure of consideration cannot be set up as a defense *pro tanto* to an action upon a promissory note, where the sum to be deducted cannot be ascertained by computation, but is unliquidated and subject to the estimation of a jury. *Briggs v. Boyd*, 37 Vt. 534. *Williams v. Hicks*, 2 Vt. 39. *Walker v. Smith*, 2 Vt. 539. *Stone v. Peake*, 16 Vt. 213. *Burton v. Schermerhorn*, 31 Vt. 289. 27 Vt. 435. *Hassams v. Dompier*, 28 Vt. 32. *Richardson v. Sanborn*, 33 Vt. 75. *Harrington v. Lee*, 33 Vt. 249. *Foster v. Phaley*, 35 Vt. 309. *Farrar v. Freeman*, 44 Vt. 63.

**232.** Where there is a partial failure of the consideration of a promissory note—as by fraud or misrepresentation—three things must concur to have an abatement in the assessment of damages, viz: fraud in procuring the note for the sum named; an offer to rescind; and ability by computation to fix the amount to be deducted. *Barrett, J.*, in *Harrington v. Lee*. *Walker v. Smith*. *Stone v. Peake*.

**233.** “If there is such a rule, there ought not to be; it is sustained by no principle of policy, convenience or justice.” *Peck, J.*, in *Kelly v. Pember*, 35 Vt. 186. *Note*—This rule is now changed by Stat. 1867, No. 51, when the suit is between the original parties to the note or bill, but not otherwise. *Farrar v. Freeman*, 44 Vt. 63. *Thrall v. Horton*, 44 Vt. 386.

**234.** It is not a defense to an action upon a promissory note, that its consideration, *in part*, and not liquidated, was a piece of land conveyed with warranty, on which was an outstanding mortgage which the grantee has since paid. *Hassams v. Dompier*, 28 Vt. 32.

**235.** The defendant purchased of the plaintiff a pew in a meeting house, and gave the plaintiff his promissory note therefor, and the plaintiff agreed to deed the pew to the defendant in a few days. In an action on the note,—*Held*, that the plaintiff's neglect to deed the pew was no defense to the note,—for, (1), the promises were independent; (2), the consideration had not failed, it being promise for promise, and the plaintiff's promise remained; (3), the plaintiff's promise was not void by the statute of frauds, but good until avoided by him. *Chapman v. Eddy*, 13 Vt. 205.

**236.** The defendant gave his note towards the purchase of a sawmill conveyed with warranty, and, after occupying for two years, his title failed but not so as to make him accountable for the past use. In an action on the note, defense was made that the consideration had wholly failed; but it appeared that the use of the premises was of greater value than the note; against which the defendant urged that he had made improvements upon the premises to more than the value of such use. *Held*, that the expense of only such improvements could be reckoned against the value of the use, as were necessary to render the use of value. *Foster v. Phaley*, 35 Vt. 303.

## BOND.

**1. What is.** The word “bond” does not necessarily import an instrument under seal. A railway bond may be negotiable, and may be declared upon in assumpsit as an instrument importing a consideration, like a bill or promissory note, though called in the declaration a

"bond." *Ide v. Conn. & Pass. R. R. Co.*, 32 Vt. 297.

2. A lost bond of this character was allowed in chancery upon furnishing an indemnity. *Miller v. Rut. & Wash. R. Co.*, 40 Vt. 399.

3. A bond in these words: "We A B and C D are jointly and severally bound," &c., where signed and sealed by A B, C D, and E F, is good against E F. *Campbell v. Campbell*, Brayt. 38.

4. **Delivery.** Where a bond contains, in the obligatory part, the names of several persons as sureties, if only a part sign the bond and with an understanding and on condition that it is not to be delivered until signed by the others, it does not become effectual as to those who do sign, until the condition is complied with, although handed to the obligee by the principal signer. Such bond carries notice on its face to the obliges of its incompleteness. *Fletcher v. Austin*, 11 Vt. 447. 31 Vt. 318.

5. Two parties signed a deputy sheriff's bond and handed it to him with directions not to deliver it to the sheriff, the obligee, until and unless signed by certain other persons, who were named also as sureties in the obligatory part of the bond. The deputy delivered it to the obligee without such additional signatures, and after the expiration of the deputy's office and after he had become liable for official default, the other named sureties signed the bond. *Held*, that the two who first signed were not liable thereon, without proof of their consent to such subsequent signing and delivery. *Ib.*

6. Where the probate court, upon the appointment of an administrator, determined the form and amount of the bond and who should sign it, and directed that when so signed it might be delivered to one S, and should be the same as if returned to the judge, and the bond on the same day was so signed and delivered to S;—*Held*, that it took effect on that day, although it was not returned to the judge and filed in the probate court until 18 days afterwards. *Clark v. Tabor*, 22 Vt. 595.

7. **Official bond.** A bond taken by color of one's office is void, if it contain provisions not authorized by law;—as a jail bond to a sheriff, conditioned to behave as a good orderly prisoner, pay board, jailor's fees, &c. *Lyon v. Ide*, 1 D. Chip. 46. *S. C.*, N. Chip. 49.

8. A condition not provided nor authorized by law inserted in an official bond is void,—as in an administration bond. *Probate Court v. Matthews*, 6 Vt. 269.

9. A guardian's bond to the probate court was *held* obligatory and effective, although the condition was not in its details strictly according to the provisions of the statute, but provided, in general terms, for the faithful execution of the office "in all parts thereof, accord-

ing to the rules and directions of the law," &c. *Probate Court v. Strong*, 27 Vt. 202.

10. Where a guardian's bond, filed in the probate court, was to A B, Esq., "judge of the court of probate," &c., "to be paid unto the said judge, or his successor in said office," &c.;—*Held*, that this was an official bond, and was in legal effect a bond to the probate court. *Ib.*

11. A like bond to "the judge of probate" of a county in New Hampshire was *held* to be an official bond to the probate court, and not enforceable in this State. *Judge of Probate v. Hibbard*, 44 Vt. 597.

12. **Annual office.** A bank charter required an annual election of directors, who should hold their offices for one year and until their successors should be appointed and qualified; and that no director should enter upon or discharge any of the duties of his office, until his bond had been executed and approved, as provided in the charter. M was elected director in 1849 and gave his bond, with sureties, conditioned for the due performance of his duties as director, "while he shall be a director of said bank." M was annually re-elected and acted as a director for several years thereafter, but never executed any other bond. In an action upon the bond;—*Held*, that it did not cover official defaults occurring after the expiration of the term of office under the first election, viz., one year. *State Treasurer v. Mann*, 34 Vt. 871.

13. **Action—Pleadings.** Where the action is founded on a deed, the deed must be declared upon; and in such case the plea of *nil debet* is ill on general demurrer. So *held* in an action of debt on a jail bond. *Dyer v. Cleaveland*, 18 Vt. 241.

14. In assigning breaches of the condition of an indemnifying bond, it is not necessary to aver that the defendant had notice of those facts which constitute a breach of the bond. *Topliff v. Hayes*, 20 Vt. 362.

15. Declaration on a bond of indemnity, assigning breaches:—After *oyer*, there was a general plea of *non damnificatus* concluding with a verification. *Held*, well enough on demurrer. *Williams v. Willson*, 1 Vt. 266.

16. In debt upon bond, the condition set out upon *oyer* appeared to be, that the defendant should make his appearance before certain arbitrators and pay such sum as they should award; and thereupon the defendant pleaded *no award*. *Held* ill on demurrer, because not answering the first of said conditions. *North v. Johnson*, 1 D. Chip. 131.

17. In actions of a certain class—as covenant, or debt on bond with condition—every part of the declaration not answered is admitted. *Freeman v. Henry*, 48 Vt. 553. *Carpenter v. Briggs*, 15 Vt. 34.

**18. Payments amounting to penalty.**

In an action upon a bond in the penal sum of \$1,000, conditioned to pay the obligee during his life the annual sum of \$100;—*Held*, that the punctual payment of the first ten yearly sums was no satisfaction of the bond, so as to bar an action thereon to recover for further accruing yearly sums during the life of the obligee. *Blackmer v. Blackmer*, 5 Vt. 355.

**19. Tender of performance.** Where a bond is conditioned to become absolute upon the performance of a collateral thing by the obligee, a tender of performance, wrongfully refused, has the effect of actual performance so far as to give a right of action on the bond, but has not the effect of performance as to damages. *Boardman v. Keeler*, 21 Vt. 77. 36 Vt. 720.

**20. Form of judgment.** The stipulation in the condition of a bond, that if the obligor shall not carry on a particular business, &c., then the bond shall become void, is, under G. S. c. 30, s. 65, in legal effect a "covenant" or "agreement" that he will not carry on such business. And in an action on such bond, where the breaches and the injury may be continuous, or from time to time, judgment is to be rendered for the penalty, and execution to issue only for the damages assessed for past breaches. *Marvin v. Bell*, 41 Vt. 607.

**21. Distinction taken between such case under s. 65, and a case under s. 63, where there can be but one breach and assessment—**as on jail bonds; bonds conditioned for the payment of a single sum of money; or the performance of a single service or duty. *Id.* *Williams v. Willson*, 1 Vt. 266.

**22. Damages—Interest.** In an action on a bond conditioned to indemnify against a certain payment, interest on the sum paid, though exceeding the penalty, may be recovered as damages. *Williams v. Willson*.

**23.** In an action against the surety on a jail bond, interest in excess of the penalty was refused. *Matlocks v. Bellamy*, 8 Vt. 463.

**24. Construction—Instances.** The plaintiff had covenanted to support his mother. A, one of the defendants, as principal, and the others, as sureties, gave a bond to the plaintiff that A should support the mother, and save the plaintiff harmless from such expense by virtue of his said covenant. In an action on the bond;—*Held*, that the defendants were liable for such support as the plaintiff had furnished for the mother upon the neglect of A to furnish it; and that the plaintiff was not bound to wait for a suit to be brought against him on his covenant, before furnishing the support and charging the defendants; and that the sureties were equally bound with the principal. *Seaver v. Young*, 16 Vt. 658.

**25.** A bond to indemnify the plaintiff "from all costs and expenses" in consequence of the

plaintiff's making [having made] certain attachments, was *held* to cover costs and expenses incurred by the plaintiff in defending a suit brought against him for having made such attachments, in which suit the attachments were sustained;—the words used being construed with reference to the subject matter, and the contemporaneous circumstances. *Chilsons v. Downer*, 27 Vt. 586.

**26.** The plaintiff, an authorized person, had attached on four writs certain property which was appraised under the statute at \$218, and was delivered up to the debtor upon the giving by W to the plaintiff a bond, conditioned to pay the plaintiff, or any officer having executions which might be obtained in said suits, \$218, or to indemnify the plaintiff "from all damages and costs which may accrue to him if such payment is not made to him to meet such executions." Before the taking of the bond and the delivery of the property, the plaintiff had been at expense in keeping and appraising it. In one of the suits only was judgment recovered against the defendant therein, and the execution on that judgment was paid by W. In an action against W on the bond;—*Held*, that he had performed the second alternative of the condition, and that the plaintiff could not recover such expenses. *Mason v. Whipple*, 31 Vt. 473.

**27.** Where a bond was given conditioned to become absolute if the obligee should make and deliver a certain number of pairs of boots by certain times named, the obligor to furnish the leather;—*Held*, that the refusal to furnish the leather was a direct breach of the bond and worked a forfeiture. *Boardman v. Keeler*, 21 Vt. 77.

## BOOK ACCOUNT.

- I. CHARGES;—FORM OF CHARGE AND RIGHT TO CHARGE.
  - II. FOR WHAT THE ACTION LIES.
    1. *In general.*
    2. *As effected by agreement and course of dealing.*
  - III. WHEN THE ACTION DOES NOT LIE.
  - IV. JURISDICTION.
  - V. JUDGMENT TO ACCOUNT.
  - VI. AUDITOR AND AUDIT.
  - VII. EFFECT OF JUDGMENT AS A BAR.
  - VIII. TENDER.
  - IX. STATUTE OF LIMITATIONS.
- I. CHARGES;—FORM OF CHARGE AND RIGHT TO CHARGE.
    1. **Form.** Erasures and alterations in a book account do not destroy its character as an original. These only go to its credit, and the book

is evidence notwithstanding. *Sargeant v. Pettibone*, 1 Aik. 355.

2. The form in which a charge on a book is made does not effect the right of recovery in an action of book account. *Stone v. Pulsipher*, 16 Vt. 428. *Gassett v. Andover*, 21 Vt. 342. *Tobias v. Blinn*, 21 Vt. 544; as where it is made in gross. *Newell v. Keith*, 11 Vt. 214.

3. That the charge was made against a certain party, and the account in form kept with him, is not conclusive evidence that the credit was given to him. *Scott v. Shepherd*, 3 Vt. 104.

4. A charge on book against a wrong party does not preclude a recovery against the right party. *Goodrich v. Drew*, 10 Vt. 187.

5. The charge of a party's note on his book is proper and may be adjusted in the book action, where there is a credit entered to which the note was intended to be applicable. *Barlow v. Butler*, 1 Vt. 146.

6. **Right.** The general usage and practice of the country is important in determining what is a proper subject of charge on book. *Hall v. Peck*, 10 Vt. 474.

7. It is no objection to maintaining the action on book, that the charge was not made at the time the right to charge accrued. *Kingsland v. Adams*, 10 Vt. 201. Nor does the right depend upon the plaintiff's having kept books of account, or accounts in any form, but he may make up his account in court. *Bell v. McLeran*, 3 Vt. 185.

8. The right to make a charge on book must exist at the time of delivering the article, or performing the service, and cannot depend upon the happening of subsequent events. *Slasson v. Davis*, 1 Aik. 73.

9. The right to make a charge on book does not require that there should be an immediate and present right of action upon it. It is sufficient, in any case, if an obligation to account for the money or property received results directly from the transaction between the parties. On this obligation, or liability, the right to charge is founded; and it does not depend on the time or mode of accounting, nor on the question whether the obligation is already absolute and perfect, or is subject to be modified by some act or condition to be performed by the other party. That a demand is necessary to perfect the right, is no objection to maintaining the action of book account. *Jackman v. Partridge*, 21 Vt. 558. *Hall v. Peck*, 10 Vt. 474. *Rogers v. Miller*, 15 Vt. 431.

10. In order to entitle the plaintiff to maintain an action of book account, it is not necessary that he should have contemplated making a charge, or even that he should have supposed that he was entitled to make it, provided the facts then existing, but of which he was not apprised, gave him the right to make it. *Loomis v. Wainwright*, 21 Vt. 520.

11. Property may have been delivered under a contract which gave no right to charge on book; but when a new contract supervenes which changes the ownership, the right to charge and to recover in an action of book account may arise. So, too, of contracts for services. *Perry v. Buckman*, 33 Vt. 7.

## II. FOR WHAT THE ACTION LIES.

### 1. In general.

12. **Concurrent with general assumpsit.** In every case, where a recovery could be had under the general counts in assumpsit for goods sold and delivered, labor, &c., and these are the ordinary subjects of book charge, a recovery therefor can be had in the action of book account. *Wilkins v. Stevens*, 8 Vt. 214.

13. The action of book account, with some few exceptions, is concurrent with the action of general assumpsit. *Gassett v. Andover*, 21 Vt. 342.

14. **Instances.** The action of book account lies for a hogshead of gin, *Field v. Sawyer*, Brayt. 89;—for 2,088 lbs. wool sold and delivered, *Leach v. Shepard*, 5 Vt. 368;—for lottery tickets lawfully issued and sold, *Mills v. Brownell*, 8 Vt. 468;—for postages charged by one while postmaster, *Sargeant v. Pettibone*, 1 Aik. 355;—for fees charged for services as a justice of the peace, *Id.*;—on a charge for money, *Warden v. Johnson*, 11 Vt. 455. *Chellis v. Woods*, 11 Vt. 466;—as for money loaned, or money paid at the defendant's request, *Sargeant v. Pettibone*, 1 Aik. 355;—or money of the plaintiff received by the defendant from a third person on the plaintiff's order, *Stone v. Foster*, 16 Vt. 546.

15. Also, for money advanced to be paid for in transportation thereafter to be done, to be adjusted upon the defendant's rendering an account,—where the defendant fails to perform the service. *Hiakok v. Ridley*, 15 Vt. 42;—also, for money paid for the defendant at his request, under an agreement that the defendant would secure the payment by mortgage, which he failed to do. *Weller v. McCarty*, 16 Vt. 98.

16. Where an application was made to the probate court, by an overseer of the poor, for a commission for inquisition and the appointment of a guardian for an insane person;—*Held*, that the probate judge could recover of the town, in an action of book account, his fees as judge for issuing such commission, although the application was so defective as not to warrant any proceedings under it. *Sargeant v. Sunderland*, 21 Vt. 284.

17. It is no objection to a recovery in the action of book account for money, that the defendant gave a receipt for the money, as ex-

pressed, "to be accounted for." *Boutwell v. Tyler*, 11 Vt. 487.

18. All attempts to establish any general rule, as to what may or may not be charged on book, have failed. It is no objection to such action, \* that the account consists of a single item,—as a horse sold. The case of *Ames v. Fisher*, Brayt. 39, for "the domestic spinning jenny," has often been overruled. *Kingsland v. Adams*, 10 Vt. 201. 21 Vt. 528.

19. The action of book account was sustained for trees growing upon the plaintiff's land, which were cut and carried away by the defendant by the plaintiff's permission. *McLeran v. Stevens*, 16 Vt. 616.

20. In this action a recovery may be had for charges arising from a former settlement of partnership deal between the parties, where the suit does not involve the closing of unsettled partnership deal and recovering a balance. *Surger v. Proctor*, 2 Vt. 580.

21. **Sale.** For the purpose of recovering the price or value of property, the action on book should be limited to cases of actual sale, or to cases where the party has admitted his indebtedness and liability *as upon a sale*; in other words, where he has consented that his previous appropriation of the property should be treated as a purchase of it. *Royce, J. in Tyson v. Doe*, 15 Vt. 571, citing 11 Vt. 79. 12 Vt. 13.

22. Where property has been sold conditionally and payments have afterwards been made towards it by way of services, the services may be charged on book to await a subsequent application; and, in a proper case, as if the vendor disaffirm the contract by taking back the property before such application has been made, the vendee may recover for his services in an action on book, deducting, in a proper case, for the use of the property. *Stone v. Puleipher*, 16 Vt. 428. *Martin v. Eames*, 26 Vt. 476.

23. An agent to sell, having sold a part, purchased the remainder of the goods. *Held*, that the whole amount was properly chargeable on book and recoverable in the book action. *Starr v. Huntley*, 12 Vt. 13. 15 Vt. 575.

24. **Special contract.** It is no objection to the maintaining of an action of book account to recover for items otherwise properly chargeable on book, that they accrued under a contract special as to the time and manner of performance, or the time and manner of payment. *Austin v. Wheeler*, 16 Vt. 95. *Stearns v. Haven*, 16 Vt. 87. *Eddy v. Stafford*, 18 Vt. 285. *Porter v. Munger*, 22 Vt. 191. *Waterman v. Stimpson*, 24 Vt. 508. 38 Vt. 152. *Boardman v. Keeler*, 2 Vt. 65. *Newton v. Higgins*, 2 Vt. 366. *Fry v. Slyfield*, 3 Vt. 246. *Weller v. McCarty*, 16 Vt. 98.

25. Where a party sues to recover the stipulated price for services actually rendered under a special contract fully performed on his

part, it is no objection to the action on book that the services were performed under a special contract still unrescinded. *Myers v. Baptist Society*, 38 Vt. 614.

26. **Received to account for.** Where promissory notes of the plaintiff went into the hands of the defendant to be held or collected as a security for the defendant's account against him, and to be held until such account should be settled, and the plaintiff in fact owed the defendant nothing;—*Held*, that the plaintiff could, after demand, recover therefor in an action of book account. *Woodward v. Harlow*, 28 Vt. 338.

27. Money received by an agent to be accounted for, when he becomes a debtor by receipt of the money, may be recovered of him by his principal in the action of book account. *Vt. Mutual Ins. Co. v. Cummings*, 11 Vt. 503.

28. Where articles have been left with an agent for sale, they may be charged on book, and, *when sold*, a recovery therefor may be had in the action of book account. *Hall v. Peck*, 10 Vt. 474. *Gallup v. Merrill*, 40 Vt. 137. 44 Vt. 308.

29. In an action of book account, one charge was for property of the plaintiff received by the defendant to be sold and accounted for. On the hearing the defendant resisted this item solely on the ground that he had purchased and owned the property. *Held*, that this justified the inference of a refusal to deliver or account for it, and that the plaintiff could recover therefor. *Hickok v. Stevens*, 18 Vt. 111.

30. Where the plaintiff took his goods to the defendant to answer on a previous contract between them, and the defendant while receiving the goods wrongfully insisted on applying them to the account of another person, whereupon the plaintiff claimed the goods as his and demanded them or pay for them, which the defendant refused and applied the goods to such other person's credit, and afterwards sold the goods;—*Held*, that the plaintiff might charge and recover for the goods in an action of book account. *Waterman v. Stimpson*, 24 Vt. 508.

31. **Article manufactured.** Where one orders an article manufactured at a mechanic's shop, and it is made according to the order, it may be charged and recovered for in the action of book account, whether it is ever delivered or not. When the order is executed, so that nothing more remains to be done, the title to the thing passes to the vendee, and thereafter it remains at his risk, and he becomes debtor to the vendor for the price, and that is the proper time to make the charge on book. The law is the same where one employs another to procure an article to be manufactured for him elsewhere, or to purchase it for him; and when so procured or purchased, it may be charged on book. *Paddock v. Ames*, 14 Vt. 515.

32. The plaintiff made for L an organ case, and delivered it before being fully finished, and charged it to L on book. L sold it to the defendant, who agreed with L to pay the plaintiff therefor, and the defendant informed the plaintiff of the transaction, and the plaintiff thereupon erased the name of L from the charge and inserted that of the defendant. Afterwards the plaintiff delivered to the defendant the pillars, trimmings, &c., to finish the case. *Held*, that the price of the case was recoverable of the defendant in the action of book account. *Pangborn v. Saxton*, 11 Vt. 79. 15 Vt. 575.

33. **Price conditional.** The plaintiff sold the defendant a mare for a specified sum, but if she should prove to be with foal the defendant agreed to pay four dollars additional to a third person to whom the plaintiff had agreed to pay that amount. The mare having proved with foal, and the defendant having refused to pay the \$4.00;—*Held*, that the plaintiff could recover that sum in an action of book account. *Dwyer v. Hall*, 22 Vt. 142.

34. **Article lent.** Where an article is lent and there is a right at the time to charge for the use of it, its value may be recovered in an action of book account where it is worn out in the use—as a wagon wheel lent—and the form of the charge, whether for the use of the article, or for the article itself, is not material. *Stone v. Pulsipher*, 16 Vt. 428; or for damage to the article. *Gassett v. Andover*, 21 Vt. 342.

35. The defendant hired of the plaintiff, for a stipulated price, a derrick to use and to be returned in as good condition as it then was, except the ordinary and natural wear. It was broken in the use, and the plaintiff got it repaired. In an action of book account;—*Held*, that the damage to the machine was caused by the use, and that a depreciation of its value in consequence of the use, to the extent of the repairs made, was properly adjusted in the account for the use. *Woodward v. Cutler*, 33 Vt. 49.

36. Some nails were borrowed of the plaintiff to be paid for in nails again. *Held*, that this was rather a purchase to be paid in kind, than a borrowing for use; that the nails were properly chargeable on book, and that the item was recoverable in this form of action. *Case v. McDonald*, 39 Vt. 65.

## 2. As affected by agreement and course of dealing.

37. Matters not in themselves strictly chargeable on book may, not only by express agreement, but even by agreement implied merely from the parties' course of dealing, be adjusted in the action of book account. *Scott v. Lance*, 21 Vt. 507. *Case v. Berry*, 3 Vt. 332. *Hall v. Eaton*, 12 Vt. 510.

38. Executions and notes may, by agreement,

be charged on book, and may, in such case, be recovered for in this action. *Gleason v. Briggs*, 28 Vt. 136.

39. Where there are running and mutual accounts between parties, and there is an agreement or common understanding that items not properly chargeable on book—as taxes paid by one for the other—shall be adjusted and settled with their other accounts, they may be included in the account and be recovered for in this action. *Noyes v. Hall*, 28 Vt. 645.

40. Breaches of contract, and matters of unliquidated damages of various kinds and degrees, may be brought into the adjustment of mutual book accounts in the action of book account, if such was the previous express agreement, or the mutual expectation of the parties. *Chamberlain v. Farr*, 23 Vt. 265.

41. A claim of damages for a trespass or tort may become a matter of contract by the mutual agreement of the parties, and be recoverable in book account; but not without such agreement. *Stone v. Black*, 37 Vt. 25. *Hassam v. Hassam*, 22 Vt. 516. *Stearns v. Dillingham*, 22 Vt. 624. *Winn v. Sprague*, Vt. 243.

42. Where an item not properly chargeable on book was presented before the auditor, and the only objection made to it was that it had been paid, and the auditor found that it had not been paid;—*Held*, that objection could not be thereafter taken that the item was not a proper one to be adjusted in the action on book—consent to the adjustment being implied. *Peck v. Soragan*, 27 Vt. 92.

43. The defendant held, as his security for his obligation assumed for the plaintiff, a mare and colt of the plaintiff. He sold the mare for enough to satisfy such obligation and retained the colt, admitting his liability to account for them and expressing a willingness to do so when the plaintiff would settle with him all matters between them. In an action of book account;—*Held*, that the proceeds of the sale of the mare, and the value of the colt, were proper matters of charge and adjustment in the action. *Cobleigh v. Stone*, 29 Vt. 525.

44. The defendant's cattle having trespassed upon the plaintiff's land and damaged his crop of oats, through the defect of a division fence which both parties were under an equal obligation to keep in repair, the defendant, on being reminded by the plaintiff of the damage done, told the plaintiff that he would allow him what was right for the oats when they came to settle. *Held*, that this did not amount to a consent to a change in the form of the liability, and warrant a recovery in an action of book account. *Winn v. Sprague*, 35 Vt. 243.

45. Rent, or the use of land, or other matter not properly chargeable on book, may be adjusted in the action of book account by application as against charges on book agreed or un-

derstood to be so adjusted, and claimed on trial. *Farrand v. Gage*, 3 Vt. 326. 12 Vt. 512. *Case v. Berry*, 3 Vt. 332. *Gunnison v. Bancroft*, 11 Vt. 490. 25 Vt. 40. *Chamberlain v. Farr*, 23 Vt. 265.

46. If a party charges any matter upon book, and claims to recover for it in the action of book account, he cannot object to the other party's bringing into the account any other matter, though not properly chargeable and recoverable on book, upon which it was agreed that such charge should apply. *Gunnison v. Bancroft*. *Farrand v. Gage*. *Fassett v. Vincent*, 8 Vt. 73.

### III. WHEN THE ACTION DOES NOT LIE.

47. The action of book account does not lie for a wagon, delivered on a written order containing a special contract as to the time and manner of payment. *Whelpley v. Higly*, Brayt. 39 (Overruled).

48. Nor where there was a single charge, for a "spinning jenny." *Ames v. Fisher*, Brayt. 39. (Overruled, 10 Vt. 201.)

49. **Sale without delivery.** An action of book account for goods sold will not lie, where the sale is not completed by actual delivery. *Read v. Barlow*, 1 Aik. 145. *S. C.*, 1 Vt. 97. 8 Vt. 218. 18 Vt. 499. 36 Vt. 79.

50. Book account will not lie, in such case, except where *assumpsit* will, for goods sold and delivered, or bargained and sold. There must be such a completed and perfected contract as that the property has passed to the defendant. *Hodges v. Fox*, 36 Vt. 74. *Bundy v. Ayer*, 18 Vt. 497. 13 Vt. 580.

51. **Special assignment.** Goods assigned to be disposed of and converted into money and the proceeds applied in a particular manner, cannot be recovered for in the action of book account. *Allen v. Thrall*, 10 Vt. 255.

52. **Special damages.** This action does not lie to recover damages for the breach of a special contract. *Blanchard v. Butterfield*, 12 Vt. 451. *Smith v. Smith*, 14 Vt. 440. *Pierce v. Smith*, 16 Vt. 166. *Bailey v. Bailey*, 16 Vt. 656. *Scott v. Lance*, 21 Vt. 507.

53. Nor can unliquidated damages, claimed by either party, be adjusted in this action, whether arising from a tort, or the breach of a contract, special or implied. *Smalley v. Soragen*, 30 Vt. 2.

54. A claim resting in damages for the breach of a special guaranty—as that goods should pass the custom house under a certain tariff—cannot be recovered in the action of book account. *Pierce v. Smith*, 16 Vt. 166.

55. Nor does it lie upon a collateral agreement. *Smith v. Hyde*, 19 Vt. 54.

56. The plaintiff was employed to make shoes for the defendant by the pair, the defen-

dant preparing the work. *Held*, (1), that the plaintiff could not charge and recover, in this action, for lost time on account of not being kept constantly supplied with work;—this is but damages for the defendant's neglect;—(2), that he could not, for this reason, and without notice to the defendant, charge his services by the month. *Blanchard v. Butterfield*, 12 Vt. 451.

57. By contract between the parties, the plaintiff was to furnish plough irons, the defendant to wood them and return half the ploughs. The defendant set aside, as the plaintiff's property, twelve ploughs thus wooded for him under the contract, six of which were afterwards attached and sold on execution as the property of the defendant. *Held*, that the plaintiff could not maintain an action of book account for the value of the six ploughs so sold. *Tyson v. Doe*, 15 Vt. 571.

58. In an action on book to recover for services of the plaintiff's minor son whom he had hired out to the defendant for a specified term, at a specified price per month;—*Held*, that the plaintiff could recover only for the time of actual service, whether or not the defendant wrongfully suffered the minor to leave service, or turned him off. *Hennessy v. Stewart*, 31 Vt. 486.

59. **Intermixture.** This action does not lie to recover the value of goods which the plaintiff negligently intermixed with those of the defendant, and which were used by the defendant. *Pratt v. Bryant*, 20 Vt. 333.

60. **Usury.** Goods delivered in payment of usurious interest cannot be charged and recovered for in this action. A recovery in such case can be had only in the mode pointed out by the statute. *Allen v. Thrall*, 10 Vt. 255.

61. **Money lost.** A claim for money lost by the negligence of an employé cannot be recovered of him in an action of book account, where he denies his liability and does not consent to its being so adjusted. *Chase v. Spencer*, 27 Vt. 412; and see *Drury v. Douglas*, 35 Vt. 474.

62. —**due on note.** A sum due upon a promissory note cannot be charged and recovered for on book. *Stevens v. Damon*, 29 Vt. 521.

63. —**collected by attorney.** Without an agreement express or implied to that effect, money collected by an attorney cannot be charged and adjusted in the action of book account. *Scott v. Lance*, 21 Vt. 507. *Farrand v. Gage*, 3 Vt. 326.

64. **Rent.** So, as to the use and occupation of land,—or rent. *Ib.* *Hitchcock v. Smith*, Brayt. 39. *Case v. Berry*, 3 Vt. 332. *Nichols v. Packard*, 16 Vt. 91.

65. **Costs of arbitration.** The costs and expenses of an arbitration, revoked before award made, cannot be recovered in an action



of book account, against the party revoking. *Bryant v. Clifford*, 27 Vt. 664.

**66. Articles lent.** Tools lent not to be worn out by use and not damaged, nor a return demanded, cannot be recovered for in this action, though not returned. *Scott v. Brigham*, 27 Vt. 561.

**67.** The plaintiff borrowed the defendant's chain and broke it. *Held*, that the plaintiff could not, in an action of book account, recover the expense paid for mending the chain. *Ib.*

**68. —bailed for sale.** A party cannot recover in this action for items which he could not recover under the common counts in general assumpsit;—as, for articles bailed for sale which are not sold, but which the defendant merely refused to deliver on demand. *Kidder v. Soules*, 44 Vt. 303.

**69. Tenants in common, &c.** One of two tenants in common of personal property cannot recover of the other, in an action of book account, for having used more than his share of the common property. *Albee v. Fairbanks*, 10 Vt. 314. *McCrillis v. Banks*, 19 Vt. 442. 21 Vt. 560.

**70.** Where one joint owner or tenant in common appropriates more than his share, the excess cannot be recovered in this action, although so done by consent and under an agreement to account on final settlement. *Briggs v. Brewster*, 23 Vt. 100. *Scott v. Lance*, 21 Vt. 507. (Changed by Stat. 1852.)

**71. Joint action.** In a joint action of book account, the defendant cannot be allowed for items due from the plaintiffs severally. *Gleason v. Vermont Central R. Co.*, 25 Vt. 37.

**72. Waiving tort.** In a matter of trespass, or tort, the plaintiff cannot waive the tort and recover therefor in book account, nor in assumpsit. *Peach v. Mills*, 14 Vt. 371. *McCrillis v. Banks*, 19 Vt. 442. *Hassam v. Hassam*, 22 Vt. 516. *Stearns v. Dillingham*, 22 Vt. 624. *Scott v. Lance*, 21 Vt. 507. *Drury v. Douglas*, 35 Vt. 474.

**73. No part of account due at commencement of suit.** This action cannot be sustained if no part of the plaintiff's account had become due at the commencement of the suit, although it had all become due before the audit. *Wetherell v. Everts*, 17 Vt. 219. 24 Vt. 42.

**74. Items of account proper.** The Statute of 1852 (G. S. c. 41, s. 18) does not extend to cases where the entire account is a partnership dealing, and there are no items properly chargeable on book and recoverable in the action of book account. *Green v. Chapman*, 27 Vt. 236. *Duryea v. Whitcomb*, 31 Vt. 395.

**75.** It is foreign from the letter and spirit of G. S. c. 41, s. 18, to allow a party whose principal matter of controversy properly belongs to the action of account, but who has few items

of book account disconnected with, or rising incidentally out of, the principal subject matter, to bring in and settle in the action of book account the principal subject in controversy. *Huzley v. Carman*, 46 Vt. 462. *Hydeville Co. v. Burnes*, 37 Vt. 588.

#### IV. JURISDICTION.

**76. Apparent debtor side of book.** The debtor side of the plaintiff's book, to be determined by inspection, affords the only rule for determining the jurisdiction of a justice, in the action of book account. It is not affected by an omission to charge what might have been charged, nor by any entries of credit on the defendant's book. *Stone v. Winslow*, 7 Vt. 338. *Beach v. Boynton*, 26 Vt. 105.

**77.** The converse of the proposition must follow, and the county court alone has jurisdiction where the debtor side of the plaintiff's book exceeds \$100 [now \$200];—certainly where the charges are not either fictitious or made in bad faith. *Nichols v. Packard*, 16 Vt. 91.

**78.** The debit side of the plaintiff's claim, as presented, is regarded as his book for the purpose of determining the jurisdiction of the court; and the fact that such claim was not upon his book, or was not fully proved, unless it was merely fictitious, does not defeat the jurisdiction. *Mason v. Potter*, 26 Vt. 722.

**79.** If the debtor side of the plaintiff's book exceeds \$100 [G. S. §200], the county court has original and exclusive jurisdiction, which is not affected by the sum ultimately found due the plaintiff. *Eddy v. Horton*, 27 Vt. 285;—nor by the fact that part of the items have been paid and credited, leaving a balance of a less sum. *Reed v. Talford*, 10 Vt. 568. *Willard v. Collamer*, 34 Vt. 594.

**80. —as presented and claimed.** A justice has jurisdiction in an action of book account where neither the *ad damnum*, nor the plaintiff's account, as presented and claimed, exceeds \$100 [G. S. §200], although the debtor side of the plaintiff's book, in all, may exceed that sum. *Fargo v. Remington*, 6 Vt. 131. *Stevens v. Damon*, 29 Vt. 521.

**81. — erroneous statement of.** Where a party's account is made to exceed the limit of a justice's jurisdiction by an erroneous mode of stating the account, the jurisdiction is not lost. *Temple v. Bradley*, 14 Vt. 254.

**82.** In an action on book appealed from a justice, the debtor side of the plaintiff's book, as presented to the auditor, showed a case within the justice's jurisdiction. *Held*, that the jurisdiction was not defeated by the fact that the auditor adopted such a mode of stating the account as to swell the debtor side of the account beyond the jurisdiction. *Mason v. Hutchins*, 32 Vt. 780.

**83.** An article sold with the privilege of return, and returned, and both charged and credited on the plaintiff's book, should not be taken into account to bar a justice of his jurisdiction, the suit being brought in good faith. *Page v. Morgan*, 28 Vt. 565.

**84. Fictitious entries.** The plaintiff in an action of book account cannot bring his case within the jurisdiction of the county court by entering in his account a bill of goods paid for and receipted on delivery, and which was not charged in account at the time. *Nelson v. Emery*, 17 Vt. 579.

**85.** A party cannot give a court jurisdiction by making figures on paper that he concedes do not represent the amount of the claim he holds, or designs to make; nor by changing the figures of charges on an original book, correctly made, to larger figures upon a draft of account, without right. *Scott v. McDonough*, 39 Vt. 203.

**86. Stating balances.** Book account, brought to the county court.—The plaintiff's whole account was over \$100; but he and the defendant had, from week to week, looked over their respective accounts, found balances and carried over the balances to the account of the next week, until they had a final settlement, and the balance then found due was less than \$100. *Held*, that although assumpsit might lie upon an implied promise to pay the balance found due, yet this settlement was not a merger of all previous dealings, though it might be used as evidence to regulate the sum to be recovered; and that the county court had jurisdiction. *Clark v. Edgell*, 26 Vt. 108.

**87.** A balance of book accounts found due on mutual settlement may be charged over as an item in the new account, and may be recovered in the action of book account. In such case, the previous state of the accounts does not affect the question of jurisdiction. The parties are witnesses to such settlement. *Gibson v. Sumner*, 6 Vt. 163. *Spear v. Peck*, 15 Vt. 566. *Warren v. Bishop*, 22 Vt. 607.

**88. Disputed award.** Where the plaintiff's whole account exceeded \$100, but it had all been awarded upon by an arbitrator, except an item of \$3.20 omitted, and the validity of the award was disputed by the plaintiff;—*Held*, in an action on book, that the county court had jurisdiction, although the award was held valid and a bar to all the account except such item. *Ennos v. Pratt*, 26 Vt. 630.

**89. Increase of the account.** In an action on book brought in the county court, where the debtor side of the plaintiff's book at the time of commencing the suit was less than sufficient to give original jurisdiction;—*Held*, that jurisdiction was not conferred by a subsequent increase of the account and that the suit must be dismissed at any stage of the proceedings

whenever the want of jurisdiction is discovered. *Shepherd v. Beede*, 24 Vt. 40.

**90. Ad damnum.** An action on book, returnable to the county court, was dismissed on motion, where the balance declared for and the *ad damnum* were both within the jurisdiction of a justice. *Bates v. Downer*, 4 Vt. 178.

**91.** A judgment of the county court in an original action of book account, where the declaration was in common form without any averment as to the amount of the debtor side of the plaintiff's book and the *ad damnum* was laid at \$100, and where no objection was taken to the action, was *held* not void for want of jurisdiction, where it appeared from the account made part of the auditor's report, that the debit side of the plaintiff's account exceeded \$100. *Paul v. Burton*, 32 Vt. 148.

**92. Apparent debtor side of the account not a conclusive test.** In an action of book account, the *apparent* "debtor side of the plaintiff's book" is not the conclusive test of jurisdiction. Thus, where it is made apparently to exceed a justice's jurisdiction by items charged, or posted, by mistake and not claimed, (*Catlin v. Aiken*, 5 Vt. 177. *Phelps v. Wood*, 9 Vt. 399); or so made by the entry of items not properly chargeable on book, or in that account, and not insisted upon, (*Scott v. Sampson*, 28 Vt. 569. *Sheldon v. Flynn*, 17 Vt. 238.)—*Held*, that the justice properly took jurisdiction.

**93.** Where the "debtor side of the plaintiff's book" was made apparently to exceed a justice's jurisdiction, by including certain items which had been settled by the giving of a note therefor which had been paid, and about this there was no dispute, nor misunderstanding;—*Held*, that the county court had not original jurisdiction. *Hodges v. Fox*, 36 Vt. 74.

**94. Plaintiff's good faith.** An action of book account brought in good faith in the county court, the jurisdiction being fairly doubtful, was sustained. *Stanley v. Barker*, 25 Vt. 507.

**95.** In this action the jurisdiction is not left to the choice of the plaintiff, but depends upon the debtor side of his account as an open, subsisting, unliquidated account, irrespective of credits, payments, or offsets. *Hodges v. Fox*, 36 Vt. 74.

**96.** Where the statute arbitrarily prescribes the criterion of jurisdiction, as in the action of book account or upon a promissory note, the plaintiff's good faith in bringing his suit in the particular court has little application to the question. *Id.* *Barrett, J.*, in *Miller v. Livingstone*, 37 Vt. 408-9. See *Reed v. Stockwell*, 34 Vt. 206.

**97. Interest on the account.** To the sum demanded in an action of book account, and

found due, the court added interest so as to exceed the sum demanded, and rendered judgment therefor. *Held* correct. *Dickenson v. Gould*, 2 Tyl. 32.

98. In an action of book account before a justice, the addition of interest to the plaintiff's account by consent of the parties in adjusting the balances, was *held* not to affect the jurisdiction, although if the claim for interest had been presented as part of the debit side of the plaintiff's book, the jurisdiction would have been exceeded. *Stone v. Winslow*, 7 Vt. 338.

99. It is optional with the plaintiff whether to claim interest upon his account or not; and a justice suit will not be dismissed because, by adding interest, the account would exceed the justice's jurisdiction. *Paige v. Morgan*, 28 Vt. 565. *Catlin v. Aiken*, 5 Vt. 177. *Stone v. Winslow*.

100. The county court has original jurisdiction of an action of book account, although the debit side of the plaintiff's account, as charged, is less than \$100, if the interest which was demandable, though not actually charged when the suit was commenced, would raise the claim above that sum—[now \$200]. *Blin v. Pierce*, 20 Vt. 25.

#### V. JUDGMENT TO ACCOUNT.

101. After judgment to account and a report of auditors, the court refused a motion to arrest judgment, for the reason that the declaration was not according to the statute form,—the judgment to account being an admission of unsettled accounts between the parties. *McKoy v. Brown*, 13 Vt. 593.

102. The plaintiff has not the right to become *non suit*, after judgment to account and the case has gone before the auditor. *Lyon v. Adams*, 24 Vt. 268. 30 Vt. 218. 28 Vt. 444.

103. In the action of book account, the preliminary judgment to account is always rendered without reference to the actual dealings between the parties, or whether any have existed or not. *Davis, J.*, in *Hagar v. Stone*, 20 Vt. 109. It is little more in point of conclusiveness than an ordinary order of reference. *Steele, J.*, in *Smith v. Bradley*, 39 Vt. 369. *Reed v. Barlow*, 1 Aik. 145. *Matthews v. Tower*, 39 Vt. 438.

104. After a judgment to account, though by default, final judgment in chief may be rendered for the defendant on the report of the auditor. *Gordon v. Potter*, 17 Vt. 348.

#### VI. AUDITOR AND AUDIT.

105. **Competency and powers.** Report by two auditors of the three appointed. Upon proof to the court, that the hearing was had by the two only by consent of the parties, the re-

port was accepted. *Booth v. Tousey*, 1 Tyl. 407.

106. Under sec. 54 of the judiciary act of 1797 (Slade's Stat. 73), the court could by themselves audit the accounts and ascertain the sum due in an action of book coming into court by appeal, where the defendant suffered a default. *Dickenson v. Gould*, 2 Tyl. 32.

107. A judge acting as a constituent part of the court cannot appoint himself auditor in a suit; nor can he act both as judge and auditor in the same cause. *Campbell v. Wilson*, 2 Aik. 118.

108. A person whose wife is first cousin to the wife of one of the parties to a suit is disqualified to act as auditor therein. *Clapp v. Foster*, 34 Vt. 580.

109. The expression of an opinion by an auditor, before his appointment, upon the facts or the merits of the case, unfavorable to one of the parties, and that unknown to him, may be sufficient cause for setting aside the report, on his motion; but not if such opinion be upon a mere point of law, since the court reviews and determines the law. *Fay v. Green*, 2 Aik. 386.

110. An auditor allowed a claim in a case where he was interested to disallow it. *Held*, that the party against whom the allowance was made could not object to the report for this cause. *Lovell v. Field*, 5 Vt. 218.

111. **Special defenses before auditor.** The court early settled the practice, that in the action of book account the defendant might omit to plead special matter, and might present it before the auditors as a defense, in whole or in part. *May v. Brownell*, 8 Vt. 463. 18 Vt. 385.

112. Where a declaration on book was filed in set-off to an action upon a note;—*Held*, that a plea to such declaration, that the items of such account were received under an agreement that their amount was to be allowed on the note, was insufficient. *Blackmore v. Page*, 2 Tyl. 110.

113. There is no use in craving *oyer*, since the party before the auditor is not confined to the *oyer*. *Read v. Barlow*, 1 Aik. 145.

114. In the action of book account, the right to plead in bar is as limited, as the right to defend before the auditor is extended. *Steele, J.*, in *Smith v. Bradley*, 39 Vt. 369.

115. No defense can be specially pleaded, which depends for its effect upon the plaintiff's account, or puts in issue the plaintiff's account. All such defenses must go before the auditors. *Porter v. Smith*, 20 Vt. 344. *Matthews v. Tower*, 39 Vt. 433.

116. A plea which puts in issue facts to which the parties may testify before the auditors, is bad. *Delaware v. Staunton*, 8 Vt. 48. *Hall v. Downs*, Brayt. 168; and the law is the

same since the statute allowing parties to be witnesses in general. *Mattheus v. Tower*.

117. The non-joinder of a party defendant is matter of defense before the auditors and cannot be pleaded in abatement. *Loomis v. Barrett*, 4 Vt. 450. *Smith v. Watson*, 14 Vt. 332. *Hagar v. Stone*, 20 Vt. 106. (*Goddard v. Brown*, 11 Vt. 278. *Smith v. Bradley*, 39 Vt. 369.)

118. The law is the same though the omitted co-contractor resides without the State—since process might have issued against him. *Bailey v. Hodges*, 19 Vt. 618.

119. A payment, accord and satisfaction, settlement or release, unless it be a release of the action, cannot be pleaded in bar, but may be used in defense before the auditors. *Dela ware v. Staunton*, 8 Vt. 48. *Mattheus v. Tower*, 39 Vt. 433.

120. Nor can it be pleaded that the defendants declared against as partners were never partners. *Porter v. Smith*, 20 Vt. 344.

121. Nor can the statute of limitations be pleaded in bar. *Smith v. Bradley*, 39 Vt. 366.

122. But in an action of book account by husband and wife, the death of the wife pending the suit cannot be objected to before the auditor. The question is one for the court upon proper motion. *Perry v. Whitney*, 30 Vt. 390.

123. Distinction in matter of pleading noted, between the action of account and book account. *Mattheus v. Tower*, 39 Vt. 433.

*Note.*—By Stat. 1872, No. 54, special defenses, proper for a plea in bar, may be made before the auditor in the common law action of account.

124. **Set-off.** A mere independent set-off, not a matter of account, cannot be brought in before the auditor, but must be pleaded in the county court. *Hassam v. Hassam*, 22 Vt. 516.

125. **Proceedings.** It need not appear of record that an auditor was sworn. This will be presumed unless the contrary appear. *Putnam v. Dutton*, 8 Vt. 396. *Reed v. Talford*, 10 Vt. 568. 11 Vt. 201.

126. In the case of three auditors, two may make report, provided the other sit at the hearing, though he may dissent from the majority. *Thompson v. Arms*, 5 Vt. 546. *Newell v. Keith*, 11 Vt. 214. 23 Vt. 465.

127. It is not necessary that auditors should convene and organize before giving notice of the time and place of hearing, but such notice may be given by one of the number, usually the one first named, without the presence of the others; nor need they all convene for the purpose of an adjournment; and where the party is once duly notified, he must take notice of the adjournment. *Swinton v. Erwin*, 8 Vt. 282.

128. An auditor has power, after a cause has been heard and submitted, especially before

making up and publishing his report, to open the cause for further testimony. This discretion might be revised in the county court, but error cannot be predicated of it. *Chase v. Spencer*, 27 Vt. 412.

129. If one of two partners, defendants in an action on book, die after the accounts are submitted to an auditor, he may proceed to audit the accounts notwithstanding. *Newton v. Higgins*, 2 Vt. 366.

130. **Accounts to be adjusted down to time of hearing.** The auditor must adjust all the items of account due and payable at the time of taking the account, though not due nor accrued at the commencement of the suit, provided any part was due and payable before suit brought. *Ambler v. Bradley*, 6 Vt. 119;—and this, although the result be to change the balance and turn the case to the other side. *Pratt v. Gallup*, 7 Vt. 344.

131. It is the duty of a justice of the peace, in an action of book account, to adjust the accounts up to the time of trial; and of the auditor, in case of an appeal, to the time of the audit. *Martin v. Fairbanks*, 7 Vt. 97; provided, that any part of the plaintiff's account had become due at the commencement of the suit. *Wetherell v. Everts*, 17 Vt. 219.

132. This right of the plaintiff to have the accounts adjusted down to the time of the audit and to have his attachment stand as a security for the balance so found due him, is not defeated by an attachment subsequent to his own. *Chaffee v. Malarkee*, 26 Vt. 242.

133. The plaintiff drew an order on the defendant requesting him to pay C a certain sum to be accounted for to the defendant on settlement. The defendant wrote upon the order an agreement to pay C what might be due the plaintiff after settlement. An attempted settlement having failed, the plaintiff brought this action of book account before a justice and obtained a judgment from which the defendant appealed, and after the appeal paid C the full amount of the order, which exceeded the sum due the plaintiff. *Held*, that the defendant was entitled to a judgment for the excess. *Northrop v. Sanborn*, 22 Vt. 433.

134. The bringing of an action of book account is not *per se* a revocation of a previous authority given the defendant to pay, to a third person, certain items of the plaintiff's account. Unless otherwise revoked, the defendant will be allowed such payments made after suit commenced, though the effect be to change the balance to his side. *Id.* *Walker v. Barrington*, 28 Vt. 781.

135. **Production of books.** In this action a party is not bound to produce his original book of entries, unless required so to do by the auditor, or the court; and this is matter of discretion, first of the auditor, and then of the

county court. *Held*, that it was not error in this case, to allow a disputed account without requiring the production of the original book, although this was insisted upon by the other party. (G. S. c. 41, s. 8.) *Ward v. Baker*, 16 Vt. 287.

136. *Held*, that it was not error for an auditor to receive, on the plaintiff's side, a letter written by the plaintiff to the defendant, which he claimed to be a specification of his claim and to contain all the facts upon which it was based, as a sort of original entry—there being no other original entry, and the plaintiff being himself a witness. *Houghton v. Paine*, 29 Vt. 57.

137. **Parties as witnesses.** In the action of book account both parties, being made witnesses by statute, may testify to every material fact in relation to the respective accounts proper to be considered in deciding upon the merits of the several claims. *Stevens v. Richards*, 2 Aik. 81. *Burton v. Ferris*, Brayt. 78. *Fay v. Green*, 2 Aik. 386. *May v. Corlew*, 4 Vt. 12. *Hilliker v. Loop*, 5 Vt. 116. *Whiting v. Corwin*, 5 Vt. 451. *McLaughlin v. Hill*, 6 Vt. 20. *Blush v. Granger*, 6 Vt. 340. *Delaware v. Staunton*, 8 Vt. 48. *Fassett v. Vincent*, 8 Vt. 73. *Reed v. Telford*, 10 Vt. 568. *Wurden v. Johnson*, 11 Vt. 455. *Clark v. Marsh*, 20 Vt. 338. 22 Vt. 611. *Carter v. Wright*, 25 Vt. 656.

138. It is otherwise as to matters which occur subsequent to and are independent of the account, *as such*; as, for example, a tender, a new promise to take the case out of the statute of limitations, and possibly some others. *Redfield, C. J.*, in *Clark v. Marsh*, 20 Vt. 341.

139. So *held*, as to a new promise, *Paul v. Trescott*, 6 Vt. 26. *White v. Dow*, 23 Vt. 300;—as to a tender, *Pratt v. Gallup*, 7 Vt. 344;—as to a new promise after a discharge in bankruptcy, *Spaulding v. Vincent*, 24 Vt. 501.

140. But the party may testify to a credit on account, or payment, although the effect of establishing it may be to save the account from the operation of the statute of limitations. *Sargeant v. Sunderland*, 21 Vt. 284. *Hapgood v. Southgate*, 21 Vt. 584. *Noyes v. Crushman*, 25 Vt. 390.

141. A note, given up to the maker to apply on his account against the payee, may as well be testified to by the party in the book account action, as any other payment. *Fassett v. Vincent*, 8 Vt. 117.

142. In an action of book account against two;—*Held*, that the plaintiff might prove by one of the defendants that the other was holden with him. *Keeler v. Mathews*, 17 Vt. 125.

143. **Report—copies of accounts to be annexed.** It is not a matter of discretion, but the duty of an auditor, although not requested, to return with his report copies of the accounts

of the parties, and a statement of the items of each that he allows, or disallows. *Crocker v. Goodnow*, 42 Vt. 682. *Macks v. Brush*, 5 Vt. 70. *Flower Brook Mfg. Co. v. Buck*, 16 Vt. 290. *Read v. Barlow*, 1 Aik. 145.

144. And if requested, but not otherwise, he must also report the facts or grounds of allowing or disallowing items. *Crocker v. Goodnow*. *Macks v. Brush*. *Hoyt v. Clark*, 39 Vt. 87.

145. An exception to the report of an auditor, that he has not appended to the report the account of the excepting party, will not be allowed, unless it appear affirmatively, that such an account was presented at the hearing before him. *Hill v. Hogaboom*, 13 Vt. 141.

146. **Special findings.** When requested, auditors should report the facts found with the particularity of a special verdict;—upon affidavits showing their refusal so to do, their report will be set aside. *McConnell v. Pike*, 3 Vt. 595.

147. The report of an auditor stated simply that the account presented was disallowed. *Held* sufficient,—it not appearing that he had been requested to state the facts or grounds upon which he disallowed the account. *Wait v. Johnson*, 24 Vt. 112.

148. **Report in the alternative.** Auditors may submit any question of law to the court, and for that purpose they may report in the alternative. *May v. Corlew*, 4 Vt. 12.

149. **To report facts,—not evidence.** An auditor must report facts,—not evidence merely. *Stoddard v. Chapin*, 15 Vt. 443. 45 Vt. 346.

150. An auditor must report facts, not the evidence of those facts; but the court may make all the presumptions which necessarily follow from the facts reported. *Shaw v. Shaw*, 6 Vt. 69.

151. **How far conclusive.** An auditor should report facts, not evidence. His finding of facts is conclusive, and cannot be revised by the Supreme Court. *Smith v. Woodworth*, 43 Vt. 39.

152. An error in computation made by an auditor is an error of fact, and, when not passed upon in the county court, cannot be revised or corrected by the Supreme Court. *Cobleigh v. Stone*, 29 Vt. 525.

153. Where an auditor reports the evidence upon which he found a fact, and such evidence tended to prove it, his finding is conclusive; but if the evidence had no such tendency, his finding is erroneous and may be corrected. *Hodges v. Hosford*, 17 Vt. 615.

154. The finding of a fact by an auditor is usually conclusive upon the court; but if the matter found by him, as a fact, is merely his inference from other facts specially found and stated, and the proper resulting fact is one

which the law would infer from the special facts stated, and the auditor makes a mistake in law in his inference, the court may disregard his ultimate finding, and render judgment according to the legal inference. *Briggs v. Briggs*, 46 Vt. 571.

**155.** Upon a report of auditors finding that a son had hired with and worked for his father some 33 years after becoming of age, and that he reasonably deserved to have a certain sum therefor; that the father had acknowledged an indebtedness to the son, but "did not find, otherwise than by inference, that the services were performed at the request of the father";—*Held*, that the report sufficiently showed that the services were performed at the request of the father, under the mutual expectation of a reasonable compensation therefor; and that this was sufficient to entitle the son to recover, without proof of an express promise to pay. The law implies the promise under the circumstances. *Way v. Way*, 27 Vt. 625.

**156.** Where the evidence before an auditor has a legal tendency to prove the fact in controversy, his decision upon the weight and sufficiency of the evidence is conclusive. *Bagley v. Moulton*, 42 Vt. 184. *Wood v. Barney*, 2 Vt. 389. *Phelps v. Wood*, 9 Vt. 399. *Cottrill v. Vanduzen*, 22 Vt. 511.

**157. Inference.** Whether an auditor comes to his result upon direct and positive testimony, or by inferring facts which might be legitimately inferred from the evidence, is immaterial. His finding is conclusive in either case. *Bacon v. Vaughn*, 34 Vt. 73. *Kent v. Hancock*, 13 Vt. 519.

**158.** All reasonable intendments are to be made in support of the conclusions and judgment of an auditor, and the county court. (See case, as to inferences drawn.) *Brudstreet v. Bank of Royalton*, 42 Vt. 128.

**159.** The report of an auditor should not be set aside because the auditor states his conclusion generally, where, upon either of the two grounds stated, it was justifiable upon the evidence. *Cahill v. Patterson*, 30 Vt. 592.

**160. Finding by county court.** If an auditor reports the testimony, instead of finding the facts, and a party, without exception or motion to recommit, proceeds to a hearing upon the report, he thereby submits the issue of fact to the court, and such finding cannot be revised by the Supreme Court. *Bond v. Clark*, 47 Vt. 565.

**161.** Where the county court, instead of recommitting the report of an auditor, undertakes to decide any question of fact, or to draw any inference of fact arising on the report, such decision is final. *Birchard v. Palmer*, 18 Vt. 203. *Barber v. Britton*, 26 Vt. 112.

**162.** The Supreme Court will only presume in aid of the judgment below, that the county

court inferred such facts from the report, as on an examination it can be seen *ought* to have been inferred. *Pratt v. Page*, 32 Vt. 13. *Stone v. Foster*, 16 Vt. 546.

**163.** In regard to such inferences as may be fairly deduced from the facts stated in an auditor's report, the Supreme Court considers that, in doubtful cases, the construction of the county court is to be regarded as conclusive. *Perlinau v. Phelps*, 25 Vt. 478.

**164. Matters of evidence.** If testimony before an auditor could be held admissible in any view, or in connection with any other evidence, it cannot be held, upon exceptions, to have been inadmissible where the report is, that it was offered and admitted "among other things not objected to." *Paige v. Morgan*, 28 Vt. 565.

**165.** The admission of evidence for the purpose of proving facts altogether unimportant, which could not have prejudiced the objecting party and which was admissible for another purpose, is not sufficient reason for setting aside an auditor's report. *Kendrick v. Tarbell*, 37 Vt. 512.

**166.** An objection to the admission of testimony by an auditor must be taken by exceptions to his report, and a motion to recommit. It is not reached by exceptions to the judgment of the county court. *Kidder v. Smith*, 34 Vt. 294.

**167.** Where a witness, interested as bail for the party calling him, testified before auditors against the objection of the opposite party, who, from absence of the record, could not prove such interest;—*Held*, that the report in favor of the party using the witness should be set aside. *McConnell v. Pike*, 3 Vt. 595.

**168. Affidavits, &c.** The Supreme Court will not examine reports of auditors upon affidavits, counter statements, questions of fact, or matters of discretion for the county court, but only upon errors of law. *Thompson v. Arms*, 5 Vt. 546.

**169. Recommitment.** A motion to recommit the report of an auditor will not be entertained by the Supreme Court, where the case stands upon exceptions. Any cause for a new trial should be brought forward by petition. *Hutchinson v. Onion*, 24 Vt. 654.

**170.** In actions of book account, where it is apparent that all the facts are not stated in the auditor's report, the Supreme Court has, in some cases, been induced to reverse the judgment and recommit the report to the auditor to report more fully,—as in *Woodbridge v. Proprietors of Addison*, 6 Vt. 204. But the practice has been otherwise, of late, and the settled practice has been for the Supreme Court to deny an application to recommit. *Clark v. Whipple*, 12 Vt. 483.

**171.** Where an auditor disallows a charge,

the party is entitled to have the grounds of such disallowance stated in the report, and if not so stated, when requested, the report should be recommitted for amendment; but where the objection is first raised in the Supreme Court, it will not be entertained. *Goodrich v. Drew*, 10 Vt. 137.

172. Where an auditor had reported evidence, but not facts sufficient to warrant the judgment below, the court, after reversing the judgment, remanded the case, on request, for a further finding and report. *Wabsh v. Pierce*, 11 Vt. 32. *Hunt v. Haynes*, 45 Vt. 346.

173. Where an auditor finds a fact and allows a charge upon improper testimony, the court does not on this account reject the charge, but again refers the subject to the same or another auditor. *Warden v. Johnson*, 11 Vt. 455.

174. Where exceptions were filed to an auditor's report, and exceptions to the judgment thereon, the Supreme Court reversed the judgment and again referred the cause to the auditor, to make report to the Supreme Court, because the facts were not sufficiently stated to raise the questions of law litigated. *Eddy v. Hine*, 3 Vt. 389. 10 Vt. 140.

175. Where a report of auditors is wholly rejected, the whole case is again submitted to the same or another board of auditors, who are to hear the whole case anew; or it may be recommitted simply for amendment, or correction, in which case no further hearing will be had; or it may be recommitted to hear testimony as to a particular fact, but this must be by consent of parties. *May v. Corlew*, 4 Vt. 12.

176. An auditor's report was recommitted to attach copies of the accounts. This the auditor did, stating the items allowed and disallowed, and corrected an error in computation in his first report, but refused a new hearing upon the whole case;—*Held* correct, but, *dictum*, if important new testimony had been presented, not in the power of the party at the first hearing, it should have been received. *Leach v. Shepard*, 5 Vt. 363.

177. On a case being recommitted to an auditor he has a discretion, whether to require the parties to go over anew the whole trial, or not, subject to the direction of the county court. *Mason v. Potter*, 26 Vt. 722.

178. **Mistake suggested.** Where parties adjusted their book accounts and agreed upon a balance due, although no settlement was made upon the books, and the accounts were continued as before;—*Held*, that the auditor in adjusting the subsequent accounts properly refused to go back of the settlement, upon the supposition that there was some mistake in it. The error must be first discovered, and then it may be corrected; but this would not open the whole settled account for examination. *Hodges v.*

*Hosford*, 17 Vt. 615. *Whiting v. Corwin*, 5 Vt. 451.

#### VII. EFFECT OF JUDGMENT AS A BAR.

179. In the action of book account, either party may sue and insist on an adjustment of the account. If the defendant refuses to present his account, although he may have an account exceeding the plaintiff's, this is no bar to the plaintiff's recovery, unless the defendant shows an agreement, or understanding on both parts, to have the plaintiff's account apply in payment of some claim of the defendant. *Scott v. Nichols*, 12 Vt. 76.

180. In an action of book account before a justice, the plaintiff omitted to present part of the account on his book, claiming and supposing that it had been settled. The defendant denied the settlement, and presented and claimed an account in his favor which the plaintiff claimed was included in the supposed settlement. The justice found that there had been no settlement, and allowed the defendant's account, giving judgment for the balance between that and such of the plaintiff's account as he presented. *Held*, that such judgment was no bar, in a subsequent action on book, to a recovery for the items so omitted—the reason for failure to present them on the first trial being sufficient. *Stevens v. Damon*, 29 Vt. 521.

181. The plaintiff in an action of book account cannot divide his account, and make it the subject of several actions. A judgment in such action is a *prima facie* bar to all previous existing accounts; but it does not bar items of account not embraced in the judgment because not then due (*McLaughlin v. Hill*, 6 Vt. 20);—or because omitted by mistake, or other good cause. *Warren v. Newfane*, 25 Vt. 250. *Stevens v. Damon*.

#### VIII. TENDER.

182. In an action of book account brought originally to the county court, a tender made before the commencement of the suit need not be pleaded, but may be proved before the auditor; and if the money tendered be paid to the auditor and be by him sent to the court with his report, it is sufficient. *Woodcock v. Clark*, 18 Vt. 333.

183. In this action before a justice, a failure to produce the tender in court before the justice is a waiver of it; and to keep the tender good on appeal, it must be produced at the hearing before the auditor, and be returned into court with his report. *Sargent v. Slack*, 47 Vt. 674.

184. A tender under the statute, after suit brought, can be made in the book action. *Peck v. Soragan*, 27 Vt. 92.

185. A tender in this action first made before the auditor, though the money is left in his hands, is not effective. *Wing v. Hurlburt*, 15 Vt. 607. 18 Vt. 336.

186. In an action of book account, the accounts between the parties are considered as entire, and neither can single out a particular item and make a valid tender upon it, and thereby change the balance; and this is so even as to items accruing after the commencement of the suit and before the audit. *Pratt v. Gallup*, 7 Vt. 344. *Wing v. Hurlburt*, 15 Vt. 607. 22 Vt. 519.

187. Where an independent claim is pleaded in set-off in an action of book account, a replication of a tender made before the plea pleaded, though after the commencement of the suit, is sufficient. *Hassam v. Hassam*, 22 Vt. 516.

#### IX. STATUTE OF LIMITATIONS.

188. The statute of limitations, if not insisted upon before the auditors in book account, cannot be urged as an objection to the acceptance of their report. *Newell v. Keith*, 11 Vt. 214.

#### BURIAL GROUNDS.

1. Where land was set out and sequestered for the enlargement of public burial grounds, under G. S. c. 18, s. 9;—*Held*, that it was not essential to the validity of the proceedings,

that the damages awarded to the land owner should be paid or tendered *within the ten days* named in the statute. *Edgecumbe v. Burlington*, 46 Vt. 218.

2. The Act of 1868, No. 91, incorporating the Green Mount Cemetery Association, authorized the city of Burlington to transfer and convey to said association the public cemetery in that city known as Green Mount Cemetery, in trust, to support, embellish and manage the same, and to be thereafter under the control and management of said association for the purposes aforesaid. Subsequently, the city set out and sequestered certain of the orator's land by way of enlargement of the cemetery, under G. S. c. 18, s. 9, with the view of transferring the cemetery, thus enlarged, to said association in pursuance of the act. The transfer was afterwards so made, and upon the express trust and confidence that the association should, at their own expense, support and manage said cemetery for purposes of a public burial ground only, conformably to all the laws of the State applicable thereto, and to the provisions of the act of 1868, with a provision for surrender and reverter to the city upon breach of the trust in any respect. *Held*, that such enlargement did not destroy the identity of the cemetery, and that said act authorized the conveyance thereof, as so enlarged, to the association in the manner above stated; and that the needful enlargement was not rendered unlawful, or ineffective, because of the purpose to transfer the cemetery, after thus enlarged, to the association. *Id.*

### C.

#### CARRIERS.

1. **Common carrier—His liability.** The master of a canal boat on Lake Champlain, carrying goods for hire, is a common carrier, and liable as such for all losses not occasioned by the act of God. *Spencer v. Daggett*, 2 Vt. 92.

2. The charter of the Champlain Transportation Co. extended to the carrying of all goods, wares and merchandise, "and all other articles and things usually transported by water," on Lake Champlain. It appearing that, at the time the company took the charter and went into operation, bank bills were usually carried by water craft upon the lake;—*Held*, that their powers as a corporation extended to the carrying of bank bills, but did not necessarily constitute the company common carriers of bank bills so as to compel them to assume the risk of such carriage, if they should confine their business to carrying other dissimilar commodities;

but if they assumed the business of carrying bank bills, they assumed the liability of common carriers in respect thereto. *Farmers' & Merchs. Bank v. Champ. Tr. Co.*, 23 Vt. 186.

3. Common carriers by water are not answerable for damage to goods which is occasioned by the act of Providence; but are bound to provide safe and seaworthy vessels, suitable to the season and the difficulties of the navigation. *Day v. Ridley*, 16 Vt. 48.

4. In an action against a common carrier for loss of goods, evidence of a departure from the usual course of events, as the non-arrival of the goods at their place of destination (*Brintnall v. Sar. & W. R. Co.*, 32 Vt. 665); an unusual delay in the delivery (*Mann v. Birchard*, 40 Vt. 826); or the landing of the goods out of course (*Day v. Ridley*, 16 Vt. 48), is sufficient to throw upon the carrier the burden of accounting for the loss. *Id.*

5. All common carriers are responsible for



the loss of goods by a delivery to the wrong person; and it is no excuse, in such case, that they delivered them in the customary manner and in the usual course of business. *Winslow v. Vt. & Mass. R. Co.*, 42 Vt. 700.

6. One Collins, whom the plaintiffs well knew as Collins, fraudulently induced them to send certain goods by the defendants' railway to the address of J. F. Roberts, Boston, Mass., Collins representing that there was such a man who had ordered the goods. There was no such person as J. F. Roberts. Upon the arrival of the goods in Boston, Collins applied to one Clough, who was in the employ of a truckman and accustomed to take freight from the defendants' depot, and, informing Clough that his name was J. F. Roberts, requested Clough to get the goods. Clough went to the depot and, upon informing the defendants' freight agents there that Roberts had directed him to get the goods, they delivered the goods to Clough, who receipted for them in his own name and took away the goods, and delivered them according to Collins's order to parties who had purchased them of Collins, representing himself to be J. F. Roberts. Collins got pay for the goods and absconded. *Held*, that the defendants were liable for the goods as common carriers; that here was a misdelivery, and, there being no such man as Roberts, the goods should have been held for the consignors; that the error in the direction of the goods did not mislead the defendants, and they were guilty of actual negligence in the delivery, and would be liable even on that ground. *Ib.*

7. **Notice.** A common carrier may, by general notice brought home to the owner of the things delivered for carriage, limit his responsibility for carrying certain commodities beyond the line of his general business, or he may make his responsibility dependent upon certain conditions,—as having notice of the kind and quantity of the things, and a certain reasonable rate of premium for insurance paid beyond the mere expense of carriage. *Redfield, J.*, in *Farm. & Mech. Bank v. Champlain Tr. Co.*, 23 Vt. 186.

8. **End of transit.** The responsibility of a common carrier, as such, continues after the goods have reached their destination, until the party entitled to them has had a reasonable time to call for, examine and take them. *Winslow v. Vt. & Mass. R. Co.*, 42 Vt. 700. *Blumenthal v. Brainerd*, 38 Vt. 402.

9. A wharfinger is as much a public person as the carrier himself; and where the carrier by steamboat or other vessel, in the due and common course of his business, delivers his goods or parcels into the custody of the wharfinger upon the wharf, the transit is ended, and his responsibility as carrier ceases, unless he has, either expressly or by fair implication, un-

dertaken to do something more, *Sargy v. Joslin*, 20 Vt. 172;—and the question as to the time and place at which the duty of the carrier ends, is one of contract to be determined by the jury from a consideration of all that was said by either party at the time of the delivery and acceptance of the goods for carriage, the course of the business, the practice of the carrier, and all other attending circumstances, the same as in case of any other contract, in order to determine the intention of the parties. *Farm. & Mech. Bank v. Champlain Tr. Co.*, 23 Vt. 186. 35 Vt. 619. 38 Vt. 413.

10. **Detention for freight.** *Held*, that replevin can be maintained against a common carrier for goods detained by him under a claim of lien for freight and charges, after demand of the goods by the owner and a refusal, in case the damages to the goods, for which the carrier is liable, exceeds the claim for freight and charges. *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441.

11. **Private carrier—Agent of necessity.** The defendant, a private carrier, contracted late in the fall to transport by canal boat a cargo of oats for the plaintiff from Burlington to New York. Both parties expected that the boat would reach New York that fall, but the boat, without the fault of the defendant, got frozen in on the route, and was obliged to lie by all winter. The safety of the cargo and of the boat required that the oats should be removed and safely stored, and this was done by the defendant. On the opening of navigation, the next spring, the oats were reloaded and delivered in New York. *Held*, that the defendant could recover of the plaintiff the expense of handling and storing the oats. *Beckwith v. Frisbie*, 32 Vt. 559.

12. **Party to sue.** The plaintiffs were common carriers by a boat which, with the merchandise on board, was lost by the default of the defendant in towing it. *Held*, that as they had a possession coupled with an interest, they could recover the value of the merchandise lost, although they had not paid the owners, nor had been paid for freight of the goods. *White v. Bascom*, 28 Vt. 268.

13. The consignor who owns the goods and sustains the injury from the damage or loss, is the proper party to bring an action against the carrier. *Blumenthal v. Brainerd*, 38 Vt. 402. See RAILROAD.

## CASES CRITICISED—

### APPROVED, DOUBTED, OR OVERRULED.

*Adams v. Johnson*, Brayt. 55, as to protection of equitable assignee, overruled by *Strong v. Strong*, 2 Aik. 373.

*Aldrich v. Londonderry*, 5 Vt. 441, criticised in *Worcester v. Ballard*, 38 Vt. 60.

*Ames v. Fisher*, Brayt. 39, overruled by *Kingsland v. Adams*, 10 Vt. 201.

*Atkinson v. Brooks*, 26 Vt. 569, overruled by *Austin v. Curtis*, 31 Vt. 64.

*Austin v. Austin*, 9 Vt. 420, commented on and explained in *Dunklee v. Adams*, 20 Vt. 415.

*Barber v. Britton*, 26 Vt. 112, as to what presumptions may be made in favor of the judgment below, questioned in *Pratt v. Page*, 32 Vt. 19.

*Barlow v. Burr*, 1 Vt. 488, as to costs on exceptions, disproved in *Downing v. Roberts*, 22 Vt. 457.

*Barnet v. Concord*, 4 Vt. 564, substantially overruled on one point, in *Plymouth v. Mendon*, 23 Vt. 451.

*Barrett v. Copeland*, 20 Vt. 244, reasons and argument overruled in *Dana v. Lull*, 21 Vt. 383. *Bellows v. Allen*, 22 Vt. 108.

*Bates v. Downer*, 4 Vt. 178, wrongly decided. See *Paul v. Burton*, 32 Vt. 148.

*Beckwith v. Hayward*, Brayt. 55, as to protection of equitable assignee, overruled by *Strong v. Strong*, 2 Aik. 373.

*Bigelow v. Topliff*, 25 Vt. 289. *Dictum* of *Isham, J.*, as to equality of attaching creditors and purchasers, overruled in *Hackett v. Callender*, 32 Vt. 108. 33 Vt. 252. 35 Vt. 2. 43 Vt. 409.

*Blackmer v. Blackmer*, 5 Vt. 355. Decision inapplicable by change of statute. *Lytle v. Bond*, 39 Vt. 888.

*Bloss v. Kitttridge*, 5 Vt. 28, on point of pleading, is opposed to *Wightman v. Carlisle*, 14 Vt. 296.

*Boardman v. Keeler*, 2 Vt. 65. *Dictum* as to dormant partner being plaintiff, overruled by *Hilliker v. Loop*, 5 Vt. 116. *Lapham v. Green*, 9 Vt. 407.

*Brainerd v. Burton*, 5 Vt. 97, overruled on one point by *Paris v. Vail*, 18 Vt. 277. *Smith v. Atkins*, 18 Vt. 461. *Baxter v. Bush*, 29 Vt. 469.

*Brooks v. Page*, 1 D. Chip. 340, overruled on one point in *Dewey v. Washburn*, 12 Vt. 580.

*Brown v. Turner*, 1 Aik. 350. *Dictum* as to partition disapproved in *Baldwin v. Aldrich*, 34 Vt. 529.

*Brundridge v. Whitcomb*, 1 D. Chip. 180, as to offset, overruled in *Leavenworth v. Lapham*, 5 Vt. 208. *Adams v. Bliss*, 16 Vt. 42.

*Buck v. Pickwell*, 27 Vt. 157. "The opinion has not the force of authority beyond the point of judgment." *Sterling v. Baldwin*, 42 Vt. 309. Approved "to the extent of the matter decided." *Fitch v. Burk*, 38 Vt. 687.

*Busk v. Squiers*, 23 Vt. 498, limited and explained in *Hodges v. Eddy*, 38 Vt. 327.

*Burlington v. Calais*, 1 Vt. 385. On the

question of evidence, "the case is rather an overstrained one." *Underwood v. Hart*, 23 Vt. 130.

*Burton v. Austin*, 4 Vt. 105, questioned in *Beach v. Beach*, 20 Vt. 88.

*Chaplin v. Hill*, 24 Vt. 528, qualified in *Russell v. Dodds*, 37 Vt. 497.

*Chipman v. Sancyer*, 1 Tyl. 83. 2 Tyl. 61, that an execution issued after a year and a day is void, overruled by *Fletcher v. Mott*, 1 Aik. 339; as to ejectment by an executor, overruled by *Aldis v. Burdick*, 8 Vt. 21.

*Chittenden v. Barney*, 1 Vt. 28, goes too far. *Gates v. Adams*, 24 Vt. 74.

*Clafin v. Hubbard*, Brayt. 88, overruled, as to costs, by *Allard v. Bingham*, 8 Vt. 470.

*Clapp v. Beardsley*, 1 Vt. 151, limited in *Aldis v. Burdick*, 8 Vt. 21.

*Conner v. Chase*, 15 Vt. 764, qualified in *Hills v. Loomis*, 42 Vt. 565.

*Davis v. Goodnow*, 27 Vt. 715, explained in *Putnam v. Town*, 34 Vt. 429.

*Davis v. White*, 27 Vt. 751, overruled in *Hodges v. Eddy*, 38 Vt. 346.

*Dean v. Dean*, 27 Vt. 746. *Dictum* as to presumed capacity of testator overruled by *Williams v. Robinson*, 42 Vt. 658.

*In re Dougherty*, 27 Vt. 326. See *State v. Conlin*, *infra*.

*Downer v. Fox*, 20 Vt. 392. *Dictum*, that an attaching creditor should not be made defendant in a bill of foreclosure, disapproved in *Chandler v. Dyer*, 37 Vt. 345.

*Drake v. Collins*, 1 Tyl. 79, 2 Tyl. 63, overruled by *Bagley v. Wiswall*, Brayt. 23.

*Woodrow v. O'Conner*, 28 Vt. 776. *Edgell v. Lowell*, 4 Vt. 405, explained in *Root v. Reynolds*, 32 Vt. 139.

*Farnham v. Ingham*, 5 Vt. 514, overruled in *Isaacs v. Elkins*, 11 Vt. 679.

*Farnsworth v. Tilton*, 1 D. Chip. 297. Question of pleading—*Dictum* disapproved in *Kinsman v. Page*, 22 Vt. 631.

*Farr v. Brackett*, 30 Vt. 344,—*dictum* as to assignments disapproved in *Passumpsic Bank v. Strong*, 42 Vt. 301.

*Fitzsimmons v. Joslin*, 21 Vt. 129, approved in *Field v. Stearns*, 42 Vt. 111.

*Flint v. Day*, 9 Vt. 345, doubted in *Pitkin v. Flanagan*, 23 Vt. 164, and *Keith v. Goodwin*, 31 Vt. 276: Overruled by *Adams v. Flanagan*, 36 Vt. 400.

*Gaffield v. Enos*, Brayt. 234, overruled by *Austin v. Palmer*, 2 Vt. 489.

*Gibson v. Davis*, 22 Vt. 374. *Quere* raised—settled in *Chandler v. Warren*, 30 Vt. 510.

*Goodnow v. Stafford*, 27 Vt. 437, limited in *Carruth v. Tighe*, 32 Vt. 626.

*Greensboro v. Underhill*, 12 Vt. 604, questioned in *Northfield v. Plymouth*, 20 Vt. 582.

*Hackett v. Callender*, 32 Vt. 97, approved in *Perrin v. Reed*, 35 Vt. 2. *Field v. Stearns*, 42 Vt. 112.

*Hale v. Miller*, 15 Vt. 211. *Dicta* as to form of action overruled by *Hall v. Ray*, 40 Vt. 579.

*Harris v. Bullock*, Brayt. 141, overruled by *Putney v. Bellows*, 8 Vt. 272. 10 Vt. 489.

*Harris v. Holmes*, 30 Vt. 352. *Dicta* as to receiving evidence provisionally, overruled by *Conn. & Pass. R. R. Co. v. Baxter*, 32 Vt. 805. 36 Vt. 88. *Sterling v. Sterling*, 41 Vt. 80.

*Harrington v. Harrington*, 10 Vt. 505, overruled in *Le Barron v. Le Barron*, 35 Vt. 370.

*Hartland v. Williamstown*, 1 Aik. 241. *Dictum* overruled in *Landgrove v. Pawlet*, 20 Vt. 309.

*Hatheway v. Allen*, Brayt. 152, limited in *Closson v. Staples*, 42 Vt. 223.

*Hazen v. Hazen*, 19 Vt. 603, overruled in *Le Barron v. Le Barron*, 35 Vt. 370.

*Hill v. Kendall*, 25 Vt. 528, questioned in *Moore v. Stevens*, 33 Vt. 308.

*Hill v. Pratt*, 29 Vt. 126. Opinion criticised in *Fenno v. Weston*, 31 Vt. 352.

*Hines v. Soule*, 14 Vt. 99, overruled by *Hayward Rubber Co. v. Dunklee*, 30 Vt. 29; *Downs v. Belden*, 46 Vt. 674; *Alger v. Andrews* 47 Vt. 238.

*Hodges v. Green*, 28 Vt. 358, limited and explained in *Ballard v. Bond*, 32 Vt. 359; *King v. Smith*, 33 Vt. 25.

*Holley v. Winoski Turnpike Co.*, 1 Aik. 74, explained as a decision of fact on a case stated, in *Leicester v. Pittsford*, 6 Vt. 247. See *Sessions v. Newport*, 23 Vt. 12.

*Hubbard v. Dewey*, 2 Aik. 312. The reasoning and *dicta* of *Hutchinson, J.*, criticised in *Benedict v. Heineberg*, 43 Vt. 231.

*Hutchins v. Hawley*, 9 Vt. 295, is not now the law. *Wheeler v. Winn*, 38 Vt. 122.

*Ingersoll v. Van Gilder*, 1 D. Chip. 59, overruled in *Starkweather v. Loomis*, 2 Vt. 573; *Brown v. Edson*, 23 Vt. 447.

*Jackman v. New Haven*, 42 Vt. 591, overruled in *Bucklin v. Sudbury*, 43 Vt. 700.

*Kirby v. Mayo*, 13 Vt. 103. *Dictum* limited in *Wait v. Richardson*, 33 Vt. 192.

*Knapp v. Leaveway*, 27 Vt. 298, qualified in *Lamson v. Bradley*, 42 Vt. 173.

*Londonderry v. Acton*, 3 Vt. 122, reconsidered and approved in *Dummerston v. Newfane*, 37 Vt. 9.

*Lyman v. Windsor*, 29 Vt. 305. Expressions in the opinion criticised in *Jarvis v. Barnard*, 30 Vt. 502.

*Martin v. Bigelow*, 2 Aik. 184, overruled by *Johns v. Stevens*, 3 Vt. 308; *Davis v. Fuller*, 12 Vt. 178. 25 Vt. 231.

*Martin v. Blodget*, 1 Aik. 375. *Dictum* as to demurrer overruled in *Parlin v. Bundy*, 18 Vt. 582; *Wheeler v. Wheelock*, 33 Vt. 144.

*Martin v. Fairbanks*, 7 Vt. 97, questioned or overruled in *Wetherell v. Roarts*, 17 Vt. 219.

*Mattison v. Westcott*, 13 Vt. 258, overruled, on the main point, by *Latham v. Lewis*, cited in *Hodges v. Fox*, 36 Vt. 81.

*McGray v. Wheeler*, 18 Vt. 502, criticised in *Joyal v. Barney*, 20 Vt. 154.

*Michigan State Bank v. Leavenworth*, 28 Vt. 209, overruled by *Austin v. Curtis*, 31 Vt. 64.

*Middlebury v. Hubbardton*, 1 D. Chip. 205, overruled, as to form of action, in *Danville v. Putney*, 6 Vt. 512; *Pawlet v. Sandgate*, 19 Vt. 630; *Castleton v. Miner*, 8 Vt. 209: Criticised and in part overruled in *Worcester v. Ballard*, 38 Vt. 60.

*Moore v. Jones*, 28 Vt. 739, disregarded in *Nichols v. Bellows*, 22 Vt. 581.

*Mott v. Mott*, 5 Vt. 111, and *Snow v. Conant*, 8 Vt. 301, as to offsets, seem opposed to each other, and questioned in *Adams v. Bliss*, 16 Vt. 42.

*Musney v. Noyes*, 26 Vt. 472, that an assignment contrary to statute is wholly void, denied in *Merrill v. Englesby*, 28 Vt. 150, 158.

*Munson v. Hastings*, 12 Vt. 346, explained in *Whitcomb v. Wolcott*, 21 Vt. 368.

*Nelson v. Denison*, 17 Vt. 77, questioned in *McKenzie v. Ransom*, 22 Vt. 331. *Hammond v. Wilder*, 25 Vt. 347.

*Newbury v. Brunswick*, 2 Vt. 151, overruled on one point in *Landgrove v. Pawlet*, 20 Vt. 309.

*Nichols v. Holgate*, 2 Aik. 140. *Dictum* that an attaching creditor should not be made defendant in a bill of foreclosure, disapproved in *Chandler v. Dyer*, 37 Vt. 345.

*Northfield v. Plymouth*, 20 Vt. 582, on the point of admitting irrelevant testimony and then charging it out, denied and overruled. *Conn. & Pass. R. R. Co. v. Baxter*, 32 Vt. 805. *Wood v. Willard*, 36 Vt. 88. *Stirling v. Stirling*, 41 Vt. 91.

*Quimit v. Henshaw*, 35 Vt. 605, criticised in *Blumenthal v. Brainerd*, 38 Vt. 416.

*Paddleford v. Bancroft*, 22 Vt. 529, limited in *Aldrich v. Bonett*, 33 Vt. 202.

*Paddock v. Colby*, 18 Vt. 485, questioned, as to statute of limitations, in *Carruth v. Paige*, 22 Vt. 179; cited in *Burton v. Stevens*, 24 Vt. 133, and *Hill v. Kendall*, 25 Vt. 531; impugned in *Moore v. Stevens*, 33 Vt. 308.

*Paddock v. Strowbridge*, 29 Vt. 470. The author states, on the authority of Judge Bennett, that this opinion of the Chief Justice was prepared as a dissenting opinion, and got published, erroneously, as the opinion of the court. *Page v. Johnson*, 1 D. Chip. 338, overruled on one point by *Way v. Swift*, 12 Vt. 390.

*Parker v. Birby*, 2 Tyl. 466, overruled in *Brown v. Wright*, 17 Vt. 97.

*Phelps v. Parks*, 4 Vt. 488, commented upon and distinguished from *Perry v. Whipple*, 38 Vt. 278.

*Pierce v. Gilson*, 9 Vt. 216. *Dicta* of *Wil-*

*liams, C. J.*, disapproved in *Gleason v. Owen*, 35 Vt. 595. *Spencer v. Dearth*, 43 Vt. 103.

*Pike v. Hill*, 15 Vt. 183, qualified in *Paddleford v. Bancroft*, 22 Vt. 536; but sanctioned in *Eastman v. Waterman*, 26 Vt. 500. *Farr v. Ludd*, 37 Vt. 160.

*Pinney v. Fellows*, 15 Vt. 525, criticised for its reasons on one point in *Dewey v. Dewey*, 35 Vt. 560.

*Poor v. Woodburn*, 25 Vt. 284, approved in *Field v. Stearns*, 42 Vt. 111.

*Powell v. Broen*, 1 Tyl. 285, overruled in *Brown v. Wright*, 17 Vt. 97.

*Preble v. Bottom*, 27 Vt. 249, commented upon in *Chamberlin v. Scott*, 33 Vt. 84.

*Provost v. Harwood*, 29 Vt. 219. Rule of damages explained in *Whitcomb v. Gilman*, 35 Vt. 299.

*Putney v. Dummerston*, 13 Vt. 370, questioned in *Sheldon v. Fairfax*, 21 Vt. 102, and contradicted by *Worcester v. Ballard*, 38 Vt. 60.

*Rice v. Montpelier*, 19 Vt. 470, limited in *Cassedy v. Stockbridge*, 21 Vt. 391.

*Rice v. Talmadge*, 20 Vt. 378. *Dicta* overruled in *Chandler v. Warren*, 30 Vt. 512.

*Riford v. Montgomery*, 7 Vt. 411. Reasonableness of rule in that and kindred cases questioned in *Deering v. Austin*, 34 Vt. 334.

*Roberts v. Griswold*, 35 Vt. 496, affirmed in *Bagley v. Moulton*, 42 Vt. 188.

*Robinson v. Hutchinson*, 26 Vt. 45. *Dictum* that capacity of testator is presumed, overruled by *Williams v. Robinson*, 42 Vt. 658.

*Sanford v. Norton*, 17 Vt. 285. Opinion criticised in *Sylvester v. Downer*, 20 Vt. 359-60.

*Saunders v. Honre*, 1 D. Chip. 363, overruled by *Bradley v. Bentley*, 8 Vt. 243. 11 Vt. 679.

*Sessions v. Gilbert*, Brayt. 75. Not followed. *Giddings v. Munson*, 4 Vt. 312.

*Skiff v. Solace*, 23 Vt. 279, overruled by *Taylor v. Boardman*, 25 Vt. 581. *Jones v. Taylor*, 30 Vt. 42. *Cobb v. Buscwell*, 37 Vt. 337.

*Smith v. Shumway*, 2 Tyl. 74, overruled in part by *Bonedish v. Peckham*, 1 D. Chip. 145. *Bozen v. Hall*, 20 Vt. 232.

*Snow v. Conant*, 8 Vt. 301, and *Mott v. Mott*, 5 Vt. 111, as to offsets, seem opposed to each other, and questioned in *Adams v. Bliss*, 16 Vt. 42.

*St. Albans v. Georgia*, Brayt. 177, overruled by *Londonderry v. Windham*, 2 Vt. 149. 3 Vt. 24.

*Stanley v. Robbins*, 36 Vt. 422. *Dicta* as to assignments overruled in *Pasumpsic Bank v. Strong*, 42 Vt. 301.

*Stanton v. Stanton*, 37 Vt. 411, commented upon and distinguished from *Thrall v. Mead*, 40 Vt. 540.

*State v. Boston, &c., R. Co.*, 25 Vt. 445, as to cost, qualified in *State v. Bradford*, 32 Vt. 54.

*State v. Conlin*, 27 Vt. 318. *In re Dougherty*, 27 Vt. 326. *State v. Freeman*, 27 Vt. 523.

*Dicta*, that certain minor offenses do not come within Art. 10 of bill of rights, condemned in *State v. Peterson*, 41 Vt. 524.

*State v. Freeman*, 27 Vt. 523. See *State v. Conlin*, *supra*.

*State v. Johnson*, 28 Vt. 512, affirmed in *State v. Reed*, 39 Vt. 417.

*State v. J. N. B.*, 1 Tyl. 36, overruled by *State v. Phelps*, 2 Tyl. 374.

*State v. Root*, 12 Vt. 396, overruled, on the point of a court's taking knowledge of the law of another State, in *State v. Horn*, 43 Vt. 20.

*State v. Towne*, 28 Vt. 771, questioned in *Moore v. Stevens*, 33 Vt. 308.

*Stevens v. Adams*, Brayt. 29, overruled by *Turner v. Loney*, 2 Aik. 72.

*Stevens v. Wilkins*, 8 Vt. 231, overruled by *Mann v. Holbrook*, 20 Vt. 523.

*Stephenson v. Clark*, 20 Vt. 624, limited and explained, in *Burrows v. Stebbins*, 26 Vt. 659.

*Stoddard v. Allen*, N. Chip. 44, overruled by many cases since.

*Strong v. Allen*, Brayt. 232, overruled by *Austin v. Palmer*, 2 Vt. 489.

*Strong v. Garfield*, 10 Vt. 504. *Dictum* of *Phelps, J.*, doubted in *Watson v. Brainard*, 33 Vt. 90.

*Strong v. Strong*, 2 Aik. 373, overruled on one point by *Lowell v. Leland*, 3 Vt. 581. *Paris v. Hulett*, 26 Vt. 308.

*Taft v. Pike*, 14 Vt. 405. *Dictum* as to interest against infants, overruled in *Bradley v. Pratt*, 23 Vt. 378.

*Taylor v. Nichols*, 29 Vt. 104. *Dictum* as to official oaths denied in *Courser v. Powers*, 34 Vt. 517.

*Thayer v. Davis*, 38 Vt. 163, is imperfectly reported. See *Sterling v. Sterling*, 41 Vt. 93.

*Thrall v. Seward*, 37 Vt. 573, explained and affirmed in *Hunter v. Kittredge*, 41 Vt. 359.

*Town v. Wiley*, 23 Vt. 355. Approval of *Pitts v. Hall* (9 N. H. 441), qualified in *Gilson v. Spear*, 38 Vt. 314.

*Trask v. Donoghue*, 1 Aik. 370, overruled on one point by *Roberts v. Hall*, 35 Vt. 28.

*Tyler v. Lathrop*, 5 Vt. 170, has been followed in cases *precisely identical*—not to be extended, &c. *Spear v. Flint*, 17 Vt. 498. *Hariman v. Swift*, 31 Vt. 385. *Bradish v. Redway*, 35 Vt. 426.

*Vickery v. Taft*, 1 D. Chip. 241, "has been regarded as a sound case only upon its peculiar facts." *Gates v. Lockwood*, 27 Vt. 287.

*Vermont Central R. Co. v. Hills*, 23 Vt. 685. *Dictum* questioned in *Swaeney v. Brooks*, 34 Vt. 455.

*Ward v. Sharp*, 15 Vt. 115, limited in *Davis v. Converse*, 35 Vt. 508.

*Weed v. Nutting*, Brayt. 28, overruled by *Clough v. Brown*, 38 Vt. 179.

*Wells v. Mace*, 17 Vt. 503, reversed in *U. S. Sup. Ct.*, 7 Howard 272.

*Wetmore v. Blush*, Brayt. 55, as to protection of equitable assignee, overruled by *Strong v. Strong*, 2 Aik. 373.

*Wheeler v. Lewis*, 11 Vt. 265, limited in *Bull v. Bliss*, 30 Vt. 131.

*Wheeler v. Wheeler*, 11 Vt. 60, commented on in *Ellsworth v. Fogg*, 35 Vt. 358.

*White v. Comstock*, 6 Vt. 405, affirmed in *Burnett v. Ward*, 42 Vt. 89.

*Whitman v. Pownal*, 19 Vt. 229. *Dictum* of Davis, J., disapproved in *Jakeway v. Barrett*, 38 Vt. 325.

*Whittle v. Skinner*, 33 Vt. 531, overruled as to oral assignment, &c., by *Noyes v. Brown*, 33 Vt. 431, and *Wescott v. Potter*, 40 Vt. 271.

*Wilcox v. Sherwin*, 1 D. Chip. 72, overruled by *Blood v. Sayre*, 17 Vt. 613.

*Williams v. Hicks*, 2 Vt. 36, criticised and limited in *Clough v. Patrick*, 37 Vt. 421.

*Windsor v. Jacob*, 1 Tyl. 241, overruled by *Fairfield v. Hall*, 8 Vt. 68.

*Wright v. Doolittle*, 5 Vt. 390, overruled by *Fullam v. Ives*, 37 Vt. 659.

*Young v. Judd*, Brayt. 151, overruled, on one point, by *Stinton v. Bannister*, 2 Vt. 464.

substantial justice of the case, the writ has been uniformly denied. But if the writ be granted, and error appears, the court must quash the proceedings. *West River Bridge Co. v. Dix*, 16 Vt. 446. *Royalton v. Fox*, 5 Vt. 458. *Myers v. Pownal*, 16 Vt. 415. *Rockingham v. Westminster*, 24 Vt. 288. *Pomfret v. Hartford*, 42 Vt. 134. *Chase v. Rutland*, 47 Vt. 393.

6. Questions of discretion of the county court, in highway cases, cannot be revised on *certiorari*,—as, whether the public good required a free road, the assessment of damages for the franchise of a bridge corporation, &c. *West River Bridge Co. v. Dix*.

7. Upon *certiorari*, the Supreme Court does not retain the case for further proceedings, nor render such judgment as the county court should have rendered, as on a writ of error, but either quashes the proceedings altogether, or, after reversing some erroneous judgment, remands them for further proceedings. *Sumner v. Hartland*, 25 Vt. 641.

8. As the issuing of a writ of *certiorari* is, to a great extent, matter of discretion, the practice is to hear the merits of the case upon the petition for the writ, and practically to decide the whole case upon the granting or refusing of the writ. *Walbridge v. Walbridge*, 46 Vt. 617.

### CERTIORARI.

1. Form of writ of *certiorari* and return, in case of error. *Bracket v. State*, 2 Tyl. 152.

2. In cases where the county court exercises its jurisdiction otherwise than according to the course of the common law, as in road cases, &c., the remedy is by *certiorari*, *mandamus*, or other proper writ, and not by writ of error, or exceptions. *Beckwith v. Houghton*, 11 Vt. 603. *Courser v. Vt. Central R. Co.*, 25 Vt. 476. *Stiles v. Windsor*, 45 Vt. 520.

3. In regard to all prerogative writs, whereby the Supreme Court assumes a supervisory jurisdiction over subordinate tribunals, it exercises a discretion in withholding the remedy, even where it is obvious that some formal error has intervened;—as on petition for a *certiorari*, where the pecuniary interest involved is very small. *Paine v. Leicester*, 22 Vt. 44; and where no injustice has been done. *Lyman v. Burlington*, 22 Vt. 131.

4. The writ of *certiorari* is not demandable as a matter of strict legal right, but it rests in the discretion of the court to grant, or refuse it. The petitioner must show that substantial injustice has been done, and that this may be remedied if the writ is awarded. It is not every error in the proceedings below that will induce the court to issue the writ. *Londonderry v. Peru*, 45 Vt. 424. *Paine v. Leicester*. *Lyman v. Burlington*. *Woodstock v. Gailup*, 28 Vt. 587.

5. Where the error is not one affecting the

### CHANCERY.

#### I. JURISDICTION.

1. *Ordinary jurisdiction.*
2. *Limitation by legal remedy.*
3. *Auxiliary jurisdiction.*
4. *Retaining jurisdiction once attached.*

#### II. SUIT WHERE TO BE BROUGHT,—SERVICE, ETC.

#### III. PLEADINGS.

1. *The Bill.*
2. *Demurrer.*
3. *Plea; Answer; Cross-Bill.*

#### IV. PROCEEDINGS AFTER ISSUE.

1. *The testimony.*
2. *Report of Master.*
3. *The decree.*

#### V. PROCEEDINGS AFTER DECREE.

1. *Appeal.*
2. *Hearing on appeal.*
3. *Mandate.*

#### VI. REVISORY PROCEEDINGS.

##### I. JURISDICTION.

##### 1. *Ordinary jurisdiction.*

1. **Amount in controversy.** Under a bill in equity to account, the "matter in dispute," as determining the jurisdiction of the court (G. S. c. 29, s. 3), is the difference be-

tween the respective claims of the parties. But if brought *bona fide*, the jurisdiction does not lapse because the master reports a balance less than \$50. *Washburn v. Washburn*, 23 Vt. 576.

2. A motion to dismiss a suit in chancery on the ground that the matter in controversy does not exceed fifty dollars, if not made in the court of chancery, will not be considered in the Supreme Court. *Washburn v. Dewey*, 17 Vt. 92.

3. **Marriage contract.** A court of chancery, under its common equity jurisdiction, may rescind or relieve against a marriage contract, or annul a contract solemnized before a magistrate or a minister of the gospel, if obtained by force, fraud or imposition, or under a mistake as to the legal effect of such solemnization by one party, if the other knew the legal effect and also knew that the party was under such mistake, where such ceremony has not been followed by consummation, or cohabitation;—so decreed. *Clark v. Field*, 13 Vt. 460.

4. **Sureties.** The subject of equitable relief in behalf of sureties is one of original jurisdiction in a court of chancery, and, although the liability of sureties has come to be governed by the same principles at law as in equity, the jurisdiction of the court of chancery is not affected thereby; and it is not in the power of a creditor, by first commencing proceedings at law, to deprive the surety from seeking his relief in chancery, controlling the proceedings at law. *Viele v. Hoag*, 24 Vt. 46.

5. **Tenants in common.** In matters of account between tenants in common, courts of chancery have an original jurisdiction, not depending on the need of discovery; and, since the statutes giving a jurisdiction to courts of law, the jurisdiction by bill is concurrent with the jurisdiction by action of account. *Leach v. Beatties*, 33 Vt. 195.

6. It is a proper exercise of equity jurisdiction to apportion among parties having a common use of a water-power, and a common duty to keep up the dam by which the power is created, the burden of maintaining it. *Sanborn v. Braley*, 47 Vt. 170.

7. **Trustees.** All accounting between trustees and their *cestuix* is a proper head of original equity jurisdiction, and comes within ordinary chancery jurisdiction, except where jurisdiction of certain particular species of trust is given by statute to the probate court; and in such cases, if, by reason of the limited power of the probate court or its peculiar mode of proceeding, it cannot give relief, resort may be had to a court of equity. *French v. Winsor*, 36 Vt. 412.

8. **Legacy.** Courts of equity have always been regarded as the appropriate tribunals to enforce payment of legacies, on the ground

that the executor was a mere trustee for the legatee; and this has been extended to almost every variety of case where the validity of a legacy or devise, or its effect, was brought in question. *Holmes v. Holmes*, 36 Vt. 588.

9. **Forfeiture.** Whenever a forfeiture is taken advantage of which works a hardship, and full compensation can be made, equity generally relieves against the forfeiture upon making such compensation. So done in this case. *Hagar v. Buck*, 44 Vt. 285.

10. It is altogether outside the province and functions of a court of equity to set up and enforce a forfeiture. *Vt. Copper Mining Co. v. Ormsby*, 47 Vt. 709.

11. In all cases of bills for relief against forfeitures, the question is upon the restoration of the old contract; not, whether the court will substitute a new one for it—as by substituting the periodical payment of a specified sum of money in lieu of services and support covenanted to be supplied. The legitimate power of a court thus to interfere with men's contracts may well be doubted. *Dunklee v. Adams*, 20 Vt. 415.

12. **Contracts of the weak-minded.** Chancery will not set aside a conveyance which is perfectly fair, and where no undue advantage has been taken, provided the grantor had sufficient understanding to know the nature and consequences of his act at the time. *Day v. Seely*, 17 Vt. 542.

13. That the intellectual capacity of a party is below that of the average of mankind does not alone furnish sufficient ground for setting aside his contract. *Mann v. Betterly*, 21 Vt. 326.

14. **Inadequacy of consideration.** Mere inadequacy of consideration furnishes no sufficient ground for the interference of a court of equity to set aside a deed, or contract; but inadequacy of consideration, coupled with such a degree of weakness and imbecility of intellect as would justify the inference that such weakness had been taken advantage of, would afford sufficient ground for such interference. *Ib.*

15. An exchange of lands was set aside in equity in behalf of the heirs of a very weak-minded man, though not *non compos*, where there was great inequality of consideration, of capacity in the contracting parties, and of knowledge of the properties. *Holden v. Cranford*, 1 Aik. 390.

16. It is not uncommon for a court of chancery to refuse to lend its aid to enforce a contract by reason of inadequacy in the consideration; but it is well settled that mere inadequacy, independent of and unconnected with other circumstances, is not sufficient *per se* to rescind a contract, unless its grossness amount to fraud; but where such inadequacy is connected with other circumstances of suspicion, this may fur-

nish satisfactory ground for relief. *Howard v. Edgell*, 17 Vt. 9.

17. To restrain proceedings at law. It is a general principle of equity jurisprudence, that a court of chancery will not entertain a bill to impeach a judgment at law for mere irregularity in the proceedings, but will leave such questions, arising in legal proceedings, to the exclusive jurisdiction of courts of law. It will not, upon the testimony of witnesses, try the truth of the return of a sworn officer made in a proceeding at law, and grant relief upon falsifying the record. *Wardsboro v. Whitingham*, 45 Vt. 450.

18. Equity will not postpone an earlier to a later attachment, because of a formal and technical defect in the first proceedings—as, because the first writ was made returnable to a wrong term; or because the judgment in that case, was entered and an execution issued against all the members of a firm, upon a confession of judgment by one of them; but will leave the parties to courts of laws for the assertion of mere technical rights. *Shedd v. Bank of Brattleboro*, 32 Vt. 709.

19. Where a purchaser of land had knowledge of an incumbrance upon it, and the matter was mutually settled between him and the vendor, and the vendor gave a deed containing a covenant against incumbrances, but with the understanding that no claim should be made on such covenant, and the grantee afterwards brought an action at law on such covenant;—*Held*, that this was a fraudulent use of the covenant, and that equity would enjoin him from such use of it. Suit enjoined. *Taylor v. Gilman*, 25 Vt. 411.

20. The plaintiff in a suit at law was restrained by injunction from the prosecution of that or any other suit for the same matter, although the defendant therein had a good defense at law to the suit brought, but where, if he succeeded, he would still be subject to other vexatious suits. *Morse v. Morse*, 44 Vt. 84.

21. M brought a suit at law against the town of G, upon a town order payable to him, or bearer, which he had obtained by fraud. On a bill in equity by the town to enjoin the suit at law, and that the order be delivered up to be cancelled;—*Held*, that in the exercise of a sound discretion, the special circumstances of the case warranted the granting of the relief sought:—these were, that the evidence left the fact of fraud in no doubt; that the negotiable character of the instrument, although overdue, might lead to embarrassment of the town, as would, also, a payment of it by the town treasurer, in case the bill was dismissed; also, that the question of jurisdiction was not raised by demurrer, but by the answer, and only brought to the attention of the court on final hearing after all the testimony had been taken and all this expense

incurred. *Glastenbury v. McDonald*, 44 Vt. 450.

22. Instance of restraining a partition of lands at law according to the legal import of the deeds, and ordering partition in chancery, so as to protect the orator's equitable rights, *Piper v. Farr*, 47 Vt. 721.

23. Where the relief sought is exclusively of an equitable character, such relief is not concluded by a judgment at law; since one may have a claim against an estate which could not be resisted at law, but upon which, nevertheless, he is not in equity entitled to a dividend. *West v. Bank of Rutland*, 19 Vt. 403.

24. The equitable assignee of a chose in action, with notice to the debtor, brought his action at law thereon in the name of the assignor, when the defendant procured a release from the assignor, and set it up in defense and obtained judgment,—the course of decisions at that time being that, at law, that was a defense, and that the plaintiff's claim was only of equity jurisdiction. Afterwards the plaintiff brought his bill in equity to enjoin that judgment, and to enforce his original claim. *Held*, that the judgment at law was not conclusive as a defense, although, according to the course of later decisions, the orator's equitable right would be protected at law,—the matter being of original equity jurisdiction, and the rule at law being different *then*, and *now*. *Dana v. Nelson*, 1 Aik. 252. *S. C.*, 2 Aik. 381.

25. A obtained judgment against B, under a rule "that certain sums of money specified in receipts signed by A should be deducted from said damages." B neglected or refused to produce the receipts to the clerk, and A took his execution for the full judgment, but collected only a part. About seven years afterwards, and after such receipts were lost, A brought a new suit on said judgment, refusing to apply the amount of such receipts, and obtained a second judgment for the apparent balance. On bill brought by B, an application of the amount of said receipts was decreed, and an injunction against enforcing the judgment to that amount; but no costs were allowed to either party. *Lynde v. Wright*, 1 Aik. 383.

26. If a judgment be rendered in pursuance of an agreement of the parties which directs a particular mode of satisfying it, equity regards this as the act of the parties, and not of the court, and will not permit it to be enforced in any way inconsistent with the agreement. *Nason v. Smalley*, 8 Vt. 118.

27. Arbitrators awarded that the orator should pay the defendant a certain sum, in addition to what he had already paid, and that the defendant should, at the same time, execute to the orator a deed of certain lands. The defendant duly tendered the deed which the orator refused to accept. The defendant after-

wards, in an action on the award, recovered of the orator judgment for the sum so awarded to be paid, and costs. Afterwards the defendant sold and conveyed the lands to a third person for their value; and afterwards, on his claiming to enforce the judgment, the orator brought his bill for relief. The court, by decree, enjoined the defendant from enforcing the judgment, and ordered him to repay the sum paid by the orator towards the land before the arbitration, with the orator's costs after deducting the defendant's costs in the suit at law. *Preston v. Whitcomb*, 17 Vt. 183.

28. Chancery will not relieve against a judgment at law, for matters which constituted a defense to the action at law, where the orator was fully apprised of the facts necessary to his defense, or could have ascertained them. *Briggs v. Shaw*, 15 Vt. 78.

29. Resort to chancery must be seasonably made, when the ground and occasion for it are seasonably known, or relief will be refused. Thus, where a suit at law was suffered to go to final judgment, where the facts showing the necessity of a resort to chancery were seasonably known, the judgment at law was held a bar to equitable relief. *St. Johnsbury v. Bagley*, 48 Vt. 75.

## 2. Limitation by legal remedy.

30. It is not optional with a party whether he will proceed at law or in chancery. He cannot resort to chancery where his remedy at law is adequate. *Currier v. Rosebrooks*, 48 Vt. 84.

31. An injunction against the erecting and use of a church upon lands claimed by the orator was refused, where his title was not clear and certain, and where he had an adequate remedy at law, and the defendants were responsible, &c. *White v. Booth*, 7 Vt. 181.

32. A mere breach of contract is never restrained in advance, nor redressed subsequently, in a court of equity, where the remedy at law is adequate to the injury. *Smith v. Pettingill*, 15 Vt. 82. *Washburn v. Titus*, 9 Vt. 211.

33. Chancery will never interfere to prevent by injunction a mere ordinary trespass, where the injury is in no sense irreparable, and where an adequate remedy may be found in the recovery of damages at law. Injunctions against trespasses to timber, ore, monuments, ornamental trees, coals and quarries, have been granted, being cases where the recovery of damages merely would be an inadequate remedy. *Smith v. Pettingill*.

34. Bill brought to enjoin the prosecution of an action of ejectment:—Bill dismissed for the reason that the orator had a clear defense at law to the action. *Barrett v. Sargeant*, 18 Vt. 365.

35. Where a statute made the officers of a corporation personally liable, in an action founded on the statute, for certain debts;—*Held*, that the remedy being complete at law upon the statute, the liability could not be enforced in chancery. *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313.

36. A cross-bill was dismissed with costs of defense to it, although the original bill was dismissed with costs, where the matter of the cross-bill was equally available as a defense to the original bill, and where, as to the further relief sought by the cross-bill, there was an adequate remedy at law. *Sprague v. Waldo*, 38 Vt. 139.

37. The bill set forth a good cause of action at law for a past diversion of water from the orator's mill; also that the parties were in controversy about their respective rights to the water, and asked to have these rights ascertained and established. *Held*, on demurrer, that these facts did not furnish sufficient ground for equitable interference. The bill also prayed for an injunction to restrain the defendant's use of the water except in a certain way, and alleged that the defendant claimed some of the water belonging to the orator and was using it according to such claim, and threatened to increase the use; but did not allege that such use as then made, or increased as threatened, could not be fully compensated for in damages at law; nor that any application had been made to the defendant to desist; nor that repeated and vexatious suits at law would be or were believed to be necessary, in order to maintain the rights infringed upon. *Held*, that the court of chancery had no jurisdiction of the case, as made by the bill. *Fairhaven Marble Co. v. Adams*, 46 Vt. 496; and see *Prentiss v. Larnard*, 11 Vt. 135. *Smith v. Pettingill*, 15 Vt. 82.

38. Where a party is unjustly deprived of his day in court before a justice by fraud, accident or mistake, the remedy at law under G. S. c. 38 is ample, and there is no necessity nor warrant for resorting to chancery. *Sleeper v. Croker*, 48 Vt. 9.

39. The statute authorizing the probate court to license an executor, &c., to sell real estate fraudulently conveyed by the testator, &c. (G. S. c. 52, s. 43 and *seq.*), does not provide a remedy exclusive of chancery. *Therason v. Hickok*, 37 Vt. 454.

40. The orator's claims, although several, being in the nature of claims upon a particular fund upon which others had an equal claim, and to which another class of claimants might have a paramount right, and where an accounting might be involved, the case was held a proper one for chancery jurisdiction;—the remedy at law not appearing to be clear, complete and adequate. *Richardson v. Vt. & Mass. R. Co.*, 44 Vt. 613.



3. *Auxiliary jurisdiction.*

**41. In aid of creditor to reach equitable estate.** Where a legal claim is established by judgment, and courts of law, from defect in their process or powers, are unable to afford adequate relief, the court of chancery may assist the creditor to reach property of the debtor which cannot be taken on an execution. *Bigelow v. Congregational Soc'y*, 11 Vt. 283. S. C., 15 Vt. 370.

**42.** Equity will aid a judgment creditor to reach the equitable interest of his debtor in lands, where payment of the debt cannot be obtained at law. *Woods v. Scott*, 14 Vt. 518.

**43.** It will not ordinarily do this unless the creditor has perfected his claim, so far as he can at law, by judgment and levy upon the estate. *Rice v. Barnard*, 20 Vt. 479.

**44. Dictum.** A judgment creditor must levy his execution upon a specific portion of the land, where it exceeds in value the amount of the execution, before he can resort to chancery for aid on the ground that the conveyance of his debtor was, as to him, void. *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313.

**45.** B gave G a bond for the conveyance of certain land upon being paid a certain price therefor. This purchase was really for the benefit of S, but this was unknown to B. S went into possession and made valuable improvements, when the orator attached the land and set off on execution against S, his interest therein being more than \$400. B had actual knowledge of the attachment. Afterwards G and S sold the premises to D, surrendering to B his bond, and B gave D a new bond for a conveyance, and, as the result of the arrangement and after deducting from the sale price to D the amount of S's indebtedness to himself, B gave G his note for \$400. *Held*, that B, with such knowledge of the attachment, could not convey to any one else than G, so as to defeat the orator's claim against S and G; and the court decreed that B should pay the \$400 to the orator. *Woods v. Scott*, 14 Vt. 518.

**46. In aid of probate court.** The principal jurisdiction of the settlement of the accounts of administrators, executors and of trustees appointed by the probate court, is in the probate court; and, in such cases, the jurisdiction of the court of chancery is only in aid of the probate court. *Merriam v. Hemmenway*, 26 Vt. 565.

**47.** The executrix of a will, who was also named as trustee and had been formally appointed trustee by the probate court, died. *Held*, that it belonged to her administrator to settle her account as trustee, and that the trust fund could not, in chancery, be called out of the hands of her administrator by the administrator *be bonis non* of the testator, before the settlement in the probate court;—and that the juris-

diction belonged in the first instance to the probate court. *Id.*

**48.** The interference of a court of chancery in the settlement of estates in Vermont has been confined within the narrowest limits, and has gone upon the ground merely of aiding the jurisdiction of the probate court in those points only wherein its functions and powers are inadequate to the purposes of perfect justice;—retaining its ancillary jurisdiction to the same extent over matters in the probate courts, which it has over those in the common law courts. *Adams v. Adams*, 22 Vt. 50. *Boyden v. Ward*, 38 Vt. 628.

**49.** It is no ground of equity jurisdiction for the settling of estates, that there has been unreasonable delay of proceedings in the probate court; nor that an administrator on rendering his account refused to produce the books and papers of his intestate; nor that some of the parties affected by the decree of the probate court were infants and had no proper guardians appointed. *Adams v. Adams*.

**50.** Where a creditor had become barred of his claim against an estate by neglect to present it for allowance by the commissioners;—*Held*, that chancery would not give him a decree against the estate, on the assumed ground of the continued liability of the surety and the ultimate liability of the estate. *McCollum v. Hinckley*, 9 Vt. 143.

**51.** Where the creditors of an estate have an interest adverse to that claimed by the administrator, they may come into a court of chancery for redress while the estate is in process of settlement in the probate court. This proceeding is merely ancillary to that in the probate court, and after the rights of the parties are determined the case is remitted to the probate court for final adjustment and distribution. *Morse v. Slason*, 13 Vt. 296.

4. *Retaining jurisdiction once attached.*

**52.** Where a party is obliged to resort to chancery for one purpose, his case will be retained until the whole matter is finally disposed of. *Dana v. Nelson*, 1 Aik. 252. *Beardsley v. Knight*, 10 Vt. 185. 20 Vt. 278;—though it may be necessary to bring in new parties. 10 Vt. 185.

**53.** The general rule is, that when a bill is brought seeking both discovery and relief, and material discovery is elicited, the court will proceed to grant the proper relief, even if the relief were such as a court of law might grant. *Holmes v. Holmes*, 36 Vt. 525.

As to other subjects of equity jurisdiction, see particular titles: as CLOUD ON TITLE; CONDITION; FRAUD; HUSBAND AND WIFE; INJUNCTION; INTERPLEADER; MISTAKE; MORTGAGE; PARTNERSHIP; SPECIFIC PERFORMANCE; TRUSTS, ETC.

## II. SUIT, WHERE TO BE BROUGHT; SERVICE, ETC.

**54. In what county.** Bill in chancery, brought in Chittenden county to compel the conveyance of land situate in that county, was dismissed on plea that neither of the parties resided in that county. (G. S. c. 29, s. 17.) *Birchard v. Cheever*, 40 Vt. 94.

**55.** A supplemental bill, bill of revivor, bill of review, or bill to carry into effect a former decree must be brought in the same county where the original suit was brought and the proceedings are of record. *Ferris v. Child*, 1 D. Chip. 886. *Cheever v. Rut. & Bur. R. Co.*, 39 Vt. 653.

**56.** Where a suit in chancery has been commenced in one county, and has proceeded to an interlocutory or administrative decree determining the rights and duties of the parties in respect to the property in question, to be exercised under the order and direction of that court, the assertion of those rights should be addressed to the court decreeing them and under whose order and direction they are to be exercised; and a bill to enforce such rights, brought to the court of chancery for another county, will not lie. *Cheever v. Rut. & Bur. R. Co.*

**57. Service.** The delivery to a defendant, without the State, of a copy of a bill in chancery and subpoena by an indifferent person not specially deputed, and where there was no order of court directing the mode of notice, was held insufficient, and that the defendant was not affected by it. *Bank of Burlington v. Catlin*, 11 Vt. 106.

**58. Filing bill.** G. S. c. 29, s. 56, enacting that "the issuing of a subpoena attached to a bill shall be deemed the filing of a bill," does not exclude other modes of filing existing independently of the statute, but rather provides a substitute for actually filing it in court. A bill may be so filed without issuing a subpoena—as, for the purposes of procuring an injunction, or where the defendant is out of the State so that a subpoena cannot be served upon him. The statute does not make the bill and subpoena *one process*. *Howe v. Willard*, 40 Vt. 654.

## III. PLEADINGS.

### 1. The bill.

**59. Form and substance.** A bill may well be drawn with a double aspect, so that if the orator fail of establishing one ground of recovery, he may rely upon another, although wholly or in part inconsistent with the former. *McConnell v. McConnell*, 11 Vt. 290.

**60.** The orator must stand or fall upon his case as made by his bill; nor can the answer

aid him to recover upon a case not made by the bill; nor can a special prayer for the specific relief to which he might be entitled upon the facts of the answer, be granted, where the stating part of the bill is not adapted to it. *Thomas v. Warner*, 15 Vt. 110.

**61.** The orator must stand on the allegations in his bill, and cannot make a different case by his evidence, and base upon it a claim for relief. *Barrett v. Sargeant*, 18 Vt. 365.

**62. Prayer.** A general prayer for relief is sufficient to obtain all relief consistent with the general frame of the bill, *Danforth v. Smith*, 23 Vt. 247;—all the relief which is adapted to the case, though variant from that sought by the special prayer. *Eureka Marble Co. v. Windsor Mfg. Co.*, 47 Vt. 430.

**63. Interrogatories.** A bill was held ill on demurrer, because it contained no interrogatories. *Shed v. Garfield*, 5 Vt. 39.

**64. Orator's interest.** A creditor of the estate of a deceased person cannot sustain a bill in chancery against a debtor of such estate, to secure payment to himself. There is no privity between them. The administrator is the only person who can pursue the debtors of an estate. *Isaacs v. Clark*, 13 Vt. 657.

**65.** A party in chancery taking lands upon a writ of sequestration stands as an attaching creditor at law, and, before decree and levy, has no such interest in the land as authorizes him to litigate by his bill the title against a levying creditor; and his remedy after levy is at law. *French v. Winsor*, 36 Vt. 412.

**66. Parties—Assignment.** A nominal party to a contract, who has assigned all his interest, is required to be joined in any proceeding in equity in regard to the contract only for the purpose of having the decree conclude his rights, and thus conclude all future litigation. So that, in all cases where the court can see, in the particular case, that there is no necessity for such joinder on that account, it will not be required—especially after the case has gone to a hearing. He may be a proper, but not a necessary party. *Day v. Cummings*, 19 Vt. 496; and see *Payne v. Hathaway*, 3 Vt. 212.

**67.** Where the assignment of a contract passes only the equitable interest therein, the assignor is properly joined as a party in a bill to enforce it. *Eureka Marble Co. v. Windsor Mfg. Co.*, 47 Vt. 430.

**68.** In a bill by a general creditor in an assignment against the assignee for an account, the preferred creditors need not be made parties where the orator claims only the balance after paying them. *Page v. Olcott*, 28 Vt. 465.

**69.** Where a bill was brought against the assignee under an assignment in trust for the benefit of certain attaching creditors of the assignor, of whom the orator was one, but he not assenting to the assignment, and against the

administrators of the assignor, praying to have the assignment declared void, and that the property assigned be brought into administration for the payment of the orator's debt;—*Held*, that the other creditors provided for in the assignment were not necessary parties. *Therasson v. Hickok*, 37 Vt. 454.

**70. Contribution.** On a bill for contribution and to settle the affairs of a "union store," certain associates, who left the State before the business of the "division" was closed and were beyond the reach of process, were properly left out of the account for contribution. *Henry v. Jackson*, 37 Vt. 431.

**71. Parties numerous.** A bill will not be dismissed because all the parties in interest are not made defendants, where their number is so great as to make it impracticable to bring them all in, or where this would be attended with great inconvenience and expense. But it must appear in all such cases, that a full and complete decree can be made as between the parties before the court, and without substantial injury to third persons. *Stimson v. Lewis*, 36 Vt. 91.

**72. Joint sureties.** Where some of the joint sureties pay the debt jointly, they may join in a bill against the other sureties for contribution; and there is no objection to a decree against the defendants severally for so much as each is liable for. *Fletcher v. Jackson*, 23 Vt. 581.

**73. Questions of mis-joinder and non-joinder.** On a petition by husband and wife to foreclose two mortgages upon the same land, one to the husband and the other to the wife, an objection for mis-joinder was disallowed on the hearing, it not having been noticed in the pleadings. *Bartlett v. Boyd*, 34 Vt. 256.

**74.** There are many cases where defendants have not a co-extensive common interest or relation, and yet are properly joined as defendants;—and so *held* in this case. *Eureka Marble Co. v. Windsor Mfg. Co.*, 47 Vt. 430.

**75.** Where the defendant had wrongfully filled in a common private passage way, in which the orator had a right of passage as well as the defendant, and also one A;—*Held*, that a decree might be made that the defendant remove or grade down the filling-in, without making A a party to the bill.—That was but to make him undo what, to the orator's prejudice, he had improperly done. *Walker v. Pierce*, 38 Vt. 94.

**76.** On general demurrer a bill is sufficient in regard to parties, if the facts stated disclose one ground on which the orator is entitled to relief without additional parties. *Shaw v. Chamberlin*, 45 Vt. 512.

**77. Waiver.** As a general rule, if the want of parties to a bill is not insisted upon in the answer, it cannot be at the hearing. *Page v. Olcott*, 28 Vt. 465.

**78.** If no objection be taken to a bill for

want of proper parties until the final hearing, the objection will not be regarded if a decree can be made without them; if not, the case will only stand over to bring in the necessary parties. *Cannon v. Norton*, 14 Vt. 178. 18 Vt. 420. *Day v. Cummings*, 19 Vt. 496. *Page v. Olcott*. *Rowan v. Union Arms Co.*, 36 Vt. 124.

**79.** Where certain heirs, apparently interested in the subject matter of the orator's claim, were not made parties to the bill, but gave their depositions in which they disclaimed all interest;—*Held*, that such disclaimer would bar any future claim on their part, and therefore superseded the necessity of their being made parties. *McConnell v. McConnell*, 11 Vt. 290. 19 Vt. 499.

**80.** If there be a mis-joinder of a defendant, and this is apparent in the bill, and the objection is not made by demurrer, nor in the answer, it should be considered as waived, and as coming too late when raised at the hearing. *Wing v. Cooper*, 37 Vt. 169.

**81.** Where a decree can be made which will do entire justice to all parties, notwithstanding the non-joinder or mis-joinder of a party, and the objection, though known before, is not insisted upon by plea, demurrer or answer, it cannot be raised upon the hearing. *Smith v. Bartholomeo*, 42 Vt. 356.

**82. Parties misplaced.** A court of chancery will not ordinarily dismiss a suit on account of any mere informality in the position of the parties, as orators or defendants, if all the parties interested are before the court. *West v. Bank of Rutland*, 19 Vt. 403.

**83.** All the parties being before the court and heard, the court rendered a decree settling their rights, though one of the defendants should have been orator, and the orator a defendant. *Isham v. Higbee*, 2 Vt. 354. *Nason v. Smalley*, 8 Vt. 118.

**84. Amendment.** Where a bill was brought in behalf of a corporation, as claimed, and it turned out on hearing that the complainant had no legal existence as a corporation;—*Held*, that it was within the power of the court of chancery, in its discretion, to allow an amendment by bringing in, as complainants, the stockholders in the company, to prosecute the same right in their own names. Whether the evidence filed before such amendment could be read on the hearing, after the amendment, would depend upon the circumstances of the case, and the issues involved. *Vt. Mining Co. v. Windham Co. Bank*, 44 Vt. 489.

**85.** Instance of amendment by bringing in new parties, after hearing on appeal. *Barrett v. Sargeant*, 18 Vt. 365.

## 2. Demurrer.

**86.** Demurring to a bill for want of equity is submitting to the jurisdiction of the court,

An objection to jurisdiction over the defendants should be presented by plea. *Bank of B. Falls v. Rut. & Bur. R. Co.*, 28 Vt. 470.

87. A demurrer to a bill upon its merits admits the facts regularly pleaded, and an order overruling the demurrer is made upon the supposition of the truth of the matters stated; and it is well enough that the record should state them as being taken as true, and so the orator is entitled to relief. *Hall v. Dana*, 2 Aik. 381.

88. Unless the demurrer is to that part of the bill which claims a discovery, objection cannot be taken, under it, to interrogatories whose answer might subject the defendant to a penalty. *Payne v. Hathaway*, 3 Vt. 212.

89. The question of a presumptive bar from lapse of time cannot be raised by demurrer to a bill. *Ib.*

90. A demurrer to the whole bill will be overruled, if it is ill as to part. *Shed v. Garfield*, 5 Vt. 39.

### 3. Plea; Answer; Cross bill.

91. **Form and substance of answer.** Where a defendant makes his defense by way of answer, he must set up in it all the various grounds of defense upon which he intends to rely; otherwise, they are not in the case. *Warren v. Warren*, 30 Vt. 530.

92. A defendant may answer in part, and refuse to answer further by stating sufficient ground why he should not be compelled to answer further. *Hunt v. Gookin*, 6 Vt. 462.

93. In order to excuse the defendant from either admitting or denying in his answer the truth of any material allegation of the bill, it is necessary that he deny all knowledge and information upon the point. If he has any information upon a material matter alleged, aside from the bill itself, he is bound to state his belief of the truth or falsity of the allegation; otherwise, the answer is subject to exception. *Devereaux v. Cooper*, 11 Vt. 103.

94. **Exceptions to answer.** Any defects in an answer must be supplied by taking exceptions and obtaining a further answer. If the defendant omits to answer, or answers evasively, this is not to be taken as an implied admission against his interest, or of the facts alleged in the bill, but he should be pushed to a distinct and explicit declaration as to how the facts are, the same as any other witness. *Blaisdell v. Stevens*, 16 Vt. 179. *Bigelow v. Topliff*, 25 Vt. 273, 288.

95. **Hearing on bill and answer.** Where a cause is heard upon bill and answer, the answer must be taken to be true, and the orator can take a decree only according to the allegations and qualifications of the answer. *Doolittle v. Gookin*, 10 Vt. 265.

96. An answer not traversed, though not

responsive to the bill, must be taken as true; and where the facts so stated constitute a full defense, the bill must be dismissed. *Slason v. Wright*, 14 Vt. 208.

97. Where a case stands upon bill and answer not traversed, the allegations of the defendant made by way of belief come within the general rule that the answer is to be taken as true. *Gates v. Adams*, 24 Vt. 70.

98. **Answer as evidence.** But where the answer to a bill is upon information and belief only, and the defendant is not supposed to have, and does not profess to have, personal knowledge of the facts stated in the bill, such answer, being traversed, is not evidence of the truth of its denials which requires to be overcome by something more than the testimony of one witness. *Loomis v. Fay*, 24 Vt. 240. *Wooley v. Chamberlain*, *Ib.* 270.

99. The general rule is, that the answer of one defendant is not evidence for, or against, his co-defendant. *Blodgett v. Hobart*, 18 Vt. 414. *Cannon v. Norton*, 14 Vt. 178.

100. **When responsive.** An answer responsive to the allegations of a bill, or petition, is evidence for the defendant; and his right to have the answer taken as evidence is co-extensive with his obligation to answer. *Blaisdell v. Bowers*, 40 Vt. 126. *Rich v. Austin*, 40 Vt. 416. *Grafton Bank v. Doe*, 19 Vt. 463; and see *Adams v. Adams*, 22 Vt. 50.

101. What is responsive will be determined by the bill, and not by the interrogatories. These can neither limit nor extend the defendant's obligation to answer. *Redfield, J.*, in *McDonald v. McDonald*, 16 Vt. 630.

102. The answer is to be considered as a plea, and so far as any fact is admitted it is evidence against the defendant; but when any new fact is alleged by way of avoidance of the matter charged in the bill and admitted in the answer, and the answer is traversed, it stands like any other plea, and must be proved. *Redfield, J. Ib.*

103. If the answer assert matter affirmatively in opposition to the right claimed by the orator, though it be responsive to the bill, *quære*, whether, upon a traverse, the answer shall be received as proof, or as mere pleading. *Bennett, J.*, in *Allen v. Moncer*, 17 Vt. 67. But see *Grafton Bank v. Doe*, 19 Vt. 463. *Blaisdell v. Bowers*, 40 Vt. 126. *Rich v. Austin*, *Ib.* 416.

104. Where the answer is not responsive to the bill, or sets up affirmative allegations in opposition to or in avoidance of the orator's demand, and is replied to, the answer is of no avail, as evidence, in respect to such allegations, and the defendant is as much bound to establish the allegations so made by independent testimony, as the plaintiff is to sustain his bill. *Wells v. Houston*, 37 Vt. 245. *Mott v. Har-*

*rington*, 12 Vt. 199. *Cannon v. Norton*, 14 Vt. 178. *Lane v. Marshall*, 15 Vt. 85. *Pier-son v. Clages*, *Id.* 93. *McDonald v. McDonald*, 16 Vt. 630. *Allen v. Mower*, 17 Vt. 61. *San-born v. Kittredge*, 20 Vt. 632.

105. Where a bill was brought to procure a settlement of a partnership account, and the answer, admitting the partnership, averred a settlement of the partnership accounts;—*Held*, that such averment was by way of defense and in the nature of a plea, and was not responsive, and so was not evidence, but must be proved by evidence *aliunde*. *Spaulding v. Holmes*, 25 Vt. 491.

106. The answer to a bill of foreclosure, even that of the original mortgagor, is never regarded as evidence to impeach the considera-tion of the mortgage security, where the answer is traversed. *Wooley v. Chamberlain*, 24 Vt. 270.

107. Where the plaintiff's claim as set forth in the bill rests upon a written contract, and the right of action is not barred by lapse of time, the admission of the contract in the an-swer and the allegation of payment, or of any other matter merely in discharge, are to be treated as distinct, and the answer is not evi-dence of the latter, but it must be proved other-wise; but, if the plaintiff's claim rests wholly in oral proof, and the answer of the defend-ant is invoked to make out the plaintiff's case, the defendant may admit such contract and al-lege that it was in its inception inoperative, or that it has been paid, or released, and the whole answer upon both points is to be regarded as evidence; nor need the matter of avoidance, in order to be evidence, be contained in the same sentence with the admission;—but the chancel-lor is not bound equally to believe all parts of such answer. *Adams v. Adams*, 22 Vt. 50.

108. Where a bill alleged that the release of a bond conditioned for the support of the orator was obtained by the defendant for a grossly inadequate consideration, and the answer de-nied the inadequacy, and set forth the previous arrangement which led to the execution of the bond, the maintenance of the orator from that time to the cancelling of the bond, and the amount paid for the release, the court was in-clined to think that the answer was responsive and was evidence. *Mann v. Betterly*, 21 Vt. 326.

109. And in considering the question of the sufficiency of the consideration for the discharge of the bond;—*Held*, that it was proper to take into consideration the amount of property con-veyed to the defendant on the occasion of giv-ing the bond, and the amount expended by the defendant in the support of the orator. *Id.*

110. Whatever in an answer is fairly a re-ply to the general scope of the claim set up in the bill, whether in the stating or charging part,

and whether by way of denial, excuse or avoid-ance, is evidence for the defendant. *Wilson, J.* in *Rich v. Austin*, 40 Vt. 420.

111. Where the bill or petition for foreclosure of a mortgage charged that the mortgage note "is justly due and owing and has not been paid," and the answer set forth sundry pay-ments and the circumstances under which such payments were made, and an understanding for their application upon the mortgage;—*Held*, that the answer was responsive and was evi-dence for the defendant. *Blaisdell v. Bowers*, 40 Vt. 126. *Grafton Bank v. Doe*, 19 Vt. 463.

112. **Cross-bill.** A cross-bill must be based upon an equity growing out of the claim set up in the original bill, and, in our practice, is con-sidered a dependency merely upon the principal bill. It is usually brought, either to obtain a necessary discovery of facts in aid of the de-fense of the original bill, or to obtain full relief to all parties touching the matters of the origi-nal bill. *Rutland v. Paige*, 24 Vt. 181. *Slason v. Wright*, 14 Vt. 208.

113. Active relief was refused to a defen-dant in a foreclosure suit, for want of a cross-bill, although, in his defense, he established a priority and superior right. *Simonds v. Brown*, 18 Vt. 231.

#### IV. PROCEEDINGS AFTER ISSUE.

(See *Rules of Chancery Practice*, 11 Vt. 689.)

##### 1. *The testimony.*

114. **Matters in the record.** A letter, not before proved, was admitted to be proved and read in evidence at the hearing,—such having been the former practice. *Dana v. Nelson*, 1 Aik. 252.

115. A document—as a decree in chancery—which is stated in the bill and admitted in the answer, is to be considered as proved and in evidence so far as it is stated and admitted, al-though not filed as an exhibit. *Lyman v. Lit-tle*, 15 Vt. 576.

116. A court of chancery having referred certain issues to a court of law for trial by jury, the jury found certain of the issues and failed to agree as to others. *Held*, that the case stood before the court on final hearing upon the whole record, and that not only what appeared upon the record in the court of chancery, but the in-formation collected before the jury and the tes-timony there given, as shown by the judge's report, were to be regarded. *Adams v. Soule*, 33 Vt. 538.

117. **Mode of taking testimony.** The true construction of the 16th Rule in Chancery is, that each party, before he commences taking testimony on *his side*, shall furnish to the other

the names of his witnesses, &c. *Chase v. Dix*, 46 Vt. 642.

118. The practice of having questions shown to a witness in a chancery cause, and his answers prepared beforehand, and reduced to writing, and examined by counsel before coming before the master to testify, is not allowable, and receives the censure of the court. *Hickok v. Farm. & Mech. Bank*, 35 Vt. 476; and see *McDaniels v. Barnum*, 5 Vt. 296-8.

119. Criticism and condemnation of the sometime practices of the bar in taking testimony in chancery—the needless diffuseness and prolixity, and sometimes impertinence and scandal. Costs refused in such case. *Vermont Copper, &c., Co. v. Barnard*, 40 Vt. 65.

120. **Testimony of surviving party.** G. S. c. 36, s. 24, excluding the surviving party as a witness in his own behalf, does not apply to the answer of a defendant in chancery to a bill or petition, so far as it is responsive. *Blaindell v. Bonners*, 40 Vt. 126.

121. — **of a single witness against the answer.** The testimony of one witness, against the direct and positive averment of the answer, is not sufficient ground for a decree. But the testimony of the one witness may be so corroborated by circumstances as to be sufficient, and the answer itself may contain such circumstances. *Pierson v. Catlin*, 3 Vt. 272.

122. **Motion to suppress.** Motions to suppress testimony for any defect which is curable should be made at the earliest opportunity, in order to enable the party relying upon the testimony to obviate the objection by obtaining an order to re-examine the witness. Where the testimony had been on file more than one term, the court refused a motion to suppress for an informality in taking it. *Marcy v. Ross*, 12 Vt. 484.

123. A deposition in chancery ought not to be suppressed for a failure to comply with the rules in a mere matter of form, unless such failure proceed from bad faith, rather than from accident and mistake. *Partridge v. Stocker*, 36 Vt. 108.

124. Where a motion has been made to suppress testimony, and the adverse party has given notice to bring it on before the hearing in chief, it should be so brought on, or should not be entertained on the hearing in chief. *Id.*

125. A motion to suppress testimony must be disposed of in chancery; otherwise, the question cannot be raised in the supreme court on appeal. *Van Namee v. Groot*, 40 Vt. 74.

126. — **to inspect papers.** A motion in chancery for the inspection of certain letters, &c., in the possession of the adverse party, which had been proved as exhibits, was denied, as not authorized. *Clark v. Field*, 10 Vt. 321. 16 Vt. 112.

## 2. Report of Master.

127. **Form.** In taking accounts in chancery, the master, and not the court, is to settle the facts, and his finding is conclusive, unless the report for good cause be set aside. *Merriam v. Barton*, 14 Vt. 501.

128. Exceptions to a master's report, which are addressed to the discretion of a chancellor, cannot be revised in the supreme court;—as where the accounts before a master were not verified by the oath of the party, as required by Rule 41, and the report was not recommit-  
*Id.*

129. A master appointed to take an account is not obliged to make a special report, unless by direction of the court. Nor should he report evidence, but the facts found. *Mott v. Harrington*, 15 Vt. 185.

130. A master in chancery before whom an accounting is had must report all the testimony given, as well as state the accounts at length, and all the facts found. *Herriek v. Belknap*, 27 Vt. 673. (Changed by G. S. c. 29, s. 11;—not his duty to report the testimony, unless specially required so to do by the chancellor.)

131. On a reference to a master upon an accounting ordered, the statements of the answer as to number, quantity and value, were held to be evidence merely, but not conclusive against the defendant, and yet of the strongest character. *Morse v. Slason*, 16 Vt. 319.

132. **Effect.** The court of chancery, or the supreme court, will not overrule or disregard the findings of a master to whom it has been referred to take the accounts upon a mortgage, unless for evident mistake on his part, or evident corruption. *McDaniels v. Harbour*, 43 Vt. 460. See *Thrall v. Chittenden*, 31 Vt. 186.

133. Unless the result at which the master arrives in taking an account is clearly shown to be wrong, the court will not disturb such result. *Barrett, J., in Vt. & Can. R. Co. v. Vt. Central R. Co.*, 34 Vt. 65.

134. Where an account has been taken and returned by a master, exceptions should be filed to the report as to any items objected to. It is not the duty of the chancellor to examine items not so excepted to, nor will such items be examined on appeal. *Smailey v. Corliss*, 37 Vt. 486.

135. Although the report of the master is not final as to the facts, yet it is firmly settled in this State that it will be regarded as settling the facts which fall within his province to find, and which he reports as found, unless it appears affirmatively that he has found facts without evidence, or against evidence. *Rowan v. State Bank*, 45 Vt. 160, 191, 195.

## 3. The decree.

136. **Must be of a term.** The chancellor

can make necessary orders in vacation for furthering the cause, but cannot render a final decree in the cause. According to the recent practice, the court of chancery does not adjourn, but unless when in session at the regular term, the court is not in practice regarded as open except for the purposes of such acts as a chancellor may legally do in vacation,—although, by consent of parties, a hearing may be had and final decree rendered, entitled as of the term. *Sturges v. Knapp*, 38 Vt. 540. (G. S. c. 29, s. 14.)

**137. For want of appearance.** Under the 4th and 25th Chancery Rules (1 D. Chip. 498), the orator was allowed to take a decree for want of an appearance entered by the defendant on the first day of the term, although an appearance was entered on the 4th day, and immediately on notice being proved. *Miller v. Moore*, 1 Aik. 216.

**138.** A decree dismissing a bill for want of an appearance, or prosecution, is like a nonsuit at law, and is not a bar to a subsequent bill for the same matter. *Porter v. Vaughn*, 26 Vt. 624.

**139. Must be upon the facts stated in the bill and in issue.** Facts occurring after a cause is at issue in chancery cannot be considered in deciding the case, unless brought into the issue by subsequent proceedings,—as, by the orator's withdrawing his traverse, on leave, and amending his bill, or by filing a supplemental bill; or by the defendant's filing a cross-bill, &c., so that testimony may be taken on both sides, if desired. *Blaisdell v. Stevens*, 16 Vt. 179.

**140.** A decree cannot be made upon matters happening since the bringing of the bill, unless brought into the case by some proper supplemental proceeding. *Downer v. Wilson*, 33 Vt. 1.

**141.** Where a material fact—as notice—was not alleged in the bill, but was denied in the answer which was traversed, and testimony was taken, on which the supreme court on appeal found the fact proved, yet it was held that the fact was not properly in issue; but the court, *pro forma*, reversed the decree of the chancellor, and remanded the cause for amendment, and further proceedings. *Porter v. Bank of Rutland*, 19 Vt. 410.

**142.** If the orator claim an account on certain obligations set forth in his bill, which are denied in the answer, but other and different obligations are admitted in the answer sufficient to entitle the orator to an account upon the basis of the answer, and the orator desires to have an account taken even upon the basis of the answer, in the event of failing to compel the account which he claims in his bill, he should obtain leave to file a supplemental bill, alleging in the alternative the facts admitted in

the answer. But if, instead, the answer be traversed, and on trial he fails to support the facts relied upon in his bill, he cannot fall back and claim an account on the basis of the answer. *McOrmsby v. Low*, 24 Vt. 436.

**143. Exceptional cases.** In an interpleader suit, the defendants compromised and reduced their settlement to writing after answers, and filed the writing in the cause with a statement of facts agreed. The court treated this, though irregular, as tantamount to an amended answer and as evidence of the facts stated, and rendered a decree thereon. *Horton v. Baptist Church, &c.*, 34 Vt. 309.

**144.** Where the orator sets up in his bill a claim of right against the defendant, not depending entirely upon contract, the bill will not be dismissed for a variance, when he proves a right of the same nature, though of less extent, and yet broad enough to render unjustifiable the defendant's acts complained of; and he may have a decree establishing and defining his true right, in answer to a prayer therefor. *Weston v. Cushing*, 45 Vt. 581.

## V. PROCEEDINGS AFTER DECREE.

### 1. Appeal.

**145. The term.** An appeal from chancery, actually taken at a term subsequent to the rendering of the final decree, but entered as of the former term, was held irregular, and was dismissed. *Gove v. Dyke*, 14 Vt. 561.

**146. Mode.** A party appealing from a decree in chancery is not obliged by G. S. c. 29, s. 85, to make a formal assignment of errors. *Bishop v. Day*, 13 Vt. 116. 19 Vt. 174.

**147. Entry.** An appeal from chancery cannot be entered in the supreme court upon affidavits that the appeal was duly taken, but the clerk had neglected to make the proper entries. *Gove v. Dyke*, 13 Vt. 308.

**148. Form of decree.** The supreme court refused to hear an appeal from chancery, because no decree had been drawn up in form and signed by the chancellor. *Brown v. Mead*, 16 Vt. 148.

**149. Pro forma decree.** The practice of allowing appeals in chancery upon merely formal decrees, *without hearing*, disapproved by Redfield, C. J., *Stafford v. Ballou*, 17 Vt. 329. *Hyndman v. Hyndman*, 19 Vt. 9. 24 Vt. 240.

**150.** A *pro forma* decree entered by agreement, and made for the sole purpose of being appealed from in order that the case may be brought to a speedy hearing, is not such a departure from the regular proceedings in a cause, as to affect the rights or liabilities of any person connected with the suit, either as principals or sureties. It does not, in such case, stay the

recovering of injunction damages. *Sturgis v. Knapp*, 33 Vt. 486.

**151. Final order or decree.** Where the defendant made an appearance, but neglected to make answer to the bill agreeably to the rules of court, and the bill was taken as confessed for want of an answer, and the cause was then referred to a master to take an account, and a decree was made upon the acceptance of the master's report;—*Held*, that no appeal lay from the decree. *Hart v. Strong*, 15 Vt. 377. (G. S. c. 29, s. 83.)

**152.** From the order of the chancellor amending a recorded decree, upon petition, by changing it from a dismissal of the bill "upon the merits" to a simple dismissal, an appeal was allowed and sustained. *Porter v. Vaughan*, 22 Vt. 269.

**153.** An injunction bill was taken as confessed for want of an answer and a decree entered up. The chancellor, on application of the defendant, ordered that the decree be vacated and he have leave to answer. The orator appealed. *Held*, (1), that the chancellor had power to make such order; (2), that the application was to the discretion of the chancellor and not revisable in the supreme court; (3), that not being a final decree, no appeal lay. *Hall v. Lamb*, 28 Vt. 85.

**154.** Upon hearing on bill, demurrer there-to, and plea, the chancellor overruled the demurrer and plea and rendered a decree for the orator according to the prayer of the bill. The defendant, without asking leave to withdraw his demurrer and to answer, appealed. *Held*, that he had thereby elected to treat the decree as not interlocutory, but final, and that he could not claim that the decree was erroneous because made final;—but the cause, after affirmance, was remanded, with leave to apply to the chancellor to withdraw the demurrer, and to answer the bill on its merits. *Shaw v. Chamberlain*, 45 Vt. 512.

## 2. Hearing on appeal.

**155. Practice.** On an appeal, the appellant must furnish the copies; but such copies as are required by the rules of the court of chancery to be furnished in that court belong to the case, and should come up with it. *Hilton v. Fullerton*, 19 Vt. 483.

**156.** Where a bill is demurred to, and the cause is appealed, the case will proceed in the supreme court as if it were in the court of chancery to be heard for the first time, whichever party appeals. In such case, the party demurring will open the argument. *Bishop v. Day*, 13 Vt. 116.

**157.** On an appeal, the parties must be confined to the evidence used before the chancellor. *Tarbel v. White River Bank*, 24 Vt. 655.

**158.** Chancery appeals must be heard in the supreme court upon the same evidence precisely as was before the chancellor. The certificate of an oath attached, after the appeal, to a paper used before the chancellor, is not regularly in the case in the supreme court. *Ellison v. Wilson*, 36 Vt. 60.

**159.** Chancery appeals are invariably heard entire. The supreme court will not hear a motion, made in the court of chancery, argued as a preliminary question. *Morrill v. Kirtledge*, 19 Vt. 528,—as, a motion to suppress testimony. *Smith v. Onion*, 19 Vt. 432.

**160.** In appeals from chancery, it is the practice to hear read all the testimony which was read in the court of chancery, although excepted to, and then to hear the parties on all questions arising on the merits, and on all formal exceptions properly taken in the court of chancery, which appear on the papers. And exceptions minuted by the master will be regarded as following the case to final hearing, unless expressly or impliedly waived below. *Ainsworth v. Prentiss*, 24 Vt. 646.

**161.** On appeals to the supreme court, the whole decree is appealed from, and all the pleadings and testimony in the case are sent up,—not, however, for the purpose of bringing it up as an original case, but to enable the supreme court to see if the chancellor committed any error in making the decree. (G. S. c. 29, s. 85.) It seems a necessary rule in such case, that an objection which a party, by his silence in the court below, may be deemed to have waived, and which, when waived, would leave the cause to rest with the merits of the decree, shall not be taken in the appellate court; and that no point or question, which, had it been raised in the court below, might have been obviated by amendment, or proof, can be raised in the court above. But the rule does not apply to objections which neither amendment nor proof could have obviated. *Dunshee v. Parmelee*, 19 Vt. 172. *Mott v. Harrington*, 15 Vt. 194. *Slason v. Cannon*, 19 Vt. 219.

**162. Waiver of certain defects.** In a foreclosure case the facts, as reported by a master, made a different case from that stated in the petition, which had been taken as confessed. Both parties proceeded to hearing upon the case made by the report, without objection, and without any motion to amend the petition. *Held*, that all objections for variance were thereby waived, and that the case on appeal stood upon the report. *Walker v. King*, 44 Vt. 601.

**163.** In a bill of foreclosure the mortgage was described and was admitted in the answer, and, on the hearing before the chancellor, was treated as in the case, though not produced. *Held*, that the defendant could not, on appeal, object to the absence of the mortgage as a



ground for reversing the decree. *Dunshee v. Parmelee*, 19 Vt. 172.

164. The decision of the court of chancery in regard to matters depending upon the rules of that court, or in regard to the time or form of taking any particular proceeding, will be held final on appeal; and objections of that character, if not taken in that court, will be considered as waived. *Morrill v. Kittredge*, 19 Vt. 528.

165. Where the defendant answers the bill fully in the aspect in which it was intended to be brought, and testimony is taken on both sides with reference to the issues made upon the answer in that aspect, and a final decree has been made in the court of chancery without question raised as to the sufficiency of the bill, that question cannot be raised in the supreme court. *Hills v. Loomis*, 42 Vt. 562.

166. **Matters of discretion in practice.** There are many incidental questions, as of practice, resting in the discretion of the chancellor, which are not ordinarily revisable on appeal—as, a refusal to recommit a master's report, on the ground of surprise, or newly discovered evidence; overruling formal exceptions as to the mode of taking testimony. *Lovejoy v. Churchill*, 29 Vt. 151; overruling a motion to suppress testimony for a formal defect. *Partridge v. Stocker*, 36 Vt. 108.

167. **Sending issue to jury.** On an appeal from chancery, the supreme court will not send an issue of fact to the county court to be tried by a jury. Such an order is matter resting in the discretion of the chancellor, and has not been practised in this State. *Briggs v. Shaw*, 15 Vt. 78. *Ib.*, 785.

*Note.*—In *Adams v. Soule*, the supreme court remanded a cause with direction to the chancellor to frame issues to be tried by a jury in the county court—which was done. 33 Vt. 538.

168. **Affirmative decree for defendant.** The orator's bill was dismissed in the court of chancery. He appealed, and that decree was reversed, and a decree ordered for the defendant giving the defendant affirmative relief, and costs in both courts. *Davis v. Smith*, 43 Vt. 269.

### 3. *Mandate.*

169. **How far the chancellor is bound thereby.** After the decision by the supreme court of a chancery appeal and the remanding of the cause, one defendant, at a subsequent term, asked to have the mandate so modified as to allow the filing of a cross-bill against another defendant, as to whom the bill was ordered dismissed. The court refused; but *Reidfeld*, C. J. entertained no doubt that the chancellor had authority to allow such motion, without its being a contempt of the mandate. *Barker v. Belknap*, 27 Vt. 700.

*Note.*—Such motion was afterwards allowed by *Poland*, Ch., and was approved on appeal. See 35 Vt. 451.

170. Where a chancery cause is remanded, it is the duty of the chancellor to conform his decree to the judgment of the supreme court, so far as they have adjudged; but if no direction has been given as to an incident of the decree, like the costs, it is his duty to determine it. *Gale v. Butler*, 35 Vt. 449.

171. The power and duty of a chancellor in a cause remanded are more than merely ministerial, to register the mandate of the supreme court. It is within his power to allow further proceedings to be had, if in his judgment justice requires; or to tax and apportion costs not determined by the mandate. *Ib. Barker v. Vt. Central R. Co.*, 35 Vt. 451.

172. **When it reaches the court of chancery.** On an appeal from chancery, the mandate of the supreme court directed that interest be cast upon a certain injunction bond "from the time the case should reach the court of chancery." *Held*, that by this was intended the first day of the regular term of the court of chancery following the reception of the mandate by the clerk. *Sturges v. Knapp*, 38 Vt. 540. (Distinction taken between *the chancellor* and *the court of chancery*.)

## VI. REVISORY PROCEEDINGS.

173. **Bill of review.** A bill of review may be brought of right; but it can only be for errors of law apparent on the decree, or for some new matters of fact discovered since the decree, as a release, &c.,—and herein it differs from a petition for a rehearing. *Barnum v. McDaniel*, 6 Vt. 177.

174. To entitle a party to a review of a decree on the ground of newly discovered evidence, he must show not only that it would be material and would probably change the result, substantially, but also that it was not and could not have been discovered by the use of reasonable diligence before the former trial. *Brainard v. Morse*, 47 Vt. 320.

175. After the hearing and decision of an appeal, the supreme court has no power to sustain or allow a bill of review, but that must be exercised by the court of chancery. *Slason v. Cannon*, 19 Vt. 219.

176. The discovery of new matter after decree, or after publication passed, is not a ground for a petition for rehearing, but relief must be sought by bill of review, in the first case, or by supplemental bill in the nature of a bill of review, in the other. *Mead v. Arms*, 3 Vt. 148.

177. **Petition for rehearing.** An application for a rehearing in chancery must be made, and notice served on the adverse party, within twenty days from the rising of the court which

rendered the decree—according to Rule 17 of Supreme Court rules. (1 Aik. 404.) *French v. Chittenden*, 10 Vt. 127. See Rule 24 in Chancery, 11 Vt. 695.

178. In this State, on a petition for a rehearing in chancery, the whole cause is considered open to both parties. *Sparhawk v. Buell*, 9 Vt. 41. See Ch. Rule 24.

179. No rehearing is allowed of a question raised by a cross-bill and answer filed after hearing upon the original cause, which was raised and controverted in the original bill, and which was thus adjudicated, and fell within the decree made. *Barker v. Belknap*, 39 Vt. 168.

180. —for correcting record of decree. The court of chancery may, upon petition, inquire into the accuracy of a decree recorded, and hear proofs, and amend it according to the truth. *Porter v. Vaughan*, 22 Vt. 269.

181. —for modifying decree. A petition to modify a decree and for further directions, though not embracing all the parties to the decree, nor filed in the original cause, but reciting the proceedings in the original cause, was held to be so identified with it, as to be treated as a petition in that cause. *Sevall v. Brainerd*, 38 Vt. 364.

182. On a petition to modify a decree, or for further directions under it, if all are made parties whose interests may be affected by granting the prayer of the petition, it is sufficient in this respect, though not embracing all the parties to the decree. *Ib.*

#### CHIPMAN (NATHANIEL.)

**Dissertations.** 1. On statute adopting the common law of England. N. Chip. 117.

2. On statute of conveyances. *Ib.* 141.

3. On statute of offsets. *Ib.* 167.

4. Negotiability of notes. *Ib.* 181.

**Forms.** *Ib.* 231 and seq.

#### CITY OF BURLINGTON.

1. **Ordinances.** Under the charter of the city of Burlington giving the city council power to make "any by-laws or ordinances which they may deem necessary for the well being of the city, not repugnant to the constitution or laws of the State," they may pass a valid ordinance against the unnecessary occupation, obstruction or encumbering of sidewalks so as to interfere with the convenient use of the same by passengers. *State v. Bacon*, 40 Vt. 456.

2. A complaint for a violation of an ordinance of the city of Burlington should be en-

titled in the name of the State, and should conclude, like other criminal prosecutions, contrary to the statute, &c., and against the peace and dignity of the State. *Ib.* *State v. Soragan*, 40 Vt. 450.

3. In a prosecution for the violation of an ordinance of the city of Burlington by neglecting to comply with an order of the health officer, the complaint alleged that the respondent "did disobey a lawful order of the health officer of said city after the same had been duly served upon him, which order was substantially as follows," reciting it. On demurrer, *Held*, (1), that this general allegation of disobedience was too loose—that the particular act or neglect constituting a violation of the order should be stated; (2), that the service of the order is assumed, and not averred, as it should be; and for each of these causes the complaint was ill; (3), that the complaint was not ill by use of the word "substantially"; but that the pleader would be held to as strict proof, as if the order had been set forth in the usual form, according to its legal effect. *State v. Soragan*.

4. **Warnings and meetings.** The charter of the city of Burlington provides that all warnings for city meetings "shall be issued by the mayor and published in the manner designated in the by-laws of the city." *Held*, that a standing by-law providing for a newspaper publication of such warnings and the times and extent of such publication, was not controlled by G. S. c. 15, s. 12, as to the posting of warnings of town meetings, and the time of posting. *Allen v. Burlington*, 45 Vt. 202.

5. The only business article in the warning of a city meeting was: "To vote whether the city will authorize the city council to pledge the credit of the city to an amount not exceeding \$150,000, payable in not less than 20 years, with interest at six per cent per annum, to provide a supply of water for the use of the city." The meeting having passed the vote affirmatively in the language above, then voted to authorize the city council to assess annually upon the grand list a tax of ten per cent, to be invested as a sinking fund for the extinguishment of such bonded debt. *Held*, that by the passage of the first vote the business named in the warning had been finished and the authority, under the warning, was exhausted; and that the second vote was void. *Ib.*

6. In city meeting a vote was passed authorizing the city council of Burlington to assess annually, upon the grand list of the city, a tax of ten per cent, to be invested as a sinking fund, and to be applied in extinguishment of a certain city bonded debt. *Held*, that such tax, assessed upon any other than the list of that year, was illegal. *Ib.*

7. Under the warning of a meeting of the voters of the city of Burlington, "To vote upon

the question of raising money, by tax or otherwise, to meet the accruing expenses of the city government, and for school purposes, for the ensuing year";—*Held*, that the meeting could not legally vote a tax, or authorize the mayor to borrow money on the credit of the city, for the purpose of erecting a high-school building. *Ib.*

8. **Assessments.** A municipal corporation may be authorized by the legislature to make local or special taxes or assessments, for the building of sewers, sidewalks, drains, aqueducts, &c., and to apportion the expense in the ratio of the benefits received. The power of taxation implies apportionment. The levying of such assessments is not taking private property for public use under the right eminent domain, but is the exercise of the right of taxation inherent in the State. *Non dubitatur* that a local assessment may so transcend the limit of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation. In that case, it would be the duty of the court to protect the citizens from robbery under color of a better name. *Allen v. Drew*, 44 Vt. 174.

9. Under an act authorizing the city council of Burlington to establish rates of annual rents, &c., for the supply of water by means of the city water works, or for the benefits resulting therefrom, to be called water rents, and to be apportioned to the different classes of buildings, &c., in reference to their dimensions and uses for dwellings, hotels, factories, &c., and to vacant lots, as near as may be practicable, the rents were established and apportioned by an ordinance, "for buildings of one story, twelve cents per front foot; for buildings of two stories, sixteen cents per front foot; for vacant lots, eight cents per front foot." *Held*, that such apportionment in the ratio of frontage, as applied to the several kinds of property specified, was not so manifestly unequal and unjust, or without an equivalent, as that the court could declare it illegal. *Ib.*

10. Where an act for the assessment of water rents in the city of Burlington, and an act for an amendment of the city charter were both pending as bills in the legislature at the same time, and the first provided that such assessments should be collected as provided "by the amended charter of said city," and this last act was not approved until seven days after the first;—*Held*, that the reference in the first act was to the bill then pending as an amendment of the charter, and that the act was valid. *Ib.*

11. A city assessment on adjoining property for the building of a sewer without notice to the owners, under Act of 1868, No. 88, s. 2, is void; and the commissioners may proceed and lay another assessment, as if none had ever been laid. No notice of the laying of a sewer

is required. *Woodhouse v. City of Burlington*, 47 Vt. 300.

12. **City court.** The city court of Burlington has no power, under the statute creating it, to grant a jury trial in criminal cases; nor to grant an appeal, except upon entering into such a recognizance as the statute provides; nor would an exception lie to the judgment in such case, though the appeal should be improperly denied. *State v. Cloran*, 47 Vt. 281.

### CLOUD ON TITLE.

1. Where there is a cloud upon the title of one in possession of lands, by reason of an outstanding claim of title, a bill in equity lies to remove such claim and relieve the title from the cloud. *Eldridge v. Smith*, 34 Vt. 484. *Hodges v. Griggs*, 21 Vt. 280.

2. Where the purchaser of a farm, upon which there was an attachment in favor of a creditor of a former owner, gave his note for part of the purchase money, but not to be paid until the land should be freed from the attachment, and the attaching creditor obtained judgment and levied his execution upon the land attached, but for some years thereafter had omitted to bring suit against the purchaser, who had remained in undisturbed possession;—*Held*, that the holder of the note could sustain a bill against the maker and the attaching creditor to compel an adjustment of their respective rights to the land, by a suit between them. *Hodges v. Griggs*.

3. Relief, under a bill *quia timet* to remove a cloud from the orator's title to land, is not a matter of right, but of judicial discretion with the chancellor, to be exercised only in exceptional cases, where the remedy at law is inadequate, and delay dangerous, or to prevent fraud and injustice. *Wing v. Hall*, 44 Vt. 118. *Rooney v. Soule*, 45 Vt. 303.

4. Where a title asserted is all of record so that it can be determined at law, and there is no special equity in the case, a bill to remove a cloud from the orator's title will not be entertained. *Rooney v. Soule*.

5. The orator was in possession of a portion of a certain lot, claiming the whole under a void tax deed. The defendants were in possession of the other part of the lot under a license from the orator's grantor, and while so in possession procured a deed of the whole lot from one M, who claimed to own it by an independent title. This bill was to compel the defendants to convey to the orator all the right and title they acquired by the deed from M, and to remove the cloud from the orator's title. *Held*, that the case, under its circumstances,

was not a proper one for such relief, but that the title should be tried at law. Bill dismissed without prejudice to the orator's rights in any proceedings at law. *Wing v. Hall*, 44 Vt. 118.

### COMMISSIONS.

1. There is no such usage in regard to brokerage in this country, as that the court can declare it, as a rule of law, that no compensation is due a broker for negotiating a loan upon an agreed commission, where the principal recedes from the negotiation before its completion. *Durkee v. Vt. Central R. Co.*, 29 Vt. 127.

2. Commissions partly earned before one's death were allowed to be collected by his administrator, deducting the expense of completing the transactions. *Newell v. Humphrey*, 37 Vt. 265.

See FACTOR.

### COMMIXTURE.—ACCRETION.

1. Property in articles distinguishable, as cattle, is not lost by commixture. *Holbrook v. Hyde*, 1 Vt. 286.

2. Although the owner of goods intentionally intermixes them with those of another so that they cannot be distinguished, but does not do it fraudulently but by some mistake of the facts, the property is not lost. *Pratt v. Bryant*, 20 Vt. 333.

3. **Accretion.** Ordinary repairs upon a personal chattel, such as making new bolts, nuts, thills, and the like, to a wagon, become accretions to and merge in the principal thing, and become the property of the general owner. But in a case where new wheels, and an axle added, constituted the running part of the wagon, and they could be followed, identified, severed without detriment to the wagon, and appropriated to other use without loss;—*Held*, that the mechanic making such repairs could maintain a property in them, as against the general owner. *Clark v. Wells*, 45 Vt. 4.

4. The ownership of property carries with it the ownership of its natural increase—as the future offspring of animals. *Buckmaster v. Smith*, 22 Vt. 203.

### COMMON LAW.

1. It was urged in favor of an indictment, bad at common law, that this form of an indictment had been in use in this State for more

than thirty years, that is, almost from the commencement of the government; that there had been no decision against it; and that it ought now to be considered as the *common law of Vermont* by usage. The indictment was held insufficient; and by *Chipman, C. J.*,—"That laws affecting essential rights should, by custom, originate in our courts, independent of the constitution and laws enacted by statute and in opposition to the principles and maxims of the common law, is a thing I cannot understand. It is a doctrine which ought not to be countenanced by this court." *State v. Parker*, 1 D. Chip. 298.

2. The *law merchant*, as part of the common law, is adopted by our statute, and our courts are bound to recognize it. *Nash v. Harrington*, 2 Aik. 9.

3. The adoption of the common law of England by the legislature of this State was an adoption of the whole body of the law of that country (aside from their parliamentary legislation), and included those principles of law administered by the courts of chancery, and admiralty, and the ecclesiastical courts (so far as the same were applicable to our local situation and circumstances, and not repugnant to our constitution and laws), as well as that portion of their laws administered by the ordinary and common tribunals. *Le Barron v. Le Barron*, 35 Vt. 365.

### COMPOSITION.

1. A contract in writing between a debtor and certain of his creditors, made upon sufficient consideration, agreeing to extend time of payment, and which does not profess to include all the creditors, will operate as a temporary bar to suits by such creditors as become parties by signing it. *Loomis v. Wainwright*, 21 Vt. 520.

2. If a debtor in embarrassed circumstances fraudulently conveys his property to others, and, by falsely representing his situation to his creditors, induces them to accept a composition and discharge their debts, such discharge will be set aside in equity as fraudulent, and the payment of the debts decreed. *Richards v. Hunt*, 6 Vt. 251. 8 Vt. 89. 29 Vt. 415.

3. Where, in a general composition agreement, there is a secret arrangement between the debtor and one of his creditors, by which such creditor, as a condition of his signing, secures an advantage over the others, this is such a fraud as to release the others from their agreement to discharge the debtor. *Cobleigh v. Pierce*, 32 Vt. 788.

4. Where a composition agreement between a debtor and his creditors contains a provision for the discharge of the debtor, provided all his

creditors shall sign the agreement, and that the debtor shall make the stipulated payment, or give certain security within a time named, the creditor signing is not bound thereby, if either of the conditions is not complied with. *Ib. Dauchy v. Goodrich*, 20 Vt. 127.

5. But such a condition may be waived, and is waived if the creditor, after non-compliance with the condition and with knowledge thereof, or without fraud on the part of the debtor, accepts the offered terms and releases his debt. *Ib.*

6. The defendants made a general assignment for the benefit of their creditors, the plaintiff being one. Afterwards they undertook a compromise by paying 25 cents on the dollar, and drew up a paper to be signed by their creditors, certifying that for value received of S, they agreed with S that, on payment to them respectively on or before February 1, 1863, of a sum equal to 25 per cent of their respective claims against the defendants, they would sell and convey to S all their respective claims against the defendants. The plaintiff signed the paper February 15, 1863, adding to his signature "paid February 15, \$222.87," this being the full amount of his claim, and so delivered the paper. In a day or two afterwards, one of the defendants, with money furnished by S, offered to pay the plaintiff the 25 per cent, which he declined to take, on the ground that the time of payment by the terms of the paper had expired. S, in making the compromise, acted as agent for the defendants, and for their exclusive benefit. *Held*, that the instrument operated as a release of the original debt, and not as an assignment to S;—and *held*, that the signing of the instrument was an adoption of it in every particular, except as to the time when the 25 per cent should be paid; that this became payable on demand, and that the plaintiff could recover the 25 per cent only. *Bowen v. Holly*, 38 Vt. 574.

7. A compromise agreement between a debtor and his creditors, fully executed, discharging him from his debts by payment of a percentage, is valid; and such release need not be under seal. *Paddleford v. Thacher*, 48 Vt. 574.

### CONDITION.

What is a condition precedent, and what not—**CONTRACT, II.**

1. **Effect of non-performance.** Where a note was executed and put into the hands of a third person, but not to be delivered to the payee until certain conditions were performed;—*Held*, that no recovery could be had upon it un-

til such conditions were performed, nor could it be urged that such conditions had become immaterial. *Jarvis v. Rogers*, 8 Vt. 336.

2. The condition upon which a note was executed was, that a certain suit should be brought in the name of the payee for the benefit of the maker. The suit was brought, but the payee discontinued it. *Held*, that the condition was not duly performed. *Ib.*

3. **Tender of performance.** After one has tendered performance of a condition precedent, as the payment of money, and it has been refused, it is not necessary to his remedy that he bring the money into court. *Washburn v. Dewey*, 17 Vt. 92.

3. **Performance prevented.** It will always excuse the performance of a condition precedent, that the performance was hindered by the other party. *Camp v. Barker*, 21 Vt. 469.

4. A contracted with B to draw for him a quantity of saw-logs, B to furnish a certain yoke of four-year-old steers handy for the purpose. B offered a pair of old oxen in place of the steers, and not so good for the work. *Held*, that A was not bound to accept the oxen, and was not liable for not doing the work. *Bugbee v. Haynes*, 43 Vt. 476.

5. **Waiver of performance.** The acceptance of performance of a condition precedent after the day set in the contract, and unexplained, may furnish *prima facie* evidence that the parties intended to revive the contract in its original terms; but this is not conclusive, and a different intent may be proved. *Porter v. Stuart*, 1 Vt. 44. 28 Vt. 267.

6. A mere mental determination to rest "satisfied" with the non-performance of a condition precedent, not notified to the party who was to perform it, cannot be treated as a waiver and as equivalent to performance. *Manvell v. Briggs*, 17 Vt. 176.

7. The plaintiff made a verbal contract with the defendants, to do all the wood work for the building of a house for a specified price; and it was further stipulated that the contract should be reduced to writing, although not required by law to be in writing; and the plaintiff informed the defendant that unless this was done he should not do the work by the job. The contract never was written out, but the plaintiff went on and completed a large part of the work in accordance with the verbal contract, as if, and in the expectation that it would be reduced to writing, the plaintiff sub-letting part of the work. *Held*, that his conduct operated as a waiver of his right to have the contract reduced to writing, and that he could not now repudiate the verbal contract, and charge his work by the day. *Paige v. Fullerton Woolen Co.*, 27 Vt. 485.

8. In book account the plaintiff had charged

the contract price for building a barn, which, by the contract, was to be done in a good, workmanlike manner. The auditor reported that some portion of the work was not so done, but that upon its completion the defendant "accepted the barn upon the contract." *Held* to mean that the contract was fulfilled to the satisfaction of the defendant, and that this was a conclusive waiver of any claim for deduction from the contract price. *Seargent v. Seward*, 31 Vt. 509.

**9. Change of writing by parol.** It is competent to show by oral evidence, as *matter of defense*, a parol waiver of performance of the conditions of a contract before breach, though in writing and under seal, or within the statute of frauds; nor is it necessary that such alteration should be upon any new consideration, if acted upon. *Lawrence v. Dole*, 11 Vt. 549. 30 Vt. 620. *Sherwin v. Rut. & Bur. R. Co.*, 24 Vt. 347; and see *Flanders v. Fay*, 40 Vt. 816.

**10. Effect as to action on the contract.** The time of performance of a condition precedent in a deed cannot be enlarged by parol agreement so that an action can be maintained upon the deed. *Porter v. Stewart*, 2 Aik. 417. 27 Vt. 774. *Sherwin v. Rut. & Bur. R. Co. Joslyn v. Taylor*, 33 Vt. 470. 44 Vt. 395.

**11.** In case of such enlargement or change by parol, if the party sues upon the contract specially, he must declare in assumpsit, treating the enlargement as having incorporated into itself the terms of the original contract, and so all as resting in parol. *Sherwin v. Rut. & Bur. R. Co. Barker v. Troy & Rut. R. Co.*, 27 Vt. 766.

**12.** To maintain an action upon a sealed instrument, the performance of any condition precedent must be averred according to the stipulation of the deed, and must be proved as laid; and no parol agreement to enlarge the time or change the mode of performance, and performance according to such parol agreement, can be averred or proved in such action. But where there is a covenant to perform a certain thing at a certain time, if performance of another thing, or at a different time, be accepted in lieu of the other, it is an answer to an action for the non-performance of the thing stipulated. The distinction is between pleading the matter as a defense, and making it the ground of an action. *Porter v. Stewart*, 2 Aik. 417. *Taylor v. Gallup*, 8 Vt. 349.

**13. Condition in conveyance.** Where a deed from father to son of one-third the farm on which they resided was upon the expressed condition, that if the grantee should pay the grantor, or his wife, \$80 yearly so long as either should live, "if they or either of them shall request the same, then this deed is good and valid—otherwise void;"—*Held*, that it was required that each sum should be demanded by

itself, and at or about the close of the year for which it was claimed; and that any sum not so demanded was waived, or relinquished; that the condition should not be so construed as to permit the sums to be consolidated and demanded together and after the lapse of several years; and that, without such yearly demand and non-payment, no valid cause of forfeiture had arisen. *Buckmaster v. Needham*, 22 Vt. 617.

**14.** Where a deed is made upon condition to become void upon failure to support the grantor and pay his debts, ejectment will lie by the grantor, upon breach of either condition. *Lamb v. Clark*, 29 Vt. 278.

**15.** Where a deed was made upon condition to become void, unless the grantee should support the grantor and pay his debts;—*Held*, that if the grantee was obliged to furnish such support elsewhere than at his own house—a point not decided—there was no wrongful neglect so to do, working a forfeiture of the estate, where no request had been made to furnish such support elsewhere, and no notice given that the grantor was in need of it; and that the non-payment of one of the grantor's debts did not work such forfeiture, where the grantee had never been called on for payment, and the grantor had not paid it, nor been in any way damaged by it. *Id.*

**16.** The plaintiff and defendant made an indenture, by which the defendant conveyed to the plaintiff a certain farm for the joint lives of the plaintiff and his wife, and the survivor of them, and the defendant covenanted that he would occupy and carry on the farm without sale or transfer, and from the avails and income would deliver to the plaintiff certain articles yearly, and would perform other specified services, &c., for the maintenance of the plaintiff and his wife, &c. *Held*, that the plaintiff acquired by the indenture an estate for life; and that the defendant, as incident to his covenants and to enable him to perform the same, had a right to the occupancy of the farm; but that on failure to perform such covenant for maintenance, the plaintiff could maintain ejectment without giving any notice to quit. *Oloott v. Duncklee*, 16 Vt. 478. 19 Vt. 382. 20 Vt. 415. 36 Vt. 234.

**17.** Where A and B entered into a written contract that A should deed to B an undivided half of his farm, and B should give back a life lease, and should "take the farm to the halves, or otherwise provide a decent and comfortable living for A and his wife during their lives, &c.," and that B should have the farm "so long as he fulfils the above agreement," and the deed and the lease were afterwards given in accordance with the agreement and to effectuate its provisions, but absolute in form, and without naming any of the terms of the written

contract, or referring to it, and there was no other consideration given by B;—*Held*, in chancery; (1), that the written contract determined what were the rights and liabilities of the parties under the deed and lease, and the title which B acquired by the deed—viz., as conditional upon his fulfilling the stipulations on his part, contained in the written agreement; (2), on neglect of which, A had the right to re-enter upon the whole farm, and hold the same free of any right of B therein. *Tracy v. Hutchins*, 36 Vt. 225;—distinguished (p. 234) from *Dunklee v. Adams*, 20 Vt. 415.

18. The plaintiff conveyed his farm to the defendant, and took back a mortgage conditioned for the support and maintenance of the plaintiff during his natural life, &c. The condition of defeasance contained this provision: "or if I shall have an opportunity to sell said farm and shall wish to do so, I shall have the right to do so by paying or securing to said W [plaintiff] such sum and in such manner as the judge of probate for the district of Caledonia, for the time being, shall consider will be right and just, &c." In an action of ejectment for breach of the condition to support, the defense set up was a substituted security by the award of the probate judge. *Held*, that the contract required a concurrence of both conditions, viz: an opportunity and a desire to sell, before the judge of probate was authorized to act; and that for want of proof of the existence of these conditions, or of the former only, the award of the judge was wholly inoperative. *Weeks v. Boynton*, 37 Vt. 297.

19. The judge's award provided that the defendant should execute and deliver to the plaintiff, within a time named, a bond, with one or more sureties, to the acceptance and approval of the cashier of the Bank of Caledonia, conditioned, &c. *Semble*, that this conferred upon the cashier a trust or discretion which, by the condition of the defeasance, was vested in the judge alone, and could not be shifted or delegated to any other person. *Ib.*

20. The plaintiff's counsel, at the time when the award was made, said in his presence that "they were satisfied, and had come out better than they had expected." *Held*, that the plaintiff's silence when this remark was made could not, as matter of law, be treated as equivalent to such an acceptance of the award as would change his rights under the mortgage. *Ib.*

21. **Limitation.** In case of a deed conditioned to become void unless a certain sum be paid by a day certain, the burden is on the promissor to prove such payment by the day;—otherwise a breach of the condition occurs, which operates by way of limitation of the estate; and in such case the law reverts the estate at once without formal entry. *Austin v. Downer*, 25 Vt. 558.

22. **Reservation.** A, by deed of warranty, conveyed certain lands to S, and in the premises of the deed, immediately following the description, was this clause: "Conditioned, that no building or erection is ever to be made on said land except a dwelling house and out-buildings for the same, or such other buildings and erections as would not affect the rights, privileges and interests of said A, or his heirs or assigns, to a greater degree than a dwelling house and out-buildings as aforesaid would affect his and their rights, interests and privileges; the said A being now the owner of a house and land westerly of and near said premises; and conditioned, also, that no building is to be erected on said land, which shall extend more than twenty feet southerly of the main body of the dwelling house now owned and occupied by the said A." In all other respects said deed was in the usual form of a deed without condition. *Held*, that said clause did not constitute a condition, either precedent or subsequent; nor yet a covenant, merely, that the grantor would abide by the terms of the condition; but that it showed, with the rest of the description, what rights in the land passed to the grantee, and what were left remaining to the grantor; that the land, with the use thus restricted, passed to the grantee, and the right to such restriction of the use remained to the grantor; and that neither the grantee nor his assigns could make erections on the land in violation of such restrictions. *Fuller v. Arms*, 45 Vt. 400.

23. A deed of land with a reservation of certain stone upon it, part of the realty, and the privilege of removing the same by a day named and of leaving what stone the grantor should choose at that time, was construed to mean that, if removed by that time, the stone belonged to the grantor; but, if not removed by that time, his right to the stone was gone. *Holton v. Goodrich*, 35 Vt. 19.

24. **Relief in equity.** Where a party wholly fails to perform the condition of his contract by the time stipulated, and gives no reasonable excuse therefor, he will not be relieved in equity, nor be entitled to a specific performance by a subsequent offer to perform. *White v. Yaw*, 7 Vt. 357.

25. Chancery will not relieve a party from the consequences of not complying with a condition precedent, where the non-compliance arose from his own inattention or negligence. *Barnet v. Passumpsic Turnpike Co.*, 15 Vt. 757.

26. A court of equity may grant relief from the forfeiture of an estate conditioned for the maintenance and support of the grantee,—this not as a matter of course and under all circumstances, but it rests in the sound discretion of the court, according to the circumstances. If the breach of the condition is unintentional or

purely technical, and admits of compensation, relief will be granted—as in *Henry v. Tupper*, 29 Vt. 358. (*Weeks v. Boynton*, 37 Vt. 302. *Austin v. Austin*, 9 Vt. 420.)

27. *Aliter*, where the breach is wilful and wanton, or attended with suffering or serious inconvenience to the grantee, or where there is good ground to apprehend a failure in future—as in *Dunklee v. Adams*, 20 Vt. 415.

28. Where a mortgage was given conditioned for the support of the mortgagee, the mortgagor made a second mortgage and then abandoned the premises and the further support of the mortgagee. On a bill of foreclosure by the first mortgagee;—*Held*, that the breach admitted of compensation, and the second mortgagee was let in to redeem, on the terms of making compensation for the past and providing for the future support of the mortgagee. *Austin v. Austin*, 9 Vt. 420.

29. The orator executed, as surety for another, a promissory note to the defendant, with the understanding that it was not to be delivered, or to be understood as taking effect, until the defendant complied with certain conditions. But the defendant, having got possession of the note, refused to comply with the conditions. On bill, the defendant was perpetually enjoined from negotiating the note and from enforcing it against the orator. *Chase v. Torrey*, 20 Vt. 395.

### CONSPIRACY.

1. In an action on the case against two or more in the nature of conspiracy, the conspiracy charged is important only as it serves to give character to the individual acts of those who were parties to it. The gist of the action is the damage sustained by the plaintiff, by reason of the fraud of the defendants. *Sheple v. Page*, 12 Vt. 519.

2. Where two or more combine together for the same illegal purposes, each is to be considered as the agent of the others, and the act of one, in pursuance of the object, is, in legal contemplation, the act of all. *Ib. State v. Thibau*, 30 Vt. 100. *Windover v. Robbins*, 2 Tyl. 4.

3. Their declarations stand upon the same ground. *State v. Thibau. Jenne v. Joslyn*, 41 Vt. 478. 43 Vt. 52.

### CONSTITUTIONAL LAW.

#### I. POWERS OF LEGISLATURE.

#### II. CONSTRUCTION.

#### I. POWERS OF LEGISLATURE.

1. **Generally.** American legislatures have the same unlimited power in legislation which resides in the British parliament, except where they are restrained by written constitutions. *Thorpe v. Rut. & Bur. R. Co.*, 27 Vt. 140.

2. **Rules of descent.** It is competent for the legislature to provide rules of descent of real estate, and to change them from time to time, provided the law is not retrospective. No one has a vested right of inheritance, before a descent cast. *Gilman v. Morrill*, 8 Vt. 74.

3. **Mode of conveying estates.** It is competent for the legislature to prescribe the mode of conveying existing estates in property, especially real property;—as, that a wife must join in the deed of her husband in conveying his interest in her lands, in order to the validity of the conveyance. *Peck v. Walton*, 26 Vt. 82.

4. **Police power.** The police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State, and applies as well to chartered corporations as to natural persons, though such control might materially affect the profits of the corporation. *Thorpe v. Rut. & Bur. R. Co.*, 27 Vt. 140. Under it, the legislature has power to require existing railroad corporations to maintain cattle guards at all crossings, although not provided for in the charter; and may, by general laws, impose upon railroads new conditions of like character, which are conducive to the public interest, to the extent of not destroying, or essentially modifying, the essential franchise of the corporation. *Ib. Nelson v. Vt. & Canada R. Co.*, 26 Vt. 717.

5. — **over private corporations.** The legislature may control the action, prescribe the functions and duties of corporations, and impose restraints upon them to the same extent as upon natural persons, that is, in all matters coming within the range of legislative authority, subject to the limitation of not impairing the obligation of contracts, provided the essential franchise is not taken without compensation. *Thorpe v. Rut. & Bur. R. Co. State v. Bosworth*, 13 Vt. 402.

6. **Power over municipal corporations.** The legislature may exercise over municipal corporations [as towns], exclusive control, and may constitutionally enlarge, restrain, and even destroy their municipal existence, as the public interests may require; and may control the disposition of their property held for municipal and corporate purposes—as by dividing it between the towns into which the old town may be divided. *Montpelier v. East Montpelier*, 29 Vt. 12. *S. C.*, 27 Vt. 704.

7. This right over towns is not defeated nor



affected by the fact that the town is, by its charter, made the trustee of property for other purposes than corporate and municipal use. *Ib.*

8. But such grants in trust for other purposes than corporate and municipal use, are no more the subject of legislative control, than are the private and vested rights of individuals. *Ib.* 31 Vt. 238. *Poultney v. Wells*, 1 Aik. 180.

9. The legislature has constitutional power to confer upon municipal corporations the right to make assessments upon the property benefited, for the purpose of defraying the expenses of making local improvements. *Woodhouse v. City of Burlington*, 47 Vt. 300.

10. **Hunting, &c.** Laws regulating hunting, fowling and fishing, are not in violation of the constitution of the State (section 40), unless clearly shown to be so prohibitory as to virtually deprive the inhabitants of the right secured. *State v. Norton*, 45 Vt. 258.

11. **Retrospective legislation.** Statutes, retrospective in their operation, are valid, with this qualification, that they do not impair the obligation—that is, the legal obligation—of contracts, or disturb absolute vested rights; or, in other words, the legislature may change and modify remedies, forms of proceedings, or the tribunal itself, as it may choose, but it shall not directly, nor indirectly, destroy or abolish all remedy whatever, by which the performance of any class of valid, legal contracts may be enforced. *Poland, C. J.*, in *Richardson v. Cook*, 37 Vt. 603.

12. **Taking for public use.** Where the use is a public one, it rests wholly with the legislature to determine whether sufficient necessity exists to justify granting the power to take private property therefor, and courts will not interfere with the discretion of the legislature—at least, not unless the entire absence of any necessity be shown. *Poland, J.*, in *Williams v. School District*, 33 Vt. 280.

13. But the legislature has not the power to so determine that a use is a public use as to make that determination conclusive, but the existence of the right in the legislature, in any class of cases, is left to be determined under the constitution by the courts. The attempt of the legislature to exercise the right of eminent domain does not, therefore, settle that it has the right. *Tyler v. Beacher*, 44 Vt. 648.

14. Under the statutes of Vermont, the owners and occupiers of grist-mills are required to grind well and sufficiently all grain received by them for that purpose, at certain fixed rates of toll, but they are not compellable to receive grain for grinding against their will. Their mills are their own private property, subject to their own control, except as to that regulation,

and the public has no rights whatever in them, or to the use of them. *Held*, therefore, that the flowage acts of 1866-7-8, professing to authorize the flowing of the lands of others for the benefit of such mills, upon compensation ascertained and paid, were not justified by the constitution authorizing the taking of private property for public use. (The flowage acts of Massachusetts and the decisions of the courts of that and other States on this subject considered.) *Ib.*

15. **Law affecting former grant.** It is well settled, that where there has been a legislative grant to a private corporation to erect a bridge, turnpike, or other public convenience, which is not in its terms exclusive, there is no constitutional obligation on the legislature not to grant to a second corporation the right to erect another bridge, or turnpike, for a similar purpose, to be constructed so near the former as greatly to impair, or even to destroy its value; and this, without making compensation to the first corporation for the consequential injury. *White River T. Co. v. Vt. Central R. Co.*, 21 Vt. 590. 27 Vt. 152.

16. **Taking franchise for public use.** The essential franchise of a private corporation is private property, and cannot be taken without compensation, even for public use; but may be taken for public use by making compensation—as the franchise of a turnpike corporation, or of a bridge corporation, for the use of a public highway, under G. S. c. 24, s. 79. *Armington v. Barnet*, 15 Vt. 745. *West River Bridge Co. v. Dix*, 16 Vt. 446. 27 Vt. 151;—or for the use of a railroad,—which is an improved highway,—when authorized by the charter of the railroad company. *White River T. Co. v. Vt. Central R. Co.*, 21 Vt. 590.

## II. CONSTRUCTION.

17. **Construction.** Questions arising under the constitution, settled by a long practice, and sanctioned by a judicial decision, should be considered as at rest. *State v. Bosworth*, 13 Vt. 402.

18. Art. V. of the Amendments to the U. S. Constitution, which provides that “no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury,” has reference solely to proceedings in the courts of the United States. *State v. Keyes*, 8 Vt. 57.

19. The same is true as to Art. VII. of the amendments providing for trial by jury in suits at common law. *Huntington v. Bishop*, 5 Vt. 186, 193. 8 Vt. 64.

See STATUTE, II.; INTOXICATING LIQUOR, I.; JURY, III.; TAXES, I.; CITY OF BURLINGTON; GRANTS.

**CONTEMPT.**

1. The power to punish for contempt is inherent in the nature and constitution of a court. A justice of the peace, sitting as a court, has such power. *In re Cooper*, 32 Vt. 253.

2. It is a contempt of court to assail its decisions, in presence of the court, with sneers, sarcasm or irony. *Ib.*

3. Where a court or magistrate, having the power to punish for contempt, has jurisdiction of the subject matter and the parties, the exercise of such power is not revisable in any other court. *Ib.* *Vilas v. Burton*, 27 Vt. 56.

**CONTRACTS.**

(Simple.)

**I. NATURE, REQUISITES AND VALIDITY.**

1. *Capacity of party; Contract implied by law; Delivery; Assent.*

2. *Consideration.*

3. *Illegality; Against public policy; Restraint of trade; Duress.*

**II. INTERPRETATION. — Rules; Instances; Particular terms; Usage; Law of place; Conditions precedent; Dependent and independent stipulations; Penalty, or liquidated damages; Whether joint or several.****III. MODIFICATION.—RESCISSION.—POWER TO STOP PERFORMANCE.****IV. CERTAIN PARTICULAR CONTRACTS.**

1. *For service.*

2. *Of indemnity.*

3. *Agistment.*

4. *Contracts in the alternative.*

**V. ACTION ON SIMPLE CONTRACT.**

1. *Parties.*

2. *Action and defense as dependent on demand,—expiration of credit,—performance.*

3. *Action, general or special.*

**VI. DAMAGES.—RECOURSEMENT.****I. NATURE, REQUISITES AND VALIDITY.**

1. *Capacity of party; Contract implied by law; Delivery; Assent.*

1. **Competency.** One may bind himself by his contract, though his intellectual capacity is below that of the average of mankind, provided he has sufficient understanding to know the nature and consequences of his act at the time. *Day v. Seely*, 17 Vt. 542. *Mann v. Betterly*, 21 Vt. 326.

2. Intoxication, to avoid a contract, must be of that degree which prevents the party from

knowing the consequences of his agreement. *Foot v. Teusbury*, 2 Vt. 97. Although such intoxication be voluntary, such contract may be avoided. *Barrett v. Buxton*, 2 Aik. 167. 16 Vt. 335. 24 Vt. 425.

3. **Implied by law.** There are numerous cases, where from the circumstances the law implies a legal obligation and a promise, though there was no express promise, and no intent between the parties to enter into a contract. *Paddock v. Kittredge*, 31 Vt. 378, 384. *Ives v. Hulet*, 12 Vt. 314, 327.

4. **Delivery.** The delivery of a written contract is no part of the contract, and is not proved by it. The delivery is an act done in reference to it and indispensable to give it efficacy, intervening between the execution of the contract and the time when it becomes operative; and the proof of the delivery rests essentially in parol, and is a question of mutual intent and purpose, both parties intending thereby to make the contract operative and binding. *King v. Woodbridge*, 34 Vt. 565. *Holmes v. Crossett*, 33 Vt. 116.

5. Where a written agreement not to sue was set up in defense of an action;—*Held*, that the defense could be met by parol evidence that the writing was handed to the defendant to procure other signatures, and was not to become operative unless signed by all the defendant's creditors, and that it was not so signed; that it was not delivered as an existing contract. *Holmes v. Crossett*; and see *Harrington v. Wright*, 48 Vt. 427.

6. —**implies acceptance.** A paper passed as a receipt and contract, but accepted as a receipt only, does not take effect as a contract. A legal delivery implies an acceptance. *King v. Woodbridge*, 34 Vt. 565.

7. **Date.** A written contract takes effect from its delivery, or time of actual execution. Its validity is not effected by its having no date, or a false date. In declaring upon it, if dated, it need not be described by its date, if sufficiently described otherwise; and where averred to have been executed on a certain day, it is no variance that it bears date of a different day; but if the date be averred, this becomes descriptive and must be proved as laid. *Broughton v. Fuller*, 9 Vt. 373. *Clark v. Kidder*, 12 Vt. 689. *Woodford v. Dorwin*, 3 Vt. 82.

8. **Signed at different times.** A written contract was signed by part of the defendants at its date, and by the others some months afterwards, but had been adopted and acted under by the other party, with the knowledge of all the defendants, from its date. *Held*, that the defendants last signing should be considered as having adopted the contract as of its date, and it is evidence that the contract was, in point of fact, made by all the defendants at that time. *Stearns v. Haven*, 16 Vt. 87.

9. **Adoption without signing.** The accepting and adopting of a written contract, by a party to it who has not signed it, binds him equally as if he had signed it. *Patchin v. Swift*, 21 Vt. 292. *Troy Academy v. Nelson*, 24 Vt. 189, 194. *Smith v. Kellogg*, 46 Vt. 560. *Phelps v. Stewart*, 12 Vt. 256. *Brandon Mfg. Co. v. Morse*, 48 Vt. 322.

10. In an action on a contract to pay interest on certain stocks of the plaintiff, &c., the declaration averred, as the consideration of the defendants' promise, a promise by the plaintiff that the defendants should have all the profits on such stocks. The contract was in writing, signed by the defendants only, and set forth their promise to pay such interest, "by having all the profits," &c. *Held*, that the writing did not necessarily import that the plaintiff retained the right of withholding those profits, and that the consideration, as alleged, viz: the plaintiff's promise, might be inferred from circumstances and the conduct of the parties under the contract. *Phelps v. Stewart*.

11. **Marginal entries.** Entries made upon the margin of an instrument before signing are regarded as a part of it. *Patch v. Phœnix Ins. Co.*, 44 Vt. 481. *Fletcher v. Blodgett*, 16 Vt. 26.

12. **Agreement to put in writing.** Where parties entered into a parol agreement, but it was also agreed that their contract should be reduced to writing;—*Held*, that either party could refuse to enter upon the performance of the contract until so reduced to writing. *Congdon v. Darcy*, 46 Vt. 478. *Paige v. Fullerton Woolen Co.*, 27 Vt. 487.

13. **Assent requisite.** The plaintiff brought to the defendant a quantity of salts, to be applied as payment on a contract not yet due. After the salts had been weighed and left at the defendant's ashery, the contract was brought forward, when the plaintiff finding it read for gross weight refused to have the salts applied upon it, but the defendant so applied them and refused to account for them in any other way. *Held*, that the defendant could not be made debtor for the salts against his will, and was not liable in an action for goods sold and delivered. *Durrill v. Lawrence*, 10 Vt. 517. 28 Vt. 657.

14. Where one for whom work is being done—as the building of a barn—sees the work going on from day to day before his eyes without objection, and finally accepts the thing by silent acquiescence, he must be bound by it. *Austin v. Wheeler*, 16 Vt. 95. 27 Vt. 232.

15. The defendant, guardian of a non compos, agreed with the plaintiff to keep the ward at \$1.50 per week, but without agreement as to time. At the end of some 14 months, the plaintiff gave the defendant notice to take the ward away, and that he would not keep him

longer for less than \$2 per week. The defendant went to remove his ward, but the ward was unwilling to go, and the defendant left him, the plaintiff repeating his notice. The defendant made no express promise to pay more than \$1.50; but,—*Held*, that the defendant should be treated as having acquiesced in the plaintiff's claim for the additional price and that he was liable therefor, but was not liable for extra charges beyond that sum. *Hutchinson v. Hutchinson*, 19 Vt. 437.

16. The defendant was under contract to support the town's poor for several years, at a price agreed, and engaged the plaintiff to board one of such paupers for \$1.25 per week. At the end of the year, the defendant sent word to the plaintiff that if he could not keep the pauper another year at \$1.00 per week, he [defendant] would come and take her away. The plaintiff returned word that he could not keep her for \$1.00 a week, and to come and take her away. The defendant did not go and take away the pauper, but suffered her to remain during the whole year, and at the end of that year substantially the same thing took place between the parties, and the pauper remained another year. *Held*, that a request was implied that the plaintiff should keep the pauper until the defendant should come for her, and his failure to come and take her away might be regarded as an assent to the plaintiff's proposal to keep her at the proposed price of \$1.25 per week, and that the plaintiff might recover that sum. *Worcester v. Ballard*, 38 Vt. 60—criticising *Aldrich v. Londonderry*, 5 Vt. 441.

17. The plaintiff, who had been keeping her child as a pauper of the defendant town under a contract as to compensation, notified the defendant's overseer of the poor, at the close of that contract, that if the child should grow worse she must have an extra compensation. The overseer allowed the child to remain in her care. *Held*, that the overseer's assent to this proposition should be presumed. At the end of the next year the overseer offered the plaintiff a certain price per week for keeping the child, which the plaintiff refused. The overseer then attempted to remove the child to other quarters, when the plaintiff resisted him. The overseer then told the plaintiff that if she refused to allow the child to be removed, he should pay only that price for future keeping. The plaintiff kept the child. *Held*, that this was an assent to the offer of the overseer. *Buck v. Worcester*, 46 Vt. 2.

18. The defendant consigned to the plaintiffs, commission merchants in Boston, certain cheese to be sold "to the best advantage." The plaintiffs sold and delivered the cheese on what was called "a sale for cash" on the 12th of September, and on the 20th of September sent the defendant an account of sales, stating the

balance due, and that he could draw for it at sight. The defendant drew a part of that balance. In point of fact, the purchaser did not pay the plaintiffs for the cheese, but put them off from time to time, and finally became bankrupt. In an action of book account;—*Held*, that the plaintiff had assumed that debt as cash in hand, and could not recover what he had paid on account of it. *Jackson v. Bissonette*, 24 Vt. 611.

## 2. Consideration.

**19. Moral obligation.** *Dictum*—a moral obligation is a sufficient consideration for an express promise. *Barlow v. Smith*, 4 Vt. 144. *Glass v. Beach*, 5 Vt. 172.

**20.** But such obligation must be strict and undoubted. Indeed, it seems that a promise to do that which the law did not render compulsory will not give a right of action, except where there was an original consideration beneficial to the party promising, and which might have been enforced through the medium of an implied promise, had it not been for some statute provision, or some positive rule of law, which exempted the party from legal liability in the particular instance. *Hawley v. Farrar*, 1 Vt. 420.

**21.** The defendant, for his own purposes and without leave of the plaintiff, brought a suit in the plaintiff's name which proceeded to judgment for costs against the plaintiff, and execution issued. Thereupon the defendant expressly promised the plaintiff, in consideration of the premises, to save the plaintiff harmless from all liability on said execution. *Held*, that such promise was upon sufficient consideration to sustain an action of assumpsit thereon. *Blodget v. Skinner*, 15 Vt. 716.

**22. Past consideration.** It is not true, as a general proposition, that a moral obligation is not sufficient to give a legally binding force to an express promise, except in cases where there had once existed a legal obligation. If the consideration, even without request, moves directly from the plaintiff to the defendant and enures directly to the defendant's benefit, the promise is binding, though made on a past consideration—the subsequent promise being equivalent to a previous request. *Boothe v. Fitzpatrick*, 36 Vt. 681.

**23.** The plaintiff took up and kept an estray animal, but did not proceed under the statute in such way as to hold the animal or make the owner legally chargeable with the keeping. The owner afterwards took away the animal and then promised to pay for the past keeping. *Held*, that the promise was on good consideration and legally binding. *Ib.*

**24. Legal obligation.** A promise by a party to do what he is bound in law to do, is not a

sufficient consideration to sustain a contract;—otherwise, as to a promise to do what the party is only morally bound to do. *Cobb v. Cowdery*, 40 Vt. 25.

**25. Value received.** The words “for value received” in a written contract furnish sufficient evidence, *prima facie*, at least, of a consideration. *Brooks v. Page*, 1 D. Chip. 345. *Lapham v. Barrett*, 1 Vt. 247. 19 Vt. 206.

**26. Other sufficient considerations.** A promise in writing to pay the amount of an execution to the attorney of the creditor, in consideration of an assignment of the execution to the promisor, was *held* valid, where the debtor was at once discharged from custody on the execution, at the request of the promisor, although the assignment was not in fact made until payment was afterwards demanded. *Page v. Thrall*, 2 Vt. 448.

**27.** The defendant requested the plaintiff to purchase a note which the defendant had given, and after the purchase promised to pay the contents to the plaintiff. In an action on the note;—*Held*, that the defendant could not set up want of consideration. *Bliss v. Rollins*, 6 Vt. 529.

**28.** The plaintiff and another contracted with the defendant and others to build a meeting house, for a certain price, and afterwards abandoned the work, when the defendant alone contracted with the plaintiff alone, that the plaintiff should resume the work and finish the house at the same price, and promised to pay what it cost more. *Held*, that this new obligation and duty was a good consideration for the defendant's promise. *Morrison v. Heath*, 11 Vt. 610.

**29.** The release of a doubtful right is a sufficient consideration to support a promise. *Blake v. Peck*, 11 Vt. 483.

**30.** The giving up and making over of a mail contract, though it has gone no further than the acceptance by the Post Office Department of a bid, is a sufficient consideration for any contract. *Carlton v. Jackson*, 21 Vt. 481.

**31.** Mutual and concurrent promises afford a sufficient legal consideration for the support of each other. *Missisquoi Bank v. Sabin*, 48 Vt. 239.

**32.** The orator transferred to his son certain property, in consideration that the son *had bound* himself to support the orator and his wife during their lives. The son died soon after. *Held*, that the sale was upon an executed consideration, and that chancery would not enjoin the administrator of the son from prosecuting an action at law to recover the property. *Deveraux v. Cooper*, 15 Vt. 88.

**33.** An agreement to forbear, or not to sue, may be a sufficient consideration to sustain an agreement to pay, &c., although no certain time of forbearance be stated or agreed upon. *Hukes v. Hotchkiss*, 23 Vt. 231.

34. The declaration in assumpsit averred that a certain suit was pending against this plaintiff in favor of one C, in which this defendant was bail for the prosecution, and that this defendant, before the return day, promised this plaintiff that if he would make no expense or preparation for the trial, and would not attend the court, he (the defendant) would procure C to discharge his action and not further prosecute it—and assigned a breach. *Held*, on motion in arrest, that the declaration set up a sufficient consideration for the promise. *Hammond v. Cook*, 25 Vt. 295.

35. The abandonment of a suit, or the discharge of a trustee, is a sufficient consideration to support a promise, although there may not have been good ground for recovery. *Cross v. Richardson*, 30 Vt. 641.

36. A mutual agreement to extend the time of performance of a special contract, requires no new extraneous consideration to support it. It is promise for promise, and such new or further agreement may be declared upon and a recovery had for such damages as the breach of it has occasioned, though in excess of what would have arisen under the original contract. *Hill v. Smith*, 34 Vt. 585.

37. A mere indebtedness to three jointly, is not a sufficient consideration to support a promise, express or implied, to one separately to pay him his portion of the debt. *Vadakin v. Soper*, 1 Aik. 287.

38. But if the other two creditors, or the firm, had given a written order on the debtor to pay to one of them his share of the joint debt, and this had been accepted and agreed to by the debtor, such mutual agreement of the parties would have sustained the action in favor of such one of the creditors. See *Allis v. Jewell*, 36 Vt. 551.

39. A general settlement, made on the faith of the withdrawal and abandonment of a disputed item, is a sufficient consideration to render such adjustment binding, and satisfies the claim. *Morgan v. Adams*, 37 Vt. 233.

40. Where a contract is payable in specific articles or property, the time or mode of payment may be varied by a new agreement made before the original contract has become payable; and if relied upon, the original contract is not converted into a money demand by non-payment at the time therein set, though there was no consideration for such new agreement. But in case of a debt already due and payable in money, an agreement to extend the time of payment requires a new consideration. *Thrall v. Mead*, 40 Vt. 540.

41. **Insufficient consideration.** A promise to a sheriff who had suffered an execution to run out in his hands, in consideration that he would not take out an *alias* execution, is void for

want of consideration. *Flagg v. Walker*, Brayt. 24.

42. H, at the special request of F, purchased for him a quantity of tin in boxes, and delivered it to him in the same condition, unopened, and without knowledge of any defect. Afterwards, on opening the boxes, F discovered that the tin was materially damaged; on notice whereof, H promised F to make him an equitable allowance upon his note given for the tin. *Held*, that such promise was void for want of consideration, there being neither fraud nor warranty. *Hawley v. Farrar*, 1 Vt. 420.

43. A stipulation between creditor and debtor, founded upon no new consideration, that the former will receive payment, in services, of a debt then due him in money, is binding no longer than the parties continue to act under it, and the creditor may at any time put an end to it, and sue for payment. *Bates v. Starr*, 2 Vt. 536.

44. Parties to a controversy having submitted the same in writing to arbitrators, the defendants, not interested, promised in writing that "in consideration of the within submission," they would pay to one of the parties the sum to be awarded him. *Held*, that there was no sufficient consideration to sustain the promise. *Barlow v. Smith*, 4 Vt. 139.

45. The plaintiff, being surety for A, became uneasy and unwilling to remain longer in that position, whereupon A, in order "to keep the plaintiff easy and contented without the immediate payment of the debt, and to render the plaintiff secure," &c., procured T to sign with him a written agreement to indemnify the plaintiff. The plaintiff was afterwards obliged to pay the debt. In an action against A and T upon the agreement;—*Held*, that it was void for want of consideration. *Riz v. Adams*, 9 Vt. 233. See 23 Vt. 231.

46. Where a declaration in assumpsit counts upon a promise made upon a past consideration, it is necessary both to allege and prove that this was at the request of the defendant, or that the defendant derived benefit from the consideration. A promise to indemnify the plaintiff for having become surety for a third person, not at the request of the defendant, and without a new consideration, is void for want of consideration. *Harding v. Cragie*, 8 Vt. 501. *Riz v. Adams*.

47. A, being administrator of B and guardian of C, presented claims in their favor respectively to commissioners on the estate of D, and had them allowed. A died, and the plaintiff, his administrator, claimed payment of these debts from the defendant, the executor of D, and the defendant gave the plaintiff his note therefor. *Held*, that the plaintiff acquired no interest in these debts as administrator of A, and that the note was without consideration.

*Sowles v. Sowles*, 10 Vt. 181. *S. C.*, 11 Vt. 146.

48. The simple promise of the debtor of A to pay that debt to B, is *nudum pactum* as to B, so long as the debtor remains liable to A. *Phalan v. Stiles*, 11 Vt. 82.

49. The promise of one already legally liable to pay a debt, that he will pay it if delay be given him, creates no new duty or legal liability. A promise to pay, or a part payment of a debt already due, is not a sufficient consideration to support an agreement to delay, but such agreement is *nudum pactum*. *Wheeler v. Washburn*, 24 Vt. 298. *Mason v. Peters*, 4 Vt. 101. *Russell v. Buck*, 11 Vt. 166. *Id.* 66. *Pomeroy v. Slade*, 16 Vt. 220. *Cole v. Shurtleff*, 41 Vt. 311.

50. A, holding two promissory notes against B, and both due, promised B that if he would pay one, the time for payment of the other should be extended one year. B thereupon borrowed the money and paid the first note. *Held*, that such promise was without consideration, and was no bar to an action upon the other note, commenced within the year. *Pomeroy v. Slade*, *supra*. 24 Vt. 296. 41 Vt. 311.

51. The plaintiff, the defendant, and B, agreed that the defendant should employ B to build a mill, and that the defendant should pay B's earnings to the plaintiff to apply on B's then indebtedness to the plaintiff. The defendant's contract with B was, that unless the mill should be so constructed as to be of a certain power and do good business, he should have nothing. B so built the mill that it was good for nothing, but was a damage to the defendant. *Held*, that the defendant was not liable to the plaintiff upon the agreement to pay him B's wages, although the plaintiff was ignorant of this special stipulation with B, since the defendant received no value for his promise, and the plaintiff parted with nothing. *Hurlbut v. Chittenden*, 26 Vt. 52.

52. **Slight consideration.** If the thing be understandingly done, mere inadequacy of price will never excuse the performance of a contract. *Harrington v. Wells*, 12 Vt. 505.

53. P agreed with R, that if R would remain for the purpose of closing certain contracts for the sale of land, he would pay R one dollar an hour for every hour he should delay R after a certain hour. R was thus delayed ten hours beyond the hour named, and charged P therefor, on book, \$10. *Held*, that this was a valid contract, and that the price agreed was recoverable of P in an action of book account. *Paige v. Ripley*, 12 Vt. 289.

### 3. *Illegality.*

54. **Violation of law.** If part of the consideration of a contract be merely void, the

contract may be supported by the residue of the consideration, if good *per se*; but if any part of the consideration be illegal, it vitiates the whole. *Cobb v. Coudery*, 40 Vt. 25. *Woodruff v. Hinman*, 11 Vt. 592. *Hinesburgh v. Sumner*, 9 Vt. 23. *Dixon v. Olmstead*, 9 Vt. 310. *Bowen v. Buck*, 28 Vt. 308.

55. A contract in contravention of the provisions of a statute is void, although the statute only inflicts a penalty—because the penalty implies a prohibition. *Elkins v. Parkhurst*, 17 Vt. 105.

56. The law of Congress having prescribed the fee of agents and attorneys for services in procuring a pension, and punishment for taking more;—*Held*, that no larger sum could be recovered, either upon an express contract, or upon a *quantum meruit*. *Morgan v. Davis*, 47 Vt. 610.

57. If the suppression of evidence in a criminal prosecution constitutes any part of the consideration of a contract, the contract is wholly void. *Badger v. Williams*, 1 D. Chip. 137.

58. A promissory note given in whole or in part for the compounding of penalties, or the suppressing of a criminal prosecution, is void, the consideration being illegal. *Hinesburgh v. Sumner*, 9 Vt. 23. *Woodruff v. Hinman*, 11 Vt. 592. *Bowen v. Buck*, 28 Vt. 308.

59. A receipt in full of all demands, given upon consideration of stifling a criminal prosecution, is void, and leaves the claim in force. *Bailey v. Buck*, 11 Vt. 252.

60. The defendant induced the plaintiff to come from New Hampshire into this State, after having procured a warrant for his arrest and surrender to the authorities of New Hampshire to answer to the charge of forgery there committed, and, on being threatened with service of the warrant, the plaintiff let the defendant have a horse by way of compromise, the defendant agreeing not to prosecute the matter further. *Held*, that whether the plaintiff was innocent or guilty of the charge, the contract was illegal; but that the parties were in *pari delicto*, and the law would not aid the plaintiff in recovering back what he had paid. *Dixon v. Olmstead*, 9 Vt. 310. 28 Vt. 313, 315.

61. **Outlawed property.** Courts of justice will not sustain actions in regard to contracts, or property, which have for their object the violation of law. Such property is, so to speak, *outlawed*, and is common plunder. If, instead of putting his property to honest uses, the owner converts it into an engine to injure the life, liberty, health, morals, peace or property of others, he thereby forfeits all right to the protection of the *bona fide* interest he had in such property before it was put to that use. And he can, I apprehend, sustain no action against any one who withholds or destroys the property, with the *bona fide* intention of preventing injury to

himself or others. *Redfield, J., in Spalding v. Preston*, 21 Vt. 9.

62. *Held*, that an action will not lie in favor of the publisher of a newspaper upon an agreement to indemnify him for the publication of a libel, and to indemnify him for refusing to give the name of the author. *Atkins v. Johnson*, 43 Vt. 78.

63. No action will lie to recover back money or property advanced upon an illegal contract. *Barnard v. Crane*, 1 Tyl. 457. For distinction, see *Hinckill v. White*, 34 Vt. 558.

64. **Against public policy.—Legislature.** An agreement of a corporation, upon consideration that a party would withdraw opposition to the passing of an act of the Legislature touching its interests, was *held* to be against public policy and void. *Pingry v. Washburn*, 1 Aik. 264. 14 Vt. 387.

65. —**sale of office.** The sale of an office, or of any agency or influence in the procuring of one, is illegal, and any contract, made upon any such consideration, is void. *Ferris v. Adams*, 23 Vt. 186. *Meacham v. Dow*, 32 Vt. 721.

66. —**hired electioneering.** The plaintiff was a candidate for the office of town representative. The defendant owed him. They agreed that the defendant should use his influence and do what he could for the plaintiff's election, and if elected, that should be a satisfaction of the plaintiff's claim. Nothing was said specially about the defendant's vote, but he did vote for the plaintiff, and would not have done so, nor have favored the plaintiff's election, but for the agreement. The plaintiff was elected, but gave no discharge of the debt. In an action to recover the debt;—*Held*, that the agreement set up in defense, although not agreed to be kept secret, was immoral and void—(1), As a bargain of the defendant to sell his own vote; (2), to use his influence and exertions in the election against his convictions and opinions. *Nichols v. Mudgett*, 32 Vt. 546.

67. —**lobbying.** An agreement in respect to services as a lobby agent, or for the sale by an individual of his personal influence and solicitations to procure the passage of a public or private law by the Legislature, is void as being prejudicial to sound legislation, manifestly injurious to the interests of the State, and in express and unquestionable contravention of public policy. *Powers v. Skinner*, 34 Vt. 274.

68. Distinction taken between this, and an employment to conduct properly an application to the Legislature. *Ib.*

69. —**affecting duty of public officers.** An agreement with a deputy sheriff, about to arrest a debtor on execution, that, if he will forbear, the promisor will have the debtor forthcoming at a future time to be taken on the execution in his life, is not illegal; and the deputy may sus-

tain an action thereon in his own name. *Miller v. Gould*, 2 Tyl. 439. See 6 Vt. 67.

70. The defendant promised the plaintiff, an officer, who had arrested a debtor on execution, that if the plaintiff would suffer the debtor to remain with the defendant and in his keeping, he would have the debtor forthcoming to be committed in the life of the execution. *Held*, that the promise was upon an illegal consideration, and was void in law. *Stevens v. Webb*, 2 Vt. 344. 18 Vt. 22.

71. The defendant being legally imprisoned for a military fine gave his note to the adjutant of the regiment, instead of money, in satisfaction of the execution, and was discharged. *Held*, that the note was upon sufficient consideration. *Kingsbury v. Whitney*, 5 Vt. 470.

72. The plaintiff, a deputy sheriff, held against the defendant an execution for collection, when the defendant promised him that if he would levy the execution upon real estate, the defendant would pay him for doing it, and would indemnify him. The plaintiff made such levy, instead of taking personal property, for which the execution creditor sued the sheriff and recovered judgment, which the defendant paid. *Held*, that it did not appear that the contract was understood to be for mere ease and favor, or to hire the plaintiff to violate a known official duty, and that the plaintiff was entitled to recover the fees for the levy. *Gleason v. Briggs*, 28 Vt. 135.

73. A contract to indemnify a sheriff for past neglect is not illegal. *Hall v. Huntoon*, 17 Vt. 244.

74. —**interest of towns.** The consideration of a promissory note was, that the plaintiff would forbear to bid against the defendant for the support of the town paupers at a public auction. *Held*, that such contract tended to work injustice to the town, was against public policy, and was void. *Noyes v. Day*, 14 Vt. 384.

75. The plaintiff, a physician, contracted with the overseers of the poor of P, to attend upon a pauper then chargeable to P, and that if P should, by a contemplated order of removal, succeed in establishing the legal settlement of the pauper to be in S, then P should pay him a reasonable compensation for his services—otherwise, nothing. P did succeed in establishing such settlement to be in S. In a subsequent action by P against S to recover such expenses, it was adjudged that, as between the towns, such contract was so far against public policy that P could not recover. In this action against P, *held*, nevertheless, that the contract was valid, as between these parties, and that the plaintiff could recover. *Edson v. Pawlet*, 22 Vt. 291. See *Pawlet v. Sandgate*, 19 Vt. 621.

76. —**private interests.** The plaintiff was in the employ of O, temporarily, as clerk in his store. O sold out the goods to the defendant,

to be appraised by one P. The plaintiff did not intend to remain during the invoicing and appraisal, but consented to do so upon the defendant's promise to pay him \$25, for assisting therein. At the same time he expected to receive from O, and did receive from him, the same pay as before the sale. This the defendant understood. *Held*, that the promise was upon good consideration, and the contract was not void as against public policy. *Shattuck v. Nellis*, 44 Vt. 262.

77. Where one creditor, who had an individual claim against an embarrassed debtor, and was also member of a firm to which such debtor was indebted, consented to make his firm, with other creditors, parties to a contract with the debtor to extend the time of payment of their claims for a specified period, if he could receive security for his individual claim, and the debtor gave such security;—*Held*, that this fact merely, in the absence of any evidence that the existence of this claim was denied to the other signers of the contract, or that they were encouraged to expect that it would be treated as embraced in the contract, did not invalidate the contract. *Loomis v. Wainwright*, 21 Vt. 520.

78. A contract between two trustees, by which one was allowed to speculate for his advantage upon trust funds for a consideration to be paid to the other, was *held* illegal and void. *Foot v. Emerson*, 10 Vt. 338.

79. Whether an agreement to abstain from bidding at a sheriff's sale is a legal consideration to support the promise of another successful bidder, to share the benefit of the purchase—*quære*. *Paige v. Hammond*, 26 Vt. 375. But see *Noyes v. Day*, 14 Vt. 384, and as cited, 47 Vt. 71. 48 Vt. 246.

80. A contract to forbear purchasing certain land at private sale, and to assist the plaintiff in the purchase thereof, is not void as against public policy. *Morrison v. Darling*, 47 Vt. 67.

81. Where two mortgagees of land, about to be sold in bankruptcy, agreed that one or the other should bid at the sale, and that the one to whom the land should be "struck off" should hold it in trust, sell it, and apply the avails in certain agreed proportions upon the mortgages;—*Held*, that such contract was on good consideration, and was not void as against public policy. *Missisquoi Bank v. Sabin*, 48 Vt. 239.

82. The defendant, one of several heirs of an estate, appeared before the probate court, but solely on his own account, to oppose the allowance of the plaintiff's account as administrator of said estate. In consideration that the defendant would withdraw his opposition, the plaintiff executed to the defendant a release of a debt due from him to the estate. *Held*, that such release was upon sufficient consideration, and was a bar to a recovery for such debt. *Holbrook v. Blodget*, 5 Vt. 520.

83. In consideration of a promise by the defendant to pay the plaintiff, a lawyer, extra for his services beyond the fees allowed by law to administrators, the plaintiff undertook the administration of the estate of the defendant's father, which involved matters of complication and difficulty, requiring the services of a lawyer. *Held*, that this was a promise for compensation, beyond statutory fees, for services beyond the ordinary services of an administrator, and was a valid contract, not prohibited by statute, nor against public policy. *Hubbell v. Olmstead*, 36 Vt. 619.

84. Services performed in giving information to the defendant as to who were witnesses in a suit in which the defendant was interested and what could be proved by them, in pursuance of an agreement to that effect, were *held* to be a good consideration for a contract. *Cobb v. Courdery*, 40 Vt. 25. *Chandler v. Mason*, 2 Vt. 193.

85. —**Maintenance.** The plaintiff and defendant having a similar interest, dependent upon a settlement of the same question, orally agreed that the plaintiff should commence and prosecute a suit in his name, by which that question would be decided, and which, as they believed, would practically enure to the benefit of both;—that the plaintiff should make all the disbursements, and when finally ascertained and adjusted, that the defendant should pay the plaintiff the one-half. The plaintiff accordingly brought and prosecuted his suit to judgment, and, having paid all the expenses thereof, brought this action of general assumpsit for money paid, to recover the one-half. *Held*, that the defendant's promise was upon good consideration; that the agreement was not within the statute of frauds; that it was not against public policy, as for *maintenance*; and that the plaintiff could recover against a plea of the statute of limitations, the one-half of such expenses which the plaintiff paid within six years before the suit. *Dorwin v. Smith*, 35 Vt. 69.

86. —**Restraint of trade.** In a contract of copartnership for two years between A and B, physicians, it was agreed that if A sold out to B at the expiration of the term, he was not to "settle himself in practice" within 20 miles of B, and if B did not purchase of A his real estate &c., B was not to "settle in the practice of medicine and surgery" within 10 miles of A. *Held*, that this was a contract not forbidden by any principle of policy or law, and that an injunction lay to prevent a breach of it. *Butler v. Burleson*, 16 Vt. 176.

87. A contract for a limited and partial restraint of trade, if reasonable, and made on good consideration, is valid—as where the defendant, in consideration that the plaintiff, a dentist, would purchase of him a quantity of mineral teeth, agreed that he would not sell



such teeth to any other person in Montpelier, the place of the plaintiff's residence and business, so long as the plaintiff should keep himself supplied therewith by purchases of the defendant. *Clark v. Crosby*, 37 Vt. 188.

**88. Duress.** An officer having attached bank bills upon a suit which was afterwards settled, refused to surrender them to the debtor except upon the debtor agreeing that he might retain a part of them, as a pretended reward for finding them. *Held*, that such agreement was compulsory and not binding; that the debtor could recover for the amount so retained; or, upon his electing to avoid the agreement, that the officer was liable as his trustee. *Lorejoy v. Lee*, 35 Vt. 430.

**89.** A person employed by another whom he has illegally imprisoned, to render services in freeing him from such imprisonment, cannot recover therefor. *Mattocks v. Owen*, 5 Vt. 42.

**90.** Where one falsely claimed that he had purchased certain property, knowing that he had not, and maliciously and without cause sued out a writ in trover for it, for the purpose of frightening and causing the owner to sell it to him, and the owner, through fear of arrest and imprisonment, such as to lead a man of ordinary firmness to be moved and controlled by it, yielded to the claim and made the sale;—*Held*, that the sale was void for duress. *Brownell v. Talcott*, 47 Vt. 248.

**91.** The defendant gave the plaintiff a note for the one-half of a debt which he was not legally holden to pay, but which the plaintiff claimed and had given value for, upon the threat of the plaintiff that, unless this was done, he would collect the whole of an execution which he held against the defendant, as a surety with others, out of the defendant's property. Judgment for plaintiff on the note. *Held*, that from these facts there was no legal inference of fraud, duress or oppression; and this not having been found by the county court as a fact, the judgment was affirmed. *Brown v. Tyler*, 16 Vt. 22.

**92.** A payment by the plaintiff of the defendant's disputed counter claim and a settlement made according to the defendant's claim, though under protest of the plaintiff, cannot be said to be by duress, because, otherwise, the defendant would have been left largely in debt to the plaintiff. *Hibbard v. Mills*, 46 Vt. 243.

**93.** The defendants, carriers, held the plaintiff's goods, which they refused to deliver without the payment of more money than they had a right to demand. The plaintiff, for the sake of obtaining his goods, paid under protest the sum demanded, and without first making a tender of the sum actually due. *Held*, that the payment was by compulsion, and that the plaintiff could recover back the sum wrong-

fully demanded. *Beckwith v. Frisbie*, 32 Vt. 559.

As to *Sunday contracts*, see SUNDAY.

## II. INTERPRETATION.

**94. General rules—Right to understand.** The language of a party to a contract must be construed as the other party had a right to understand it, or as the speaker expected the other party would understand it, and he cannot be permitted to give it a different operation in consequence of some mental reservation. *Gunnison v. Bancroft*, 11 Vt. 490. 23 Vt. 272.

**95.** It is a rule of law, no less than of morals, that what is expected by one party to a contract, and known to be so expected by the other, is to be deemed a part or condition of the contract. *Kellogg, J., in Jordan v. Dyer*, 34 Vt. 104.

**96.** Where the plaintiff asked of the defendant the extension of a license, and the defendant, not intending to accede to the request, yet designedly used such "indifferent language" as produced upon the mind of the plaintiff the impression that his request was acceded to, and he acted under that impression;—*Held*, that the defendant was bound to the same extent as if he had used express words of assent, even though the words used were susceptible of an entirely different construction. *Holton v. Goodrich*, 35 Vt. 19.

**97.** Where the defendant had an account against one of the plaintiffs and received goods of the two to apply on his account, as he understood, but not as the other plaintiff understood;—*Held*, that if from the conduct of all the parties he had good reason, as a prudent man, to understand that the goods were delivered and received to apply on such account, they must be so applied. *Lewis v. Park*, 47 Vt. 336.

**98. Contemporaneous instruments.** Several instruments executed at the same time, between the same parties, and upon the same subject matter, are to be treated as one instrument and to be construed together. *Wing v. Cooper*, 37 Vt. 178. *Raymond v. Roberts*, 2 Aik. 204. *Strong v. Barnes*, 11 Vt. 221. *Reed v. Field*, 15 Vt. 672. *Rogers v. Bancroft*, 20 Vt. 250. *Tittlemore v. Vt. Mutual F. Ins. Co.*, 20 Vt. 546. *Graham v. Stevens*, 34 Vt. 166.

**99. Nice grammar.** The great object, and indeed the only foundation of all rules of construction of contracts [as a deed], is, to come at the intention of the parties. Any rule which leads aside from this grand object, is to be disregarded—as, a nice grammatical construction, &c. *Gray v. Clark*, 11 Vt. 588.

**100.** This last is specially true, where the words of the instrument are obviously not those of a professional scrivener, but of an inexperi-

enced draftsman. *Rood v. Johnson*, 26 Vt. 64, 71.

**101. Apparent error.** Where it is perfectly apparent upon the face of a written instrument that a mere clerical error has been made, and it is also apparent from the face of the instrument what the correction should be to make it as intended, the court will correct such error by construction. *Richmond v. Woodard*, 32 Vt. 833. *Wood v. Cochrane*, 39 Vt. 544. *Goodwin v. Perkins*, 39 Vt. 598.

**102.** Thus, in the description of land in the levy of an execution, the word "northwest," as descriptive of a corner, was taken to mean "southwest." *Barnard v. Russell*, 19 Vt. 334.

**103.** This rule applied where the name of a person was inserted in the condition of a bond whose name did not elsewhere appear in it, and was not connected with the subject matter of it, in place of another name which apparently ought to have been inserted. *Richmond v. Woodard*.

**104. Operative effect.** In construing a contract, words are not to be taken in a frivolous or ineffectual sense, where a contrary exposition can be given them; and where the meaning of the language used is doubtful, or susceptible of two senses, that is to be adopted which will give effect to the instrument as a legal contract, rather than that which will render it inoperative. *Thrall v. Newell*, 19 Vt. 202.

**105. —to every part.** Agreements must be construed, if possible, so as to give effect to every part, and form from the parts a harmonious whole. Instance, *Hydeville Co. v. Eagle R. & State Co.*, 44 Vt. 395.

**106. General words, and specific.** General words in a contract, or conveyance, will be explained and controlled by more particular and specific words in the same instrument, regarding the same subject matter. Thus a conveyance was of "a certain piece of land \*\* described as follows, viz: it being two hundred shares, numbers as follows—No. one to two hundred inclusive, \$100 each share"—being stock in a manufacturing corporation. *Held*, that this was to be construed as a conveyance of stock, and not of land. *Wheelock v. Moulton*, 15 Vt. 519.

**107.** It is an ordinary rule of construction of writings, that where there is a special enumeration of particulars, and general words are also used, the general words refer to particulars of the same nature or kind as those specifically named. *Brainerd v. Peck*, 34 Vt. 496.

**108.** The words—"meaning to sell all our interest in the articles of personal property of S. & Co.," as used in a bill of sale which commenced: "Bought, &c., the following articles," and then specified the articles with the price of each—were *held* to be but words of reference,

and not to include an article not enumerated. *Hickok v. Stevens*, 18 Vt. 111.

**109.** In a contract of sale of a patent right for a certain machine, it was provided, that "if there should be any defect in said patent whereby all its privileges can not be enforced, or if there shall be any other invention so nearly like it as to materially affect the value of the same now in the patent office, or if there should be any other defect whatever, this contract to be void." *Held*, that this last general clause had reference to the same class of defects as before specified,—that they embraced defects in the patent only and not in the machine. *Vaughan v. Porter*, 16 Vt. 266.

**110. Practical construction.** Where the terms of a written contract are equivocal, resort may always be had to the circumstances under which it was executed, and the contemporaneous construction given to it by the parties, as evidence by possession, or other similar acts. *Gray v. Clark*, 11 Vt. 583.

**111.** The acts of parties in the execution of a contract are admissible, to show how the parties understood their contract, and as a practical construction of it. *Barker v. Troy & R. R. Co.*, 27 Vt. 766.

**112.** The rights of parties under a written contract,—how far determined by the practical construction of it by the parties, and their concessions. *Ib. Thompson v. Prouty*, 27 Vt. 14. *Vt. & Canada R. Co. v. Vt. Central R. Co.*, 34 Vt. 2.

**113. Instances of interpretation.** The literal import of the words of a contract—"I agree to pay, &c.,"—was *held* to be controlled by the subject matter and the relations of the parties, and to be the contract of a firm of which the plaintiff and defendant were members, and not the individual undertaking of the defendant to the plaintiff. *Hills v. Bailey*, 27 Vt. 548.

**114.** Bill of sale given as security for a debt, —interpreted by reference to its purpose. *Durkee v. Leland*, 4 Vt. 612.

**115.** An ambiguous written contract,—doubtfully construed. *Foot v. Mazhams*, 9 Vt. 223.

**116.** A, by deed, granted to B the right of procuring marble from A's land. *Held*, that A had no right to the small pieces of marble broken off in reducing the blocks to size and shape for sawing. *Rice v. Ferris*, 2 Vt. 62.

**117. Particular terms.** Certain stoves, delivered upon a contract payable in "good cooking stoves at the furnace price" (the vendor not being a manufacturer), fell to pieces on putting fire in them, from some latent defect. *Held*, that the words did not amount to a warranty of quality, and that no warranty was implied;—that no definite quality can be intended by the term *good*, and that the language imports nothing but opinion. *Barrett v. Hall*, 1 Aik. 269.

118. On a sale of pork, with a stipulation that the seller should be "accountable for the quality and weight of the pork only;"—*Held*, that he was accountable if the pork was not salted according to the usual custom. *Adams v. Simple*, Brayt. 237.

119. Where a party binds himself "to execute and deliver a good and valid deed of lands, with the usual covenants of seisin and warranty," and he afterwards conveys the title which he had to another, he has broken his contract and the other party may sue for the breach, or may treat the contract as rescinded. *Stor v. Stevens*, 7 Vt. 27.

120. The words, "shall make and well execute a good, authentic deed," relate merely to the validity and sufficiency of the deed, in point of law, to convey whatever right the grantor then had in the premises, and do not refer to the title to be conveyed. *Preston v. Whitcomb*, 11 Vt. 47. *Redfield, J.*, dissenting.

121. The words, "to give a good warranty deed," are descriptive of the kind of deed to be given, and not of the title, and are satisfied by the giving of such a deed, though there be an outstanding mortgage. *Joslyn v. Taylor*, 33 Vt. 470.

122. But a contract "to convey by a deed of conveyance a tract of land," is a contract not merely to give a deed, but to convey the land and give title. *Lawrence v. Dole*, 11 Vt. 549. 33 Vt. 474.

123. An attorney agreed not to charge his client for any costs, except officer's fees on uncollected demands. One demand was satisfied by a levy upon lands. *Held*, that this was a demand collected; and as the whole pay, including the costs, had gone to the client, he must pay such costs to the attorney. *Davis v. Downer*, 10 Vt. 529.

124. The defendant induced the plaintiff to take in trade a note which he represented to be "perfectly good." *Held*, that this was tantamount to saying that the maker was amply responsible. *Weeks v. Benton*, 7 Vt. 67.

125. Ch. 34 of the acts of 1824 enacted, that "the standard weight of rye and Indian corn shall be fifty-six pounds, nett, to the bushel." *Held*, that this defined the import of the term bushel; and that a contract for the delivery of 100 "bushels" of corn was satisfied by the delivery of 56 hundred pounds of corn, though measuring less than 100 Winchester bushels. *Richardson v. Spafford*, 13 Vt. 245.

126. A contract to pay "in leather" implies that it shall be of merchantable quality. If condemned and stamped by the leather sealer as "bad," this is evidence that it was not such as to satisfy the contract. *Elkins v. Parkhurst*, 17 Vt. 105.

127. An agreement being that a lessee should give "sufficient" security for the rent;—*Held*,

that if the security offered was in fact adequate, it might be either personal or real security; and that it was no legal objection to the real security offered, that there was a previous mortgage upon it. *Hard v. Brown*, 18 Vt. 87.

128. In the sale of lamp oil the warranty was, that the oil should "stand the climate of Vermont without chilling." *Held*, that the proper construction of the warranty was, that the oil would not chill when employed in Vermont in any of the ordinary uses in which lamp oil is employed, and in the manner in which, in business, lamp oil is required to be used. *Hart v. Hammett*, 18 Vt. 127.

129. A contract for the delivery of "good coarse salt" is answered by the delivery of coarse salt, as good, in fact, and not in reputation merely, for all the uses to which salt is ordinarily applied, as a medium of the kinds of coarse salt then known and used in the vicinity. If inferior in kind, or not a good article of the kind, the contract is not answered. *Goss v. Turner*, 21 Vt. 437.

130. A note payable in "half-blooded merino wool," is not answered by the delivery of wool of which a part does not fairly and reasonably answer the quality and fineness of half-blooded merino, and of an equal amount of finer and better quality, so as to make the average equal to half-blooded merino. All the wool must be of the quality contracted to be paid. *Perry v. Smith*, 22 Vt. 301.

131. An order drawn for "37.89" was held to be intelligible and to express the currency of the U. S. dollars and cents. *Northrop v. Sanborn*, 22 Vt. 433.

132. The plaintiff contracted to do certain work, "rip-rap, at 50 cents per cubic yard." In the absence of proof of any general usage or uniform custom to determine the mode of measurement;—*Held*, that the measurement of the work should be of the stone as fitted and laid into the wall—the rip-rap wall—and not the excavation, or stone before being broken. *Wood v. Vt. Central R. Co.*, 24 Vt. 608.

133. In a written contract for finishing a house, the stipulation was: "The work to be done in the best style and design of the present time, and adapted to such a house and its several parts, and in as good a style, and workmanship, and finish, as any in Burlington, Vt." *Held*, that this limited the *expensiveness* of the styles, designs, or patterns, of the finish to the style, and workmanship, and finish of the best houses in Burlington. *Herrick v. Noble*, 27 Vt. 1.

134. A conveyance of "all one's personal property of every name and nature," was held to convey the grantor's choses in action. *Sherman v. Dodge*, 28 Vt. 26.

135. The plaintiff contracted with the defendant to manufacture for him 100 straw-cutters—the defendant "to furnish the castings."

*Held*, that the defendant was bound to furnish the iron castings finished and fitted to the use intended, and not simply as they came from the foundry. *Allen v. Thrall*, 36 Vt. 711.

136. The plaintiff's son conducted the business of a small store of the plaintiff, under an agreement that the son should have a "support" for himself and family out of the business. Both took goods from the store as they wanted for family use, and no account was kept of them. While the son was thus in the store, the defendant, a physician, doctored the son's wife, under an agreement with him that the defendant would take his pay therefor out of the store, and goods were so delivered from time to time as the services were rendered. These services were necessary, and the son had no means of payment except from the store. The goods were charged on the store books, and, two or three days after the son left the store, he credited the defendant for his services, on the books. The plaintiff erased the credit and brought suit for the goods. *Held*, that he could not recover;—that the defendant's services fell under the denomination of *support* of the family, &c. *Morse v. Powers*, 45 Vt. 300.

137. The defendant had contracted to do a certain job of work for a third person by a certain time, to be paid for "when completed." He stated over this contract to the plaintiff, and purchased goods of him, to be paid for when the defendant should complete the job and get his pay. *Held*, that the plaintiff was entitled to sue for the goods, whenever the time had elapsed in which the job was, by the contract, to be completed and paid for, though not then completed, nor paid for. *Dana v. Mason*, 4 Vt. 308.

138. The defendant's agreement to give a note, "to be approved" by the plaintiff, was *held* to mean a note with a surety, or some security beyond that of the defendant alone. *Hale v. Jones*, 48 Vt. 227.

139. **Other instances.** The defendant gave C a bond conditioned to support him during his natural life, and [or] to furnish him food, apparel, &c., until the sum of \$1,700, received of C, and the interest accruing thereon, should be so expended. C died before the full expenditure of the \$1,700. *Held*, by construing several instruments together, that the condition of the bond was fully performed, and that the defendant was not liable to C's administrator for the unexpended balance. *Washburn v. Titus*, 10 Vt. 306.

140. Sept. 30, 1839, the defendant leased to the plaintiff certain lands for the life of the defendant, with a proviso that if the defendant should sell the premises, the lease should be void from and after the first day of October next after the sale,—the plaintiff covenanting to pay \$130 on the day of the date of the lease,

\$130 Oct. 1, 1841, and a like sum annually thereafter, and to surrender possession on the first day of October after the sale. The plaintiff, on the day of the execution of the lease, paid the \$130, and afterwards, on the same day, the defendant conveyed the premises to a third person who took possession, and the plaintiff never went into possession. *Held*, that the \$130 paid was the compensation for the first year's enjoyment, paid in advance, and that the plaintiff could recover the same, in an action for money had and received, as for a failure of consideration. *Weeks v. Hunt*, 13 Vt. 144.

141. Under an agreement between tenants in common of a mill, that each should occupy in severalty for certain successive periods of time, and that each should make all repairs upon the mill necessary to be made during his term of occupancy, not exceeding three dollars in amount, and that all repairs exceeding that amount should be at their joint expense, in proportion to their respective interests in the mill;—*Held*, that all necessary repairs made at any *one time*, not exceeding three dollars in amount, were to be at the sole expense of the tenant then occupying; but if the repairs made at *one time* exceeded three dollars, then the *whole* sum was to be a joint charge. *Kidder v. Rixford*, 16 Vt. 169.

142. In March, 1846, by written contract, the plaintiff bargained to purchase of the defendant, at a certain price per thousand feet, a quantity of timber then lying on the banks of a river, which the parties expected could be floated off to market by the rise of water of that spring—the quantity to be ascertained by the survey of certain persons agreed upon: and, as soon as surveyed, the plaintiff to furnish the defendant "a promissory note of hand," signed, &c., for the amount, &c., payable one-half by July 15, next, and one-half by Oct. 15, next—with interest after July 15, next; said notes to be payable at some bank in Boston, if the defendant desires. It was further agreed, that if the timber could not be got afloat that spring, &c., the defendant was to delay payment and interest until after it could be got afloat. After the measurement and ascertaining the price, the plaintiff offered to execute the notes therefor, embodying therein the conditions of the contract as to delay of payment and interest, but refused to execute unconditional, negotiable notes payable in Boston, as the defendant required. *Held*, that the plaintiff was bound by the contract to furnish notes absolute and negotiable, payable by the days named in the contract, and that for want of performance on his part he could not maintain trover against the defendant for his appropriation of the timber. *Scott v. Morse*, 22 Vt. 466.

143. F and H entered into a written con-

tract, signed by both, as follows: "In consideration of 36 shares in the Vermont Central Railroad Co., to be delivered to me by F, on or before the first day of July next, I do hereby agree to sell to said F my twelve shares in the East Bethel Factory," &c. In an action by F against H for his refusal to convey the factory stock, &c.;—*Held*, that this was not a mere giving of a "refusal" of the factory stock, &c.; that the contract was on good consideration, and bound the plaintiff to convey the railroad stock, and the defendant the factory stock, &c. *Faulkner v. Hebard*, 26 Vt. 452.

144. The defendant, in consideration of \$500 paid him by the plaintiff, agreed to go to California and labor there until 1851, and as much of that year as could be used and give him reasonable time to reach home by the first of December of that year, and *there* equally divide with the plaintiff the entire avails of the expedition. *Held*, that this contract did not entitle the defendant to retain from the avails the expenses of his journey home, where he prolonged his stay until after December 1st; but that the time to which he was bound to make a division of his earnings, was only such a time previous to December 1st as would afford him reasonable time thereafter to reach home by that day. *Thompson v. Prouty*, 27 Vt. 14.

145. The parties had entered into a written contract for the sale of a farm, with other stipulations as to the fodder, &c., which writing was left with the plaintiff, and he lost it. Upon completing the trade and deeding the farm, the parties disagreed as to the terms of the writing, when the plaintiff before delivering the land gave the defendant another writing, agreeing to produce the lost writing, or to take the defendant's recollection and construction of it. On trial of an action involving the terms of the first writing, the plaintiff could not produce it, and the parties disagreed in their testimony as to its terms. *Held*, that the defendant's recollection and construction should be taken, for it was so agreed. *Carpenter v. French*, 28 Vt. 796.

146. A contract for drawing timber and loading it upon railroad cars provided, that "the whole job shall be finished by the 15th day of March next; the timber to be loaded on the cars at such time as the said S (the defendant) shall direct after said timber shall be drawn, provided the cars shall be furnished by the railroad company." The defendant tried but failed to get cars from the railroad company until after March 15th. *Held*, that the true meaning of the contract was, that the drawing and carrying of the timber should be fully completed on the 15th of March, and that the plaintiff (the contractor) was not bound after that to load the timber. *Chamberlin v. Scott*, 33 Vt. 80.

147. In a contract for the furnishing of a monument [as by a parent for a deceased child], the directions given as to quality, inscription, &c., should, for special reasons, be literally and exactly followed. *Viall v. Hubbard*, 37 Vt. 114.

148. By the contract the plaintiff was to furnish for the defendant a monument of "good white marble," with the name "Octavia Jane" inscribed upon the shield. He did furnish a monument of which the material was "good white marble," but it had a discoloration or stain on it, across which a part of the inscription was wrought, which stain had gotten upon it by some accident, was temporary, and by lapse of time and exposure to the open air and frost would disappear. The name inscribed upon the shield was "Octavia J.," because there was not room to insert the full name upon the shield without putting one name above the other, and the plaintiff in good faith believed it would look better and be more satisfactory to inscribe it as he did. *Held*, that each of these was a substantial defect; that the contract was not complied with, and the defendant not bound to receive the monument. *Ib.*

149. The plaintiffs purchased of one Reynolds a canal boat, taking a bill of sale thereof, with this stipulation added: "I further agree that there is no incumbrance on said boat, except what is held by P. E. Haven, and about \$25 to William Cain on her sails; and I agree to pay said Cain and clear said sails from said Cain's incumbrance as soon as practicable"; and at the same time the defendant wrote and signed upon the back of the instrument the following: "I guarantee that said Reynolds shall clear said canal boat from said William Cain's claim on said sails as he has within agreed." All parties supposed at the time that Cain's claim was but \$25. It was in fact \$70, and was a lien and charge as well on the boat as the sails. In an action upon the guaranty;—*Held*, that the words "about \$25" were words of description to identify the claim and not of limitation, and that the guaranty bound the defendant to pay the whole of Cain's claim, which was a charge upon the sails, although it was at the same time a charge upon the boat. *Brown v. Haven*, 37 Vt. 439.

150. The plaintiff contracted to furnish lumber for the building of the defendant's house, as fast as the builders should want it. The plaintiff was dependent upon the mills in the vicinity for the supply of the lumber promised, and this was understood (*i. e.*, expected) by both parties at the time of the contract. From a failure of the mills through a drought, the plaintiff was unable to procure the lumber from the mills as fast as wanted by the builders. *Held*, that as the plaintiff was not limited by the contract to the product of

these mills, his contract was broken. *Eddy v. Clement*, 38 Vt. 486.

151. In a contract of sale by Mrs. Strong of standing timber and wood was this provision: "Said timber land is situated on the easterly part of Mrs. Strong's Bald Mountain lot, so-called; and said Davis is to cut and draw the same in and by the 31st of May, 1861, and to cut and pile the brush in a reasonable and prudent manner; said Davis to have the right of way through Mrs. Strong's said land on Bald Mountain for this purpose, and to prepare and make a road thereon." *Held*, that under this contract Davis, in order to perfect his title, was bound to draw the wood and timber, not merely from the particular locality on which it was cut, but to remove it entirely from the Bald Mountain lot, within the time specified; and that such timber as was removed from the place where cut down into a pasture on Mrs. Strong's Bald Mountain lot, and there left until after the expiration of the time named, was her property. *Strong v. Eddy*, 40 Vt. 547.

152. The defendant took a patent sugar evaporator of the plaintiff on trial;—if he "liked it" he was to pay for it; if he did not "like it" the plaintiff was to take it back. *Held*, that the defendant was required to bring to the trial of the article honesty of purpose and judgment according to his capacity, to ascertain his own wishes; and that this was sufficient, though falling short of the care and skill of ordinary persons in making such determination. *Hartford, &c., Co. v. Brush*, 43 Vt. 528.

153. The plaintiff effected a sale of real estate for the defendant, for an agreed percentage upon the price to be obtained on the sale. He sold the property for \$22,000, and took in part payment certain other lots at the price of \$7,325, with consent of the defendant, which lots were actually worth, as found by the auditor, but \$4,220. On the question whether the plaintiff was entitled to the agreed percentage upon the whole sum of \$22,000;—*Held*, that the percentage was to be computed upon the real, and not a fictitious, price of the property sold; but if the parties to the contract, or the plaintiff and defendant, judged the lots taken in payment to be worth the price at which they were taken, the price was not fictitious; and the mere fact that they were worth less, in the absence of any finding that the parties judged them to be worth less, could not have the effect to diminish the plaintiff's commissions. *Wakefield v. Merrick*, 38 Vt. 82.

154. Construction of a particular contract for the delivery of marble at a certain price per cubic foot, but variable in future years according to certain yearly price-lists of the trade. *Parker v. Adams*, 47 Vt. 139.

155. **Usage.** The usage of business in the

vicinity may be received in evidence, to show where the liability of a common carrier, or wharfinger, commences, and where it ceases. *Blin v. Mayo*, 10 Vt. 56. *Farm. & Mech. Bank v. Champlain Tr. Co.*, 16 Vt. 52, 62. *S. C.*, 18 Vt. 131. 23 Vt. 186.

156. The defendants, common carriers on Lake Champlain, received of the plaintiff a package of bank bills to carry from Burlington to Plattsburgh, directed to the cashier of the bank at Plattsburgh, and delivered the same to the wharfinger of the wharf at Plattsburgh (at which their boat touched), to carry to the bank. The package was stolen from the wharfinger and never reached the bank. In an action against the defendants as common carriers;—*Held*, that it was competent for the defendants to prove that it was the uniform usage of the defendants' business, in such cases, to deliver such packages to the wharfinger for him to carry to the bank, without their giving any notice to the consignee,—and that this usage was well known to the plaintiffs. *Farm. & Mech. Bank v. Champlain Tr. Co.*, 16 Vt. 52.

157. *Held*, that evidence of such usage was admissible in defense, although not known to the plaintiffs. *S. C.*, 18 Vt. 131. *Bennett, J.*, dissenting.

158. Under a contract for the building of railroad bridges, which was silent as to the time and place of payment;—*Held*, that the usage of the company, to pay monthly on the estimates, having been adopted in reference to the contractors, this usage became the rule of payment binding upon the parties by mutual consent. *Boody v. Rut. & Bur. R. Co. (U. S. C. C.)*, 24 Vt. 660.

159. The words on a merchant's bill of sale of merchandise, "six per cent off for cash," were held so equivocal, as to allow proof of how those words, as so used, were understood by usage of the trade;—as meaning a sale upon six months' credit. *Linsley v. Lovely*, 26 Vt. 123.

160. The particular usage of the defendant to deduct, from the weight of iron he purchased, so much as, on trial, was found unsuitable for use, was held not to avail him in an action for the price, where it did not appear that the plaintiff had knowledge of such usage, and no such general usage was shown. *Stevens v. Smith*, 21 Vt. 90.

161. A sale "for cash" implies that there is no term of credit, and any pretence of usage or custom to call a sale on 30 days' indulgence, or other term of time, a sale for cash, or without credit, is absurd. *Chapman v. Devereux*, 32 Vt. 616. *Bliss v. Arnold*, 8 Vt. 252. *Catlin v. Smith*, 24 Vt. 85. *Jackson v. Bissonette*, 24 Vt. 611.

162. **Law of place.** It is a well settled rule in regard to the construction of contracts,

that their validity and extension, as well as performance or release, must be determined by the law of the place of contract; while the mode of trial, by which is meant the form of pleading, the quality and degree of evidence, and the mode of redress, must always be determined by the law of the place of trial. *Harrison v. Edwards*, 12 Vt. 648. 26 Vt. 704.

163. — **as to interest.** All the incidents pertaining to the validity and construction, and especially to the discharge, performance or satisfaction of contracts, and the rule of damages for failure to perform will be governed by the *lex loci contractus*, which is, generally, the place of performance. This governs the rate of interest, whether stipulated, or given by way of damages. *Peck v. Mayo*, 14 Vt. 38.

164. — **rate of exchange.** Upon notes and drafts drawn in this State and payable in New York, the current rate of exchange, as customary and legal in that State, was allowed in making up the judgment. *Farmers' Bank v. Birchard*, 33 Vt. 346.

165. — **partnership.** The extent of the powers of a copartnership or of one of its members to bind the firm, and the liability of the members must be determined by the law of the place where it was formed and had its place of business, although the transaction in question was had in another State. *Cutler v. Thomas*, 25 Vt. 73. *Hastings v. Hopkinson*, 28 Vt. 108.

166. **Other instances.** The parties being residents of Lower Canada, the defendant conveyed to the plaintiff land there situate "in payment" of his certain notes to the plaintiff, the plaintiff agreeing in writing to re-deed upon the payment of the sum then due on the notes, with interest thereon, at the end of two years,—the plaintiff retaining the notes and the defendant remaining in possession of the land. In an action in this State upon one of the notes;—*Held*, that the law of Canada must govern, and that by that law the deed would be treated as an absolute conveyance in payment of the debt, with right of repurchase.—Some account given of Canadian law. *Baxter v. Willey*, 9 Vt. 276.

167. The defendant, resident in this State, by letter to the plaintiff, resident in Rhode Island, ordered, as a purchaser, lottery tickets to be sent him by mail for sale in this State. The sale of such tickets was lawful in Rhode Island, but was prohibited by statute of this State. The plaintiff was ignorant of such prohibition. *Held*, that the plaintiff could recover the price of the tickets. *Cuse v. Riker*, 10 Vt. 482.

168. In an action by a resident of this State against a railway company, for neglect in seasonably forwarding, from this State into Massachusetts, slaughtered calves less than four weeks old, whereby the meat became damaged;—*Held* to be no defense, that the sale of such ar-

ticles was a violation of a sanitary statute of that State, there being no evidence or presumption that the plaintiff had knowledge of such statute;—that such fact affected only the question of damages, so far as it went to diminish the actual or salable value of the property. *Mann v. Birchard*, 40 Vt. 326.

169. **Conditions—Full performance.** The defendant agreed to share in the expenses of a pending suit, if the case should pass to and be tried in the higher court. The case did not pass to the higher court, for the reason that the judgment in the lower court was necessarily final. *Held*, that the condition precedent had failed, and the defendant was not liable. *Penfield v. Fillmore*, Brayt. 43.

170. The plaintiff contracted with the defendant to lay certain floors of a building,—the boards to be furnished by the defendant,—and worked for a time, and then abandoned the job for the reason that the defendant failed to furnish the boards when needed. *Held*, that the furnishing of the boards was a condition precedent to the performance on the part of the plaintiff; that, as the defendant had equal means of knowing when the boards would be needed, no special demand was necessary; and that the plaintiff could recover for the work done. *Hill v. Hovey*, 26 Vt. 109.

171. Although a contract is in one sense entire—that is, full performance by the promisor is the consideration of the contract—yet, if it contains neither expressly nor by strong implication, a condition of full performance precedent to any right of claim for pay, and is of a uniform nature and thus capable of just apportionment, the court will consider the promises independent and apportionable, and allow a recovery for part performance, subject to the deduction of whatever damages the party entitled to claim full performance may have sustained. The opposite rule, of forfeiture of all claim of payment for want of full performance, has not in this State been extended to any class of contracts except that of persons hired for a definite term. *Redfield, J.*, in *Booth v. Tyson*, 15 Vt. 515.

172. Where from the nature of the transaction, forbearance to do a certain act, on the one part, is necessary in order to render performance of a stipulation, on the other part, of any avail, such forbearance though not expressly mentioned must be considered a condition precedent. *Wier v. Church*, N. Chip. 95.

173. Where the plaintiff sold the defendant property to be paid for in sawing at the defendant's mill;—*Held*, that the plaintiff could not recover without first affording the defendant an opportunity to perform his contract, by drawing the logs to the mill,—the defendant not having refused to perform it. *Downer v. Frizzle*, 10 Vt. 541.

174. Where by the contract payment was to be made in leather, such as the plaintiff should select at a tannery specified, but no definite time for such payment was stipulated;—*Held*, that a demand, with a designation of the kind of leather selected by the plaintiff, was an indispensable pre-requisite to a right of action. Had the contract fixed a time of payment, the case might have been different. *Russell v. Ormsbee*, 10 Vt. 274. See *Peck v. Hubbard*, 11 Vt. 612.

175. Under a contract, whose consideration was executory, that the defendant would get and deliver, during a period named and at a specified price per thousand feet, a certain amount of spruce lumber, "the lumber to be sawed into boards and such timber as said W [the plaintiff] may order, not over 20 feet [in length]";—*Held*, that the plaintiff, not having given notice of what kind of lumber and what quantity of each he required under the contract, could not recover for a non-delivery. By *Prout, J.*—If this were an obligation for the payment of a debt, as in *Peck v. Hubbard*, the case might be different. *Welch v. Bradley*, 41 Vt. 308.

176. A provision in a contract for work, that no claim shall be made or allowed for extra work, "unless the same shall have been done in pursuance of written contracts or orders signed by the engineer," and that claims therefor shall be presented for settlement within a given time, will bar a recovery for extra work, unless such provisions be complied with. *Vanderwerker v. Vt. Central R. Co.* 27 Vt. 130.

177. A contracted with B to furnish materials and repair a house for B, and complete the whole by a day named, and B agreed to pay a certain sum therefor "when the job is completed." A partially performed, when he was sued and B was summoned as his trustee, whereupon A abandoned the work without fault of B, and against his consent. *Held*, that the contract was entire, full performance by A being a condition precedent to the payment; and that as A could not recover a *pro rata* compensation for the work done, B was not liable as trustee. *Kettle v. Harvey*, 21 Vt. 301. 24 Vt. 515. 33 Vt. 39.

178. Where the plaintiff under a contract delivered to the defendant palm-leaf to be manufactured into hats of a specific description, which the plaintiff agreed to receive at a certain price per dozen;—*Held*, in an action on book to recover the price of the palm-leaf, and certain cash advanced, that the plaintiff was not obliged to receive a less quantity of hats than was stipulated in the contract, nor to select, out of a larger number, sufficient at the stipulated prices to pay for the cash and palm-leaf delivered. *Rogers v. Miller*, 15 Vt. 431.

179. The plaintiff agreed to let the defendant put 100 sheep into his pasture, for the season,

at 50 cts per head, and if his pasture should prove insufficient he would arrange with his father to open his pasture to the sheep. The defendant was to have the oversight and care of the sheep. The plaintiff did every thing he agreed to do. The pastures were not sufficient to keep the sheep well, and for this reason the sheep were lessened in value more than the price stipulated. The defendant took away the sheep, for this reason, before the season of pasturing was ended. *Held*, that the plaintiff could recover the full contract price, having fully performed his contract. *Chesley v. Mathewson*, 40 Vt. 197.

180. Where the defendant contracted to deliver thirty tons of starch per year for two years;—*Held*, that an action lay, after the expiration of the first year, for a breach of that part of the contract which was to be performed during the first year. *Mizer v. Williams*, 17 Vt. 457.

181. The plaintiff voluntarily, and without cause, abandoned his contract to build a house for the defendant, and refused to finish it, but sued to recover the contract price. The cause being referred, the defendant presented in offset his claim for labor and expense in completing the job and for other damages for non-completion by the plaintiff, all which the referee allowed, and allowed to the plaintiff the balance of the whole contract price. *Held* correct, for that thereby the defendant received an equivalent for full performance,—although, probably, the plaintiff could not have recovered any thing had the defendant done nothing more with him about it. *Austin v. Austin*, 47 Vt. 311.

182. A contract to deliver 100 cords of wood at \$4.75 a cord, by a day named, was *held* to be entire and not divisible, and that payment was not demandable for the wood as delivered from time to time, but only on full delivery. *Brandon Mfg. Co. v. Morse*, 48 Vt. 322.

183. —dependent, or independent. Where there are mutual and divers covenants between parties, to be performed alternately, or at different times, they are considered independent, and the plaintiff need not aver performance on his part; otherwise, if all the plaintiff's covenants were to have been performed before performance by the defendant. *Gallup v. Burnell*, Brayt. 191.

184. Where parties are to perform concurrent acts, and the plaintiff's act forms the basis or consideration of the defendant's act, the defendant may always excuse himself from performance by the failure of the plaintiff. *Lawrence v. Dole*, 11 Vt. 549. But where the defendant's act rests upon an independent consideration, he cannot excuse himself by showing a failure of the plaintiff to perform. *Day v. Essex Co. Bank*, 13 Vt. 97.



185. In the case of a mutual contract, where the one promise is the entire consideration of the other, and the acts to be performed are concurrent—as for a sale or exchange of property on each side—neither party is obliged to convey absolutely, if the other declines conveying on his part; but the party claiming damages for breach of the contract must show, either a readiness and offer to perform on his part, or else that he was excused therefrom by the consent or conduct of the other party; and this will be sufficient. *Faulkner v. Hebard*, 26 Vt. 452.

186. Courts will never construe a contract so as to make its stipulations conditions precedent, where such construction would work a hardship, unless clearly so expressed; but will rather construe such stipulations as independent agreements. *Taylor v. Gallup*, 8 Vt. 340.

187. Where A by his bond covenanted to pay B a certain account, the amount to be settled and adjusted by C, and to be paid in one year from the date of the bond;—*Held*, that it was not a condition precedent that B should procure the adjustment by C within the year, but if so adjusted after the expiration of the year, but before suit brought, an action would lie upon the bond. *Id.*

188. The plaintiff held and claimed to be owner of a note made by the defendant, and payable to A or bearer, and had a suit pending thereon against the defendant. The defendant held a note against A. The plaintiff promised the defendant that if he would give a new note for the one in suit he (the plaintiff) would show the defendant property of A sufficient to satisfy the note against A. Thereupon the defendant gave the plaintiff a new note for the one in suit, and the suit was dropped. In an action upon the new note;—*Held*, that the failure of the plaintiff to show the defendant property of A whereon to secure the note against A, was no defense; that the surrender of the former note and the settlement of the suit was a sufficient consideration for the new note; that the note and the undertaking of the plaintiff, although mutual, were independent contracts or promises, and that each party had a remedy on the promise in his favor, without performing his part of the contract. *Plumb v. Niles*, 34 Vt. 230.

189. The defendant contracted to convey on his boat two loads of wood for the plaintiff to Port Henry, at a specified price per cord; and it was agreed that if the defendant could not get out of the creek, where the wood lay, with a full load, the plaintiff was to complete the load at a certain wharf. *Held*, that the failure of the plaintiff to complete the first load at the wharf, whereby the defendant was compelled to sail to Port Henry with only two-thirds of a

load, did not absolve the defendant from his obligation to go after the second load, but that he should have done all in his power to perform the full contract on his part, and if the plaintiff failed on his part, the defendant would have his remedy in damages. (1.) The plaintiff's engagement did not go to the whole consideration or matter to be done by the defendant. (2.) The plaintiff's performance in regard to each load was to be subsequent in time to that of the defendant, and hence could not be a condition precedent, to the defendant's liability. *Keenan v. Brown*, 21 Vt. 86.

190. Under an agreement to account for certain notes after certain costs of a suit were paid, it was *held*, that payment of the costs was not a condition precedent to the maintenance of an action for an account, but that the agreement only gave an authority to retain to an amount equal to such costs, or to adjust the amount in the action. *Woodward v. Harlow*, 28 Vt. 338.

191. An action will lie upon a note payable at a fixed time in specific articles "to be delivered at any place in L where the payee should elect," without averring or proving any election of the place of delivery. This election is not a condition precedent, but a mere privilege, which is waived by not being seasonably made, and passes the election to the maker, who in such case could elect his own place of payment [in L] and notify the payee, and a tender at such place would be good. *Peck v. Hubbard*, 11 Vt. 612. See *Russel v. Ormsbee*, 10 Vt. 274. *Welch v. Bradley*, 41 Vt. 309.

192. The dependence or independence of covenants depends upon the good sense and meaning of the contract, and their precedence upon the order of time in which the intent of the transaction requires their performance, rather than from the arrangement of the covenants, or the structure of the instrument. *Kettle v. Harvey*, 21 Vt. 301.

193. The defendant made an assignment to the plaintiff, absolute in terms, of a lease, and at the same time gave a separate writing agreeing to surrender possession by a future day named, and the plaintiff at the same time gave the defendant a writing agreeing to pay certain arrearages of rent then due to the lessor, and a further sum at a future day named. The plaintiff neglected to make the stipulated payments, and the defendant refused to surrender possession by the time fixed. *Held*, that the defendant was liable in ejectment;—that the lease was a contract executed, and not dependent upon the contemporaneous executory agreement as to payment. *Strong v. Garfield*, 10 Vt. 497.

194. The defendant had attached the plaintiff's property upon a writ against a third person, and the plaintiff had sued the attaching officer therefor. The parties then entered into

mutual covenants, that the plaintiff should discontinue his suit, and, in consideration thereof, that the defendant should pay the plaintiff the full value of the property attached, to be appraised by certain persons named, by a day named. The plaintiff discontinued his suit, and the defendant then prevented the making of the appraisal. *Held*, that the covenants were not dependent upon the appraisal to be made; that this was but an incidental provision in the agreement, designed to facilitate its execution on the part of the defendant; and that the plaintiff could sue and recover upon the defendant's covenant to pay, and make proof in court of the value of the property. *Smith v. Edmunds*, 16 Vt. 687.

195. The defendant sold the plaintiff eight stoves for \$200 and received payment. He delivered six of them, and gave a bill of sale stating that "six are now delivered, and the other two to be delivered at Hyde Park in two months from date, and if the eight are not sold in one year from date, I am to take back two of them and pay \$50 and interest." The two stoves not having been delivered as agreed, the plaintiff sued and got judgment therefor and collected his damages, \$55. At the end of the year, the plaintiff having been unable to sell three of the six stoves delivered, gave the defendant notice thereof, and that two of them were ready for him at the place named, and demanded the payment of the \$50, and interest. In an action therefor;—*Held*, that the plaintiff was entitled to recover that sum; that the two stipulations of the defendant were entirely distinct; and that a satisfaction paid for breach of the first was not a satisfaction of the second, which was, in effect, a contract for rescission as to two of the stoves, if unsold at the end of the year. *Sawyer v. McIntyre*, 18 Vt. 27.

196. The plaintiff covenanted to deliver certain quantities of coal before certain specified dates, and the defendant covenanted to pay "for the above-named coal" a certain price per hundred bushels, "to be paid the first of each month for all delivered." *Held*, that the defendant's covenant was not independent, but only bound him to pay monthly, on condition that the plaintiff had delivered the coal according to the contract. *Lawrence v. Davey*, 28 Vt. 264.

#### 197. Penalty—Liquidated damages.

(1.) Where there is any reasonable doubt upon the face of a written contract how the parties intended a sum named therein, whether as a penalty or as liquidated damages, it will be construed as a penalty merely. (2.) It is a settled general rule, that where the sum is named as a penalty, and there is no stipulation that it shall be regarded as liquidated damages, it can only be regarded as a penalty. It would require very strong evidence to authorize the court to

say that the words of the parties do not express their own intention. *Held* to be a penalty, where so expressed in a bond, given on the sale of property and the good will of a business, conditioned that the obligor should refrain from prosecuting the same business. *Smith v. Wainwright*, 24 Vt. 97. See *Whitcomb v. Preston*, 13 Vt. 58.

198. **Whether joint, or several.** Separate considerations proceeding from two covenantees, and separate interests to be received by them, do not make a covenant, in terms joint, a several covenant. Distinctive words, qualifying the covenant, such as to them *respectively*, or to them *and each of them*, are necessary to make the covenant several. *Catlin v. Barnard*, 1 Aik. 9. But see *Sharp v. Conklin*, 16 Vt. 355.

199. The several defendants executed to the plaintiff a writing, in terms, "we hereby agree to indemnify E M (the plaintiff) for all damages and costs," &c., "by reason of his having become bail," &c. To each signature there was indicated a certain sum, as, "\$10.00," "\$5.00," &c. *Held*, that, as the contract was joint in its terms and object, and the subject matter was entire, it was not made several by the sums set against the signatures, which might indicate the rate of contribution among the defendants. *McCullis v. Thurston*, 27 Vt. 596.

200. Several persons, not partners, were jointly indebted to K, and three of them (the defendants) gave to the others (the plaintiffs) a writing requesting them to pay K, concluding, "and we will settle with you for our share." The plaintiffs paid K, and brought their action declaring upon this as a joint promise, alleging that the defendants' share was a certain named sum. *Held*, on demurrer, that the promise was joint, that it was upon good consideration, and that it was not necessary to aver that any balance had been agreed upon as the defendants' share. *Scott v. Keith*, 32 Vt. 246.

### III. MODIFICATION ;— RESCISSION ;— POWER TO STOP PERFORMANCE.

201. **Modification.** A contract cannot be altered except by another contract of equal force. Thus, a bond cannot be altered or superseded by, or merged in, an oral agreement merely. *Patrick v. Adams*, 29 Vt. 376.

202. Where a contract under seal is subsequently altered by the parties by a writing not under seal, or by a verbal agreement, the whole becomes a simple contract, and the rights, liabilities and remedies of the parties are thereafter to be determined by the rules applicable to all simple contracts. *Briggs v. Vt. Central R. Co.*, 31 Vt. 211. 45 Vt. 433.

203. A subsisting sealed contract becomes reduced to a simple contract by a subsequent parol agreement modifying it;—as, by a subse-

quent written agreement engrafted upon it. In such case the remedy is assumpsit, and not covenant. *Hydeville Co. v. Eagle R. & Slate Co.*, 44 Vt. 895. *Sherwin v. Rut. & Bur. R. Co.*, 24 Vt. 347.

204. Where the plaintiff had covenanted under seal to deliver certain quantities of coal by certain specified times, and had delivered part, but not according to his covenant either as to time or quantity, and the defendant then agreed by parol that if the plaintiff would continue to deliver the coal the defendant would take no advantage of the contract, but would pay for all the coal then or thereafter to be delivered, irrespective of the contract;—*Held*, that the plaintiff could recover in assumpsit for all the coal then or thereafter delivered. *Lawrence v. Davey*, 28 Vt. 264.

205. A simple contract reduced to writing may be varied or changed, in any way, by a subsequent verbal agreement. *Flanders v. Fay*, 40 Vt. 316. *Sherwin v. Rut. & Bur. R. Co.*, 24 Vt. 347.

206. *Aliter*, as to contracts under seal, which cannot be varied by a mere parol contract, whether in writing or not; since such a contract is inferior to the original. *Sherwin v. Rut. & Bur. R. Co.*

207. In regard to all written contracts, where alterations are made without writing, the substituted agreement all virtually rests on mere oral evidence, and an action must be predicated upon the altered contract; and if the original contract is set forth, it is merely as inducement. *Id. Dana v. Hancock*, 30 Vt. 616.

208. A contract under seal between the maker and payee of a promissory note, by which the maker agreed to deliver and the payee to receive certain property in satisfaction of the note, was *held* to be a substitute for, and to supersede and extinguish the note, and was a bar to an action thereon. *Bryant v. Gale*, 5 Vt. 416. 19 Vt. 551.

209. A new note, given merely in substitution for two previous notes which were in law satisfied, was *held* to be subject to the same defense. *Hurd v. Spencer*, 40 Vt. 581.

210. Whether a new contract shall supersede and take the place of a former one, is matter of probable intent. If the new contract be inconsistent with the continuance of the former one, the old contract is released by entering into the new, although of the same grade; but where not so inconsistent, and the new contract only provides a new mode of discharging the former one, it produces no effect upon the former, unless or until the new be performed;—applied to the case where an innkeeper, having a bag of gold of his guest, to keep, was requested by the guest to take it across the way to a neighbor's, for him to keep over night. *McDaniels v. Robinson*, 26 Vt. 316.

211. The plaintiff, by engagement of the defendant, boarded a man in the defendant's service. Afterwards the defendant took in a partner in the same business, and the plaintiff continued to board such person, who continued in the employment of the partnership. *Held*, that mere knowledge of the fact of the partnership did not require the plaintiff to change his mode of charging, and that the defendant was liable for the whole board bill. *Taggart v. Phelps*, 10 Vt. 318.

212. A substitution, by parol agreement, for the place of delivery of goods, as named in a written contract, is good, being acted upon. *Hunt v. Thurman*, 15 Vt. 386.

213. By the contract, the plaintiff was bound to furnish a certain number of hop-poles within a certain time, and the defendant to pay therefor a certain price. The plaintiff delivered only a part within the time fixed, and afterwards the defendant sold out the contract to M, and M then agreed with the plaintiff to extend the time for delivery, and within such extended time the plaintiff made full delivery. The case showing a subsequent assent by the defendant to such modification of the agreement, and that he treated it as a still subsisting contract;—*Held*, that he was liable to pay for the poles. *Lane v. Sprague*, 36 Vt. 289.

214. *It seems*, that where one sets up, in defense to an action for breach of contract, the waiver of a strict performance by the substitution of something different [as a further day for the delivery of articles sold], he must show performance according to the substituted conditions, or a recovery may be had, counting upon the original contract. *Hill v. Smith*, 32 Vt. 435. *Lawrence v. Dole*, 11 Vt. 555-6.

215. Where parties under a special contract—as a building contract—deviate from the original plan agreed upon, and the terms of the original contract do not appear to be applicable to the new work, it being beyond what was originally contemplated by the parties, it is undoubtedly to be regarded and treated as work wholly extra, out of the scope of the contract, and may be recovered for as such. But it is otherwise, if the original terms are not inapplicable, and there is evidence from which it may be inferred, that it was the intention of the parties that the new work should be subject to those terms—as, times and mode of payment. *Boody v. Rut. & Bur. R. Co.* (U. S. C. C.), 24 Vt. 660.

216. *Rescission*. Inadequacy of consideration may be evidence of fraud; but upon such inadequacy alone, a contract cannot be set aside or rescinded. *Kidder v. Chamberlin*, 41 Vt. 62. *Harrington v. Wells*, 12 Vt. 505.

217. A mistake or misunderstanding as to the meaning of the terms of a contract, gives

neither party the right to rescind. *Montgomery v. Ricker*, 43 Vt. 165.

218. The parties being in partnership, the defendant sold all his interest in the partnership effects to the plaintiff. It was afterwards discovered that the inventory and estimates of the effects, which the parties had before them as their guide for mutual propositions, were erroneous, by reason of which, as the plaintiff claimed, he was induced to pay the defendant too much for his interest; but the sum paid was, in fact, less than the apparent amount of the defendant's interest, and the defendant sold his interest without any idea of future accountability. *Held*, that while the sale remained in force for the plaintiff's benefit, he could not maintain an action to recover back part of the consideration paid. *Wood v. Johnson*, 13 Vt. 191.

219. A contract to be rescinded *ab initio* as to part, and at the election of one party, must be wholly rescinded. *Fay v. Oliver*, 20 Vt. 118. 21 Vt. 528.

220. The plaintiff contracted to purchase of the defendant two parcels of land for one price, and the defendant conveyed one parcel at the time, and stipulated to convey the other on receiving payment for both, and put the plaintiff in possession of both. The defendant refused, on demand, to convey the second parcel, on the alleged ground that the full price had not been paid. In general assumpsit to recover the consideration paid for the second parcel;—*Held*, that although the parties, in their estimates of the values in their negotiations, referred two-thirds of the whole sum to the first parcel and one-third to the second, it was still one entire purchase; and that as the contract had been so far executed that the plaintiff had realized manifest benefit under it, and the parties could not be placed *in statu quo*, it was not in a state to be rescinded at all, and much less as to the second parcel only, except by mutual consent, although the full price might have been paid—and that the plaintiff could not recover. *Ib.*

221. The party who would rescind a contract, though procured by fraud, must be *in a condition* to put the other party *in statu quo*;—as, to restore a promissory note taken for goods procured by fraudulent representations. *Poor v. Woodburn*, 25 Vt. 284.

222. This does not necessarily imply a tender, or distinct offer to return the note. Where he has not parted with it, the production of it at the trial, if required, to be disposed of under the direction of the court, is sufficient. *Ib. Hodgden v. Hubbard*, 18 Vt. 504.

223. Where a contract has been in part executed and each party has received a partial benefit from the contract, so that the parties cannot be placed *in statu quo* by a rescission, one party cannot rescind for the default of the

other, but must be left to his action, or cross-action. *Hammond v. Buckmaster*, 22 Vt. 875. 21 Vt. 204.

224. Where the consideration of a contract is the purchase of a thing non-existent, or wholly without value, or where the restoration of the consideration is in the nature of things impossible, no offer to rescind is necessary in order to a defense in an action upon the contract. *Smith v. Smith*, 30 Vt. 139.

225. Under certain circumstances, one of the parties to a contract may rescind it without the consent of the other; as where, by the terms of a contract, concurrent acts are to be performed—as a delivery of the property by one party and a payment of the price by the other—if either party should refuse to perform his part of the contract, the other party would be at liberty to treat this as an abandonment of the contract, and justify a rescission. *Fletcher v. Cole*, 23 Vt. 114.

226. A purchaser cannot rescind a contract induced by misrepresentation and fraud, after he has wholly disposed of the purchased property, by offering to restore what he has received for it, although disposed of before discovery of the fraud. He must rely upon other remedies. *McCrillis v. Carlton*, 37 Vt. 139.

227. The defendants secured under a contract with the plaintiff the use of a patented machine, belonging to him, for a certain yearly rent, so long as they, at their election, should continue to use it. After using the machine for some years and paying the rent, the defendants claimed to have acquired the right from another source to use the patent, and gave notice to the plaintiff that they should pay no longer; but they, or their vendees, continued to use the machine. In an action upon the contract to recover the agreed rent;—*Held*, that the contract estopped the defendants from denying the plaintiff's title so long as they, or their vendees, continued to use the machine, in the absence of fraud in the making of the contract, or unless the plaintiff's title had expired; and that the defendants could not terminate the contract to pay without surrendering the machine, and were liable to pay for such use until surrender. *Sherman v. Champlain Transportation Co.*, 31 Vt. 162.

228. But *held* otherwise as to the right, under the same contract, to use a patent for a machine built and owned by the defendants. *Ib.*

229. The plaintiff sold land to the defendant, taking his notes therefor, and gave him a bond conditioned to convey upon payment of the notes, and in the meantime the defendant to have possession, but on neglect to pay, the bond to be void and the plaintiff to have the right to re-enter and enjoy. In an action upon the notes;—*Held*, that it was no defense, as to any of the notes, that the defendant had not

paid the one first falling due, nor had taken possession;—that the bond was void only as against the plaintiff, at his election. *Chandler v. Marsh*, 8 Vt. 161.

230. The plaintiff had contracted to deliver to the defendant certain furnace castings, and to a certain amount, to be paid for partly in labor and the balance in cash in one year. After a delivery of part of the castings, the defendant refused to receive a load of the castings sent under the contract. *Held*, that the refusal was such a violation of the contract, preventing its further execution by the plaintiff, as absolved him from his obligation to deliver the balance of the castings, and to give the stipulated credit for the amount delivered, and to take payment in labor; and that an action of book account lay immediately to recover for the castings delivered. *Tyson v. Doe*, 15 Vt. 571. 20 Vt. 121. 21 Vt. 22.

231. The plaintiff procured and paid for some tea at the defendant's store, and shortly after returned it—"it not being good." The defendant received it, saying he should have some good tea soon, and would replace the tea returned with good tea. The defendant retained both tea and money and never delivered any other tea, nor did the plaintiff call for it. *Held*, that there was no contract of absolute rescinding so as to make the defendant a debtor, either for the money, or for the tea, unless called for; and that the plaintiff could not maintain an action on book therefor. *West v. Cutting*, 19 Vt. 536.

232. The plaintiff sold to the defendant a horse and a clock for a harness and two promissory notes of the defendant, by falsely and fraudulently warranting the horse to be kind and safe in harness, whereas the horse had such an inveterate habit of kicking as to be nearly or quite worthless. The plaintiff had not delivered the clock. The defendant, upon discovering the vicious habits of the horse, requested the plaintiff to receive back the horse and to surrender the harness and notes, which the plaintiff declined, and brought suit upon the notes. *Held*, that as the horse might have constituted the main inducement to the bargain, the defendant should be allowed, at his option, to treat it as entirely invalid;—and a judgment for the defendant below was affirmed. *Morrill v. Aden*, 19 Vt. 505.

233. A agreed to sell B a parcel of land for a price named, for which B gave his note, and took possession of the land, and received from A a written agreement to convey if the note should be paid when due. The note was not paid at maturity. *Held*, that A had his election to collect the note, or to rescind the contract and take back the land; but that having made his election by obtaining possession of the land by ejectment, he could not enforce pay-

ment of the note. *Arbuckle v. Hawks*, 20 Vt. 538.

234. So *held*, where the purchaser had taken a lease of the land from the vendor after the note fell due, and had occupied it as tenant;—that this was a rescission by mutual arrangement. *Porter v. Vaughn*, 26 Vt. 624.

235. The plaintiff conveyed a farm to F and took back a mortgage, which remained unpaid, and, in the expectation of getting back a quitclaim from F, entered into a contract to convey the same to the defendant, and took the defendant's notes therefor. The defendant did not then fully understand the state of the title, but soon after was informed of it, and then repudiated the contract and demanded back his notes. The plaintiff refused to rescind, and offered a good guaranty that the defendant should have a good deed, which the defendant declined, and abandoned the land. Afterwards the plaintiff received the quitclaim from F and rented the place for one year and occupied it another year, and then sold it. In an action upon the defendant's notes, the plaintiff claimed to recover his loss in the transaction. *Held*, that the facts shown amounted to a practical abandonment of the contract by the plaintiff, and operated as an acceptance of the rescission offered by the defendant, and took effect, as of that time, and thus left the notes without consideration. *Henry v. Martin*, 39 Vt. 42.

236. The defendant, having procured a horse of the plaintiff by exchange, within a reasonable time returned the horse to the plaintiff, complained that the horse was lame and unsound, and "requested to trade back and call it no trade"—offered "to trade back and have things as they were before the trade," and "asked to rescind the trade," which the plaintiff refused. The county court ruled that this did not constitute a rescission of the contract. *Held*, (by a majority), erroneous; that the evidence tended to prove a rescission, and should have been submitted to the jury to determine what the parties understood by it. *Gates v. Bliss*, 43 Vt. 299.

237. The plaintiff sold the defendant a yoke of oxen which were eight years old, but which the plaintiff fraudulently represented to be only seven years old. On the second day after the defendant took the oxen, one E informed him that, in his opinion, judging from their appearance, the oxen were nine years old. The defendant continued to use the oxen for five days longer, when he returned them to the plaintiff, and notified him that the oxen were not as represented; but the plaintiff refused to receive them, and brought suit for the price. *Held*, that the defendant had exercised his right of rescission within what, under the circumstances, was a reasonable time. *Matteson v. Holt*, 45 Vt. 336.

**238.** A purchaser, who is entitled to rescind a purchase for fraud, but who delays doing so for the purpose of affording the vendor, at his own request, an opportunity of attempting to make the thing sold of value and satisfactory to the purchaser, is not precluded by such delay from thereafter, in reasonable time, rescinding the purchase. *Powell v. Woodworth*, 46 Vt. 378.

**239.** A party having a right to rescind a contract on the ground of fraud, elects, after discovery of the fraud, to go on under the contract. This is an affirmation of the contract, and concludes him from rescinding. *Downer v. Smith*, 32 Vt. 1.

**240. Power to stop performance.** While a contract is executory, a party has the power to stop the performance on the other side by an explicit direction to that effect, thereby subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part, at that point or stage in the execution of the contract. *Danforth v. Walker*, 37 Vt. 239. *S. C.* 40 257.

**241.** The defendant contracted with the plaintiff for 1,500 bushels of potatoes, part on hand, and the balance to be purchased by the plaintiff and to be delivered during the winter as called for by the defendant. After the delivery of a part, the defendant wrote the plaintiff not to purchase any more potatoes until the plaintiff should hear from him. The plaintiff continued purchasing and the defendant refused thereafter to receive. In an action for refusing to receive the potatoes so purchased;—*Held*, that this letter was not a rescission of the contract by the defendant, but only a refusal to receive under it any potatoes thereafter purchased;—that the defendant had the power to do this and to stop the further execution of the contract, subjecting himself to such damages therefor as would compensate the plaintiff for being so stopped;—that the plaintiff had no right to go on and make further purchases and incur expense, and throw the risk of the property upon the defendant, and thereby enhance the damages at his expense, without any benefit to himself;—and that the rule of damages for this breach, so far as respects the requisite quantity then still to be purchased to fill the contract, was the difference between the price stipulated to be paid, and what it would have cost the plaintiff to procure and deliver the potatoes. *Ib.* and see *Derby v. Johnson*, 21 Vt. 17. *Nye v. Taggart*, 40 Vt. 295.

#### IV. CERTAIN PARTICULAR CONTRACTS.

##### 1. For service.

**242. Entire.** If a party, under a contract to labor for a specified period, leave the service before the expiration of that time without

sufficient cause, he cannot recover on the contract, nor on a *quantum meruit*, for the service rendered. *Hair v. Bell*, 6 Vt. 35. *Philbrook v. Belknap*, 6 Vt. 888. *St. Albans Steamboat Co. v. Wilkins*, 8 Vt. 54. *Brown v. Kimball*, 12 Vt. 617. *Ripley v. Chipman*, 13 Vt. 268. 15 Vt. 515. *Winn v. Southgate*, 17 Vt. 355. *Mullen v. Gilkinson*, 19 Vt. 503. 24 Vt. 515. *Forsyth v. Hastings*, 27 Vt. 646.

**243. Excuse for quitting.** Where the plaintiff contracted to serve the defendant for six months, but quit the service before the end of the term;—*Held*, that he could not recover although, (1), he quit under the erroneous belief that according to the legal mode of computing time under such contracts, his time was up,—and although, (2), the defendant had consented to his absence during a part of the term, but he had, on his return, resumed his work under the contract—and, although, (3), the defendant had refused to take him back after he had broken his contract by leaving. *Winn v. Southgate*.

**244.** It is no sufficient excuse for abandoning a contract of service, that the party was put to other service than that specified in the contract, if he made no objection thereto. *Hair v. Bell*, 6 Vt. 35. *Mullen v. Gilkinson*, 19 Vt. 503.

**245.** Nor, that the employer refused, upon the employee's solicitation, to discharge another servant with whom he had difficulty. *Mullen v. Gilkinson*.

**246.** Fault finding and angry words by an employer towards his laborer [as stated in the case], were *held* not a sufficient excuse for leaving the service. *Forsyth v. Hastings*, 27 Vt. 646.

**247.** A girl, hired by the defendant for domestic service for an entire term at a specified price, left such service during the term, for the reason that she "took a dislike" to the defendant's father for some rudeness in his deportment towards her in respect to her chastity. *Held*, that this was good cause for leaving, and that she could recover for the service performed, although the father was of another separate family, but occupying the same house, and the defendant had no control over him. *Patterson v. Gage*, 23 Vt. 558.

**248.** A party contracting to labor for a definite term, at a fixed price for the term or by the month, who fails to fulfil his whole contract by reason of disabling sickness, may recover for his part performance what his services have benefitted the other party, with reference to full performance—that is, by deducting from the benefit so received any damage sustained by reason of the non-performance of the entire contract. *Patrick v. Putnam*, 27 Vt. 759. *Fenton v. Clark*, 11 Vt. 557. *Seaver v. Morse*, 20 Vt. 620. *Hubbard v. Bolden*, 27 Vt. 645.

249. Nor is he barred of such recovery upon a *quantum meruit* by his neglect, after getting well, to return and complete the service where the employer would not be bound to receive him—as at the end of two weeks. *Hubbard v. Belden*. *Fenton v. Clark*. *Seaver v. Morse*.

250. **Dismissal.** The defendant had engaged to labor for the plaintiffs, A and B, for a definite term, at an agreed price. A discharged him from service. B soon after requested the defendant to go to work again under the contract,—which the defendant declined. *Held*, that the dismissal by A put an end to the contract as to both A and B, and that neither was restored to his rights under it by the request of B. *Suttons v. Tyrell*, 12 Vt. 79.

251. **Lost time.** A laborer hired for a definite period is not bound, on the expiration of the specified period, to make up for time necessarily and reasonably lost and in the loss of which his employer has acquiesced, by continuing on in the service of the employer for a length of time equal to the time so lost. Nor is the employer bound to receive labor for such length of time as compensation for the time lost; but is bound to pay only for the services actually rendered. *McDonald v. Montague*, 30 Vt. 357.

252. **Right reserved to terminate.** The plaintiff contracted to labor for the defendant at farm work for one year at \$15, per month, each party having the right to terminate the contract at any time when he should become dissatisfied and desire to terminate it. The plaintiff worked from December to July, when he became dissatisfied and quit. *Held*, that, in leaving, he had only exercised his right under the contract; that he had fully performed it and was entitled to recover the full contract price. *Whitecomb v. Gilman*, 35 Vt. 297; and he might recover in such case, although his dissatisfaction was capricious and without good reason. *Provost v. Harwood*, 29 Vt. 219.

253. The plaintiff agreed to labor for the defendant for one year, for a certain sum to be paid when he should have finished his labor; and it was mutually agreed, that if the plaintiff should become dissatisfied and wish to leave the defendant's employ, he might do so by giving fourteen days' notice of his intention to leave; and the defendant should have the right to discharge him by giving one day's notice of the intention to discharge him. *Held*, that either party, upon becoming dissatisfied, was at liberty to terminate the contract by giving the specified notice, without apprising the other party of the grounds of his dissatisfaction, and although he might have no satisfactory reason for such dissatisfaction; and the plaintiff having quit the defendant's service before the end of the year, after having given the stipulated no-

tice;—*Held*, that he became immediately entitled to sue for his wages, having "finished his labor." *Rosnier v. Cooper*, 23 Vt. 522.

254. **Time of payment.** In contracts of service for a term, as for so many months at so much per month, where no time is stipulated when payment is to be made, the law implies that it is to be made at the end of the term. *Tebb v. Ballard*, 36 Vt. 612.

255. If, in such case, the servant quit before the expiration of the term without fault of the employer, he can not demand or sue for the services rendered until after the expiration of the term, although then entitled to recover upon a *quantum meruit*. *Id.*

256. **Power to stop employment.** In a contract for labor, the employer has the power to stop the completion of the work, if he choose—subjecting himself thereby to the consequences of a violation of his contract; and the workman, after notice to quit work, has no right to continue his labor and claim pay for it. *Derby v. Johnson*, 21 Vt. 17.

257. While the plaintiff was laboring for the defendant under an entire contract for service, the defendant, without justifiable cause, ordered him to leave his employment, which the plaintiff soon after did. *Held*, that he was entitled to recover for the services performed, although he continued to work a few hours after having been ordered to leave; and although, upon a subsequent day, he gave as a further reason for leaving, that the defendant was going to break down and he was afraid he should not get his pay. *Green v. Hulett*, 22 Vt. 188.

258. **Waiver of forfeiture.** Where a farm laborer is hired for (say) four months at a fixed price per month, and quits before the expiration of the four months without the consent of his employer, or wrongfully, an offer by the employer to pay for the whole service at the contract price, or a tender of a sum of money, supposed to be the amount due as thus computed, is a waiver of any forfeiture of wages which the employer might otherwise claim. *Patnote v. Sanders*, 41 Vt. 66. *Seaver v. Morse*, 20 Vt. 620. So, any acts or declarations, recognizing a continued liability, may amount to such waiver. *Cahill v. Patterson*, 30 Vt. 592.

259. **Assent to termination.** Where a contract of service is dissolved by mutual consent before the period at which wages become due, *pro rata* wages may be recovered without any express contract to that effect. *Rogers v. Steele*, 24 Vt. 513. *Green v. Hulett*, 22 Vt. 188. (For facts constituting such consent, see cases.)

260. The plaintiff was hired to the defendant for four months at a fixed price per month, and during his term of service left voluntarily, but with the consent of the defendant. It not appearing that the plaintiff had good cause for

leaving;—*Held*, that he could recover only *pro rata* on the basis of the contract price. *Pat-note v. Sanders*, 41 Vt. 86.

261. The plaintiff had contracted to work for the defendant for one year, but left before the year was out, without cause. The plaintiff told the defendant he was going to leave, and the defendant made no objection, but said he could get just as good workmen as the plaintiff, and the plaintiff supposed the defendant consented to his leaving. The next day the defendant told the plaintiff to come, in a day or two, and he would settle with him. In about ten days, the plaintiff went to settle, when the defendant said his books were at the office of his attorney, and told him to go there. The defendant went and met the attorney. The defendant's books there showed a balance of \$57.22 due the plaintiff. The defendant then claimed \$50 damages for leaving his service, and offered to pay the difference, \$7.22. The defendant had never before claimed such damage. *Held*, that the plaintiff was not liable for damages, and was entitled to recover, *pro rata*, for the time of his service. *Boyle v. Parker*, 46 Vt. 343; and see *Rogers v. Steele*, 24 Vt. 513.

262. **Board.** The plaintiff labored for the defendant, the defendant to board him in a particular way at a certain place. *Held*, that the plaintiff could not board himself elsewhere and charge the expense to the defendant, no failure on the part of the defendant being shown. *Griffin v. Tyson*, 17 Vt. 35.

263. **Clothes.** The plaintiff, an old man of feeble mind, agreed to work for the defendant for his board and clothes, no length of service being specified. He worked from the last of February to the first of August, boarding with the defendant, and then left. When he came, he was poorly clad. The defendant furnished him no new clothes, but only saw that his old clothes were mended and taken care of. In an action to recover his wages, the auditor found that his labor was worth \$40, and that this sum was no more than was requisite to supply him with things that he actually stood in need of, to enable him to live comfortably through the fall and winter. *Held*, that the agreement to furnish clothes was not limited to the time while the plaintiff worked, but must be considered in relation to the whole year, to the season of the year in which he worked, the value of his services, the difficulty of getting work at other seasons of the year, and the clothing he then had and might reasonably require for the coming winter, and that he could recover the \$40. *Spencer v. Storrs*, 38 Vt. 156.

264. **Ministerial labor.** The defendant, a religious society, hired the plaintiff as their pastor for one year at \$800. At the close of the first year the plaintiff agreed to remain for

such sum as could be raised upon subscription—the defendant to circulate and collect the subscriptions—and he so remained for five years. *Held*, (1), that the contract of hire continued through the whole time, varied from the contract of the first year only as to the amount of compensation, and perhaps incidentally as to the time of payment; (2), that the amount which the society might, with reasonable effort and due diligence, have collected upon the subscriptions made, was the measure of the plaintiff's compensation under the contract, and could be recovered in an action on book as for a price agreed. *Myers v. Baptist Society*, 38 Vt. 614.

## 2. Contract of indemnity.

265. **Indemnity proper.** An action does not lie on a contract of indemnity, unless and until the plaintiff has sustained the loss or damage guaranteed against. *Eureka Marble Co. v. Windsor Mfg. Co.*, 47 Vt. 430.

266. A condition simply to indemnify and save harmless from the payment of a debt, is not broken until the obligee has been compelled to pay, or, having become liable, has actually paid or been put to expense. *St. Albans v. Curtis*, 1 D. Chip. 164.

267. The allowance in the probate court of a claim against the estate of a surety, is such a damnification as entitles the surety's administrator to sue the principal upon his contract of indemnity. *Pond v. Warner*, 2 Vt. 532.

268. A, as surety for B, executed with him a note to C, and, after the note had become due, B gave A a mortgage conditioned that he would pay said note "so as wholly to indemnify and save A harmless from his liability on said note." *Held*, that the mortgage was not forfeited by the mere non-payment of the note by B, it being but a common contract of indemnity; but if the mortgage had been executed before the note fell due it would probably have been otherwise. *Id.*

269. The general proposition, that there can be no contribution nor indemnity between wrong doers, is subject to the exception, that where one party induces another to do an act which is not legally supportable, and yet is not clearly in itself a breach of law, the party so inducing shall be answerable to the other for the consequences. But this inducement must consist of an express undertaking to indemnify against the consequences of such act, or omission to act, or the circumstances attending the transaction, as between the parties, must be such that the law will therefrom imply an undertaking, or raise an obligation on the part of the one to indemnify the other. *Pierpoint, C. J.*, in *Spaulding v. Oakes*, 42 Vt. 343.

270. Spaulding had been compelled to pay



a judgment recovered against him and Oakes, for injury done by a vicious ram owned by them in common, but running in the pasture of Oakes and more immediately under his charge, as reported in *Oakes v. Spaulding & Oakes*, 40 Vt. 347. In an action by Spaulding against Oakes for indemnity;—*Held*, by a majority, that the grounds of recovery in that case were not such as to raise the obligation of indemnity. *Id.*

**271. Contract to pay.** The plaintiff having executed certain notes to a third person, the defendant agreed with the plaintiff in writing, for a full consideration received, to pay said notes. *Held*, that this was not a contract to indemnify, but to pay, and that the statute of limitations commenced to run from the maturity of the notes. *Crofoot v. Moore*, 4 Vt. 204.

**272.** The plaintiff, at the defendant's request, executed a receipt to an officer for property attached upon a writ of A. v. B, upon the defendant's promise to indemnify and relieve him by paying the debt in that suit, within a few days. The defendant did not pay the debt, nor in any other way relieve the plaintiff, but the plaintiff stood chargeable upon the receipt, although he had paid nothing. *Held*, that this was more than a mere contract of indemnity, and was broken by the failure of the defendant to pay as agreed; that the plaintiff then had an immediate right of action, and could recover to the extent of his liability. *Hubbard v. Billings*, 35 Vt. 599.

**273. Special case.** The defendant, claiming to own a horse in the plaintiff's possession which the plaintiff had purchased of W, promised the plaintiff, that if he would deliver the horse to him, and would bring suit against W for having fraudulently sold the horse as his own, and should fail in such suit to recover damages, he, the defendant, would indemnify and make the plaintiff good for his damage, loss and expense. The plaintiff thereupon delivered the horse to the defendant, and brought such suit against W, but gave no notice thereof to the defendant, and failed in the suit. *Held*, (1), that the agreement was upon sufficient consideration; (2), that the record in the suit against W was evidence to prove the fact of bringing the suit and the failure to recover, and that this entitled the plaintiff to recover under the contract; (3), that, although that judgment might be treated as *inter alios*, and so not conclusive against the title of the defendant, yet, as there was no proof offered in this case that the title to the horse was in any one else than the plaintiff who had the possession, the value of the horse should be included in the plaintiff's damages. *Lincoln v. Blanchard*, 17 Vt. 464.

### 3. Agistment.

**274.** The contract of agistment implies the duty on the agister to restrain the animals within his inclosure by lawful fences, unless there is some special understanding which relieves him. If for want of such fences the animals escape and thereby are lost or suffer damage, he is liable therefor. *Sargent v. Slack*, 47 Vt. 674.

**275.** The plaintiff took of the defendant some cattle and sheep to pasture for the season, at a fixed price per week, but there was no express stipulation as to the manner of keeping, nor as to the care the plaintiff should take of them. Part of the sheep were wethers, and part ewes. Through the plaintiff's negligence and want of care in restraining his rams from going at large between Aug. 1 and Dec. 1, as required by statute, they got with the ewes, which, in consequence, had lambs out of season, and thereby the lambs were lost. In an action of book account to recover the agreed price for keeping the cattle and sheep;—*Held*, that this negligence of the plaintiff was a breach of the contract implied as to the exercise of proper care in the keeping of the property; that the contract was entire; and that the defendant could recoup the damage to the ewes against the plaintiff's entire claim. *Phelps v. Parish*, 39 Vt. 511.

### 4. Contracts in the alternative.

**276.** Where a contract is in the alternative, to do one of two things, the right of election is in the party speaking or promising. *Mayer v. Drinell*, 29 Vt. 298. *Patchin v. Swift*, 21 Vt. 292.

**277.** But if the contract be to do one of two things by a day certain, and the day elapse without election by the promisor, then the right of election passes to the promisee. *Patchin v. Swift*; and see *Russell v. Ormsbee*, 10 Vt. 274.

**278.** I bought a horse of O and delivered him a note against a third person in part payment, and agreed to give good security for the balance by a day named, or else return the horse, and the note should be the property of O. Having failed to procure the security, L returned the horse and demanded the note. O received the horse, but refused to surrender the note. *Held*, that the note became the property of O. *Larabee v. Orit*, 4 Vt. 45.

**279.** Assumpsit upon the following instrument: "In consideration of four hundred dollars received of A. Knight I promise to deliver to him, bearer, two hundred barrels of crude oil at the Connecticut River Oil Well in Bothwell, C. W., reserving the right to pay him twenty-five cents per barrel, on payment of the four hundred dollars above mentioned; said oil

to be delivered any time within three months." It was the custom, known to Knight (the plaintiff), for the purchaser to furnish barrels for his oil at the well. *Held*, to be a note for two hundred barrels of oil to be delivered at any time within three months, and to be taken in barrels to be furnished by the plaintiff, unless the defendant should choose to pay four hundred and fifty dollars in money, in lieu of the oil;—that the plaintiff was not bound to furnish barrels, without proper notice that the defendants had elected to pay in oil; and that not having given such notice, nor paid the money within the time named, the defendants were liable for the value of the oil. *Knight v. Petroleum Co.*, 44 Vt. 472.

280. Where the defendant agreed to pay the plaintiff for a job of work when completed, or give his note therefor payable in a year, at his election, and he refused to give his note;—*Held*, that he became immediately liable upon such refusal, and the plaintiff recovered in the action of book account. *Gilman v. Hall*, 11 Vt. 510.

#### V. ACTION ON SIMPLE CONTRACT.

##### 1. Parties.

281. **Plaintiff.** In the case of joint owners of property sold by one, the purchaser not knowing that others were interested, an action on such contract may be maintained, either by the one with whom the contract was actually made, or in the names of the parties really interested. *Hilliker v. Loop*, 5 Vt. 116.

282. A sued B upon a contract signed by B, of the following tenor: "Received of A \$150 to be paid in obligations against some good man or men, to be on interest, for L C when he comes of age, on account of said A." B set up a release by L C after he became of age. *Held*, that the contract was with A to pay him, and that L C could not sue upon it, nor release it. *Tuttle v. Catlin*, 1 D. Chip. 366.

283. As respects simple contracts, the promise, to whomsoever made, inures and is deemed a promise to him who has the beneficial interest,—that is, the person from whom the consideration moves. *Warden v. Burnham*, 8 Vt. 390.

284. On a contract to take certain shares in the stock of the corporation and to pay the treasurer all assessments, &c.;—*Held*, that an action for the assessments could not be brought in the name of the treasurer, but only in that of the corporation. *Whitelaw v. Cahoon*, 1 D. Chip. 295.

285. Where the consideration moves from a person principally interested in a contract, and the contract is made with him, one collaterally interested therein cannot sue thereon in his own name. *Crampton v. Ballard*, 10 Vt. 251. 17 Vt. 251. 18 Vt. 589. 46 Vt. 369.

286. Where a promise is made to a person from whom the consideration moved, but to be performed to another and for another's benefit,—*quare*, whether the latter can, in any case, maintain an action thereon. *Ib.* 11 Vt. 80. 30 Vt. 284. 47 Vt. 345.

287. Where the defendant received property from A to convert into money, under a promise to A to pay it to the plaintiff, a creditor of A, and the defendant did convert the property into money;—*Held*, that the plaintiff might sue in his own name for the money. *Phelps v. Conant*, 30 Vt. 277.

288. In such case, after the money is realized, it becomes absolutely the money of the plaintiff in the defendant's hands. Then the law implies a promise directly from the defendant to the plaintiff. *Redfield, C. J.* *Ib.* 284.

289. But where the contract is special, or to the extent that it is special, it can be sued only in the name of the party with whom it is made, and from whom the consideration moves. *Ib.*

290. Under a declaration counting upon a promise made to the plaintiff's deceased husband, upon a consideration moving from him, that the defendant would pay to her, in case of her husband's decease, a certain sum;—*Held*, that the suit could not be maintained in her name; but, *quare*, whether upon a proper declaration this might not be done. *Fugure v. Mutual Socy. of St. Joseph*, 46 Vt. 362.

291. In assumpsit upon a policy of life insurance by the administrator of the insured, the declaration alleged the consideration as moving from the insured and the promise to pay to the wife and children of the insured, or their legal representative. On demurrer, *held*, that this was not an averment of a promise to the insured, to pay, &c., but a promise to the wife, and that the declaration showed a case upon which the plaintiff could not recover. *Davenport v. Mutual Life Ass'n.*, 47 Vt. 528.

292. In assumpsit for lumber sold, which was the property of the plaintiff and W, the plaintiff's evidence was that he sold it in his own name and on his own account; while the defendant's was, that the plaintiff acted for himself and W in making the sale. *Held*, that the plaintiff's right depended upon the disputed fact, which was a question for the jury; and that the court erred in ruling that the action was rightly brought. *Leahy v. Allen*, 47 Vt. 463.

293. The legal interest in a contract is in the person from whom the consideration passed and to whom the promise was made; and he alone can sustain an action upon it, although it was made for the benefit of a third person. *Hall v. Huntoon*, 17 Vt. 244. *Pangborn v. Saxton*, 11 Vt. 18 Vt. 589.

294. A declaration counting upon a sale by the plaintiff to the defendant and a promise

thereupon to the plaintiff, is not sustained by proof of a sale by a third person of property in which the plaintiff had no interest, and a promise thereupon to such third person for the benefit of the plaintiff. *Hall v. Huntoon*.

295. Though A takes an absolute conveyance from B of his farm, but under an agreement to support B, and this for the purpose of enabling B fraudulently to obtain a pension as a reduced soldier, and though A afterwards denies the agreement and allows B to become chargeable to the town for his support, yet this does not entitle the town to an action, either at law or in chancery. *Milton v. Story*, 11 Vt. 101.

296. A suit may always be brought, either in the name of the party with whom the contract was made, or in the name of the party legally interested,—where the defendant will not be thereby embarrassed in his defense—as in case of dormant partners, factors doing business in their own name, &c.—and it is of no importance, whether or not the the defendant understood the relations of the parties, unless he has suffered loss by being misled. *Maynard v. Briggs*, 26 Vt. 94. 35 Vt. 502. *Lapham v. Green*, 9 Vt. 407. *Wait v. Johnson*, 24 Vt. 112.

297. In all actions upon contracts, except sealed instruments, promissory notes and bills of exchange, the action may be brought in the name of the real party in interest and from whom the consideration moved. When, however, the action is so brought, and not in the name of the nominal party, the other party may interpose any defense, which would be available against the nominal party, which accrues before the real party is disclosed to him. *Cummings v. Blaisdell*, 43 Vt. 382. *Smith v. Foster*, 36 Vt. 705. *Lapham v. Green*.

298. Where, at the time a contract was made, it was understood by both plaintiff and defendant that the contract was between themselves alone ;—*Held*, that the plaintiff could maintain an action thereon in his name alone, although other parties were equally interested with him in the contract. *Hibbard v. Mills*, 46 Vt. 243.

299. One who becomes a party to a contract only after its performance, and without consent of the opposite party, cannot join in an action upon it. *Dennison v. Boylston*, 48 Vt. 439.

300. **Interests severed.** The president and professors of a literary institution were entitled to all the tuition money received, which by agreement was to be divided among them in specified rates ; and it was agreed that all the money collected should be deposited with one of their number as depository, or treasurer, without authority to invest or use, and without being subject to charges, and that the interest of the parties in the fund deposited should be distinct and several interests, and not joint. *Held*, that

each member was entitled to his several share, and that the depository, after proper demand by one of the professors for his share, and refusal, was liable to him therefor in an action of book account. *Jackman v. Partridge*, 21 Vt. 558.

301. Three persons, appointed a committee by vote of a school district to repair the school house, distributed the job among themselves, each doing a part. *Held*, that each could recover against the district for the part done by him. *Geer v. School Dist. in Richmond*, 6 Vt. 76 ; and see *Sawyer v. Meth. Ep. Soc'y. in Royalton*, 18 Vt. 405. *Rogers v. Danby Universalist Soc'y*. 19 Vt. 187.

302. The defendant owed a simple contract debt to A and B jointly. All parties agreed that one-half should be paid to A and one-half to B. The defendant paid B his half. *Held*, that this worked a severance, so that A, in his own name, could recover for his half. *Ambler v. Bradley*, 6 Vt. 119. See *Cummings v. Blaisdell*, 43 Vt. 382.

303. So *held*, in like case, in an action on book, where the case stood upon the common agreement simply, without payment of the other share—it not being a matter of partnership. *Parker v. Bryant*, 40 Vt. 291.

304. The plaintiffs agreed to take jobs of work and work together, and each to hire, as near as possible, an equal amount of help, each to be paid for his own labor, and to divide the profits on the help hired, nothing being said about the division of losses. One of the plaintiffs engaged to do a job of work for the defendant, informing him that he and the other plaintiff were in partnership, or connected in business. The work was done by the plaintiffs and their hired help under their agreement, in reference to which the contract with the defendant was made. *Held*, that an action therefor was properly brought in the joint names of the plaintiffs. *Sawyer v. Worthington*, 28 Vt. 733.

305. **Defendant.** Services rendered or money paid for the joint benefit of two or more, at the request of either of them, may be recovered of them jointly. *Davis v. Downer*, 10 Vt. 529.

306. *Held*, that the plaintiff's suit was properly brought against the one party with whom he contracted and on whose credit he performed the services, although there were others who, to the plaintiff's knowledge, had an equal or greater interest in the undertaking, and who had furnished the plaintiff funds in carrying it on. *Stannard v. Smith*, 40 Vt. 513.

307. The real purchaser of goods for his own benefit is liable therefor, although he purchased them on the credit of another, with his consent, without disclosing the fact that he was himself the real party. *Coverly v. Braynard*, 28 Vt. 738.

308. In order to make one liable for services

performed for another, he must thereunto expressly promise, or so conduct himself in making the employment, that the party rendering the service has a right to and does understand that he will be responsible therefor. *Redfield v. Dana*, 47 Vt. 15.

309. G. S. c. 30, s. 78, providing that in actions upon a contract, &c., against more than one defendant, judgment may be rendered against such as are found to be liable, &c., covers all cases of defendants in such actions, whether they are described and declared against as partners, or otherwise declared against on a joint contract; and a non-suit may be allowed as to such as are not liable, or a judgment in their favor on trial. *Reynolds v. Field*, 41 Vt. 225. See *Naah v. Skinner*, 12 Vt. 219. *Hurlburt v. Hendy*, 27 Vt. 245. *Powers v. Thayer*, 30 Vt. 361.

2. *Action and defense, as dependent upon demand,—expiration of credit,—performance.*

310. **Demand.** A mutual agreement between two, that the accounts of each may be paid by the work of the other, is valid and binding as to accounts thereafter accruing, and requires a demand of payment and refusal, or unreasonable neglect to perform the services as stipulated, in order to maintain an action. If such agreement included a past account, but the parties had acted upon it, the services of the other party may be first applied to satisfy that. *Davis v. Petit*, 27 Vt. 216.

311. Where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to notice unless he stipulates for it; but when it is to do a thing in an event which lies within the peculiar knowledge of the opposite party, then notice ought to be given him before suit brought. *Lamphere v. Cowen*, 42 Vt. 175.

312. Where a specific thing is to be done on demand, such as the delivery of property or performance of a service, the liability does not become fixed immediately on demand, but only on the party's neglect, after reasonable time, to comply; and this question is always one of fact for the jury. [Applied to the case of an action upon an officer's receipt.] *Jameson v. Ware*, 6 Vt. 610.

313. Where a demand was necessary in order to maintain an action;—*Held*, that a demand made after the issuing of the writ, but before service, affording an opportunity to comply, was sufficient. *Hall v. Peck*, 10 Vt. 474.

314. Money paid by mistake, or overpaid upon a certain claim, cannot be recovered back by suit without previous notice and demand of repayment, when the mistake was not the defendant's and he did not, in any way, induce

it; and until then interest is not recoverable on such money. *Stoddard v. Chapin*, 15 Vt. 443. 29 Vt. 157.

315. Where money was illegally taken, the detention is unlawful and it may be recovered without previous demand. *Henry v. Chester*, 15 Vt. 460. *Babcock v. Granville*, 44 Vt. 325.

316. Where one has in any way wrongfully obtained the money of another by duress or fraud, no demand, before suit to recover it back, is necessary. *Hinsdill v. White*, 34 Vt. 558.

317. The plaintiff sold the defendant certain property at a price stipulated, for which the defendant agreed to pay a sleigh, at a price stipulated, represented to be then at one T's and to be taken there by the plaintiff—and an order on T for the balance. The defendant had no such sleigh, and this he knew. *Held*, that this was such a fraud as excused the plaintiff from making any demand of T for the sleigh or for payment of the order, and enabled the plaintiff to sue and recover the stipulated price of the property sold, without any demand. *Harrington v. Wells*, 12 Vt. 505.

318. Where the plaintiff came to the defendant, and demanded a settlement for his labor performed under an agreement that the defendant should board and clothe the plaintiff for his work, and the defendant drove him from the premises, threatening bodily injury;—*Held*, that this was such a denial of liability as excused the plaintiff from making a specific demand of such articles of clothing as he needed, and was entitled to. *Spencer v. Storrs*, 38 Vt. 156.

319. In an action upon an account, payable in goods out of the defendant's store;—*Held*, that no demand was necessary before suit, when the defendant had stopped trade, and where the omission to call for the goods, before that time, was not an unreasonable delay. *Brooks v. Jewell*, 14 Vt. 470.

320. In an action upon a contract whose validity had been established upon a bill to set it aside;—*Held*, that the defendant in that and this action could not defend on the ground of an attempted repudiation by the plaintiff, the defense of the former suit being a constant tender of the defendant's readiness to perform, and a waiver of demand, if demand were necessary. *Sampson v. Warner*, 48 Vt. 247.

321. Where the agreement is to give time of payment upon the debtor's giving a note with surety, and such note is not furnished, the creditor may sue at once on book, or in general assumpsit. A different rule is said to prevail where the debtor is only required to give his own note. *Rice v. Andrews*, 82 Vt. 691. *Hale v. Jones*, 48 Vt. 227.

322. Where the promise is to do a collateral thing on request, the request is parcel of the

contract, and no right of action arises until a request be made. So, if no time be fixed in the contract, or by other agreement of the parties either expressed or implied, for the doing of the thing, a request is essential to the cause of action. *Prentiss, J. in Boody v. Rut. & Bur. R. Co.* (U. S. C. C.), 24 Vt. 660.

**323.** In the case of a mere executory contract to sell and to buy on a certain day, and where each promise is the entire consideration for the other, neither party can maintain an action without averring and proving a readiness to perform on his part, at the time and place, or an excuse by the act of the other party. *Perry v. Wheeler*, 24 Vt. 286.

**324. Credit.** On the purchase of goods, each party understood that a credit of six months was given, and that the credit of a third party was pledged for the purchase. This last supposition turning out to be a mutual error;—*Held*, that the seller could not, on discovering the mistake, maintain an action for the price of the goods until the expiration of the six months. *Thayer v. Ballou*, 32 Vt. 234.

**325.** No action can be sustained upon a contract within the time stipulated for its performance, though the credit was fraudulently obtained. *Fisher v. Brown*, 1 Tyl. 387. 14 Vt. 9. 18 Vt. 235.

**326.** The plaintiff sold the defendant a quantity of marble to be used by him in the construction of a walk for the U. S. government, for which he was to pay when the work should be accepted and he should receive his pay from the U. S. *Held*, that the plaintiff's demand became payable, not when the defendant became entitled to his pay from the U. S. by acceptance of the work, but whenever thereafter by due diligence he might have received his pay from the U. S.; and delay of payment by the U. S. having been occasioned by the act of the defendant, *held*, that the credit stipulated with the plaintiff had expired, and that this action, brought before the defendant had received his pay of the U. S., was not premature. *Vt. Marble Co. v. Mann*, 36 Vt. 697.

**327. Performance by plaintiff.** Where the plaintiff was to keep the defendant's cattle at a certain barn and to feed them on the hay therein (which the defendant saw and examined before making the contract), and agreed to keep them as well as he could "considering the hay and the chance";—*Held*, that no abatement should be made from the price of keeping on account of deterioration of the cattle in the keeping, the auditor having found that the plaintiff "used ordinary care in taking care of and feeding them—feeding them as often and as much at a time as people in general feed their cattle." *Eustman v. Patterson*, 38 Vt. 146.

**328.** Where the plaintiff had contracted to build a road, in a particularly specified manner,

to be paid for "on its completion and acceptance by the agents of the town of S," and he completed it according to his contract, but such agents had wrongfully refused to accept it;—*Held*, that he could recover for the work done. *Smith v. Smith*, 45 Vt. 433.

**329.** A party receding from negotiations, and refusing to be bound by them, cannot recover for the performance of acts which would have constituted a part performance of an entire contract which would have resulted from the negotiations, if perfected. *Congdon v. Darcy*, 46 Vt. 478.

**330. Commissions.** The plaintiff contracted with the defendants to negotiate for them a loan of \$100,000, for a commission, and did secure an agreement for such loan with one H, on condition that what the plaintiff's brother was owing H should constitute part of the sum; but as this was expected to be cashed by the plaintiff to the defendants. *Held*, that this was a sufficient compliance with the contract on the plaintiff's part, to entitle him to an action for refusal by the defendants to carry out the contract. *Durkee v. Vt. Central R. Co.*, 29 Vt. 127.

**331. Reward.** F was employed by the relatives of a murdered man to trace out the murderer and procure his conviction. F sent out messengers for this purpose and directed one of them to request S, a deputy sheriff, to watch for and arrest the murderer. The message reached S, not directly from the messenger, but through one L. The murderer was arrested by S and was convicted. Said relatives had offered a reward for the arrest and conviction of the murderer, but F did not know of the offer when he sent out his messengers, and S did not know of it when he made the arrest, or that F was acting in the matter. *Held*, that S was entitled to the reward, and not F. *Russell v. Stewart*, 44 Vt. 170.

**332. Agreement not to sue.** An agreement not to sue within a particular time, or never to sue one of several joint contractors, does not operate as a release. Even the party himself, with whom the agreement is so made, cannot use it as a defense to any action in which his name is necessarily used to recover judgment, in order to collect the debt of the other debtors. *Spencer v. Williams*, 2 Vt. 209. *Pinney v. Bugbee*, 13 Vt. 623.

**333. Performance by defendant.** The defendant, under a contract to complete a mill in a workmanlike manner, did the work imperfectly, but claimed to have performed his contract. The plaintiff afterwards put the mill in condition, and brought his action to recover the expense of such reparation. *Held*, to be no defense that the defendant, after he had broken his contract and it had ceased to be executory, offered to make such repairs at his own ex-

pense, but the plaintiff refused him. *Clifford v. Richardson*, 18 Vt. 620.

334. Where the plaintiff sold goods to the defendant which he agreed to pay for in a certain note which he held against a third person, and he afterwards refused to deliver the note:—*Held*, that he could not, in an action of book account afterwards brought, offer and claim an allowance for the note. *Stevens v. Smith*, 21 Vt. 90.

335. Where the defendant owed the plaintiff a debt payable in certain mechanic's work, but refused to do the work at a reasonable price, demanding more;—*Held*, that the plaintiff could recover the amount due, as cash. *Woodman v. Stearns*, 23 Vt. 655.

336. The defendant in 1850 made with the plaintiff the following written agreement: "Received of Ira Cameron 50 dollars, in part for 200 bushels of corn this day sold him, of which I have delivered 20 bushels, and the balance (180 bushels) is due him on demand at my mill, at 75 cents per bushel, to be paid for on delivery." Within some three months the plaintiff received and indorsed upon the contract 94 bushels more, and paid therefor according to the contract. Nothing further passed between the parties until 1855 (5 years), when the plaintiff demanded the residue of the 200 bushels, offering to pay the 75 cents per bushel therefor. The defendant refused to deliver the corn, the same being then worth \$1.33 per bushel. In an action for the non-delivery, the county court construed the contract as requiring the plaintiff to call for the corn within a reasonable time, and, finding that he had not done so, gave judgment for the defendant. The supreme court *held*, that the defendant was not entitled to judgment on *this ground*, since the defendant had never requested the plaintiff to take the residue of the corn; that the case might have been properly left to the jury upon the question whether the plaintiff had not abandoned the contract. The court, however, affirmed the judgment, by giving to the contract this interpretation,—that the contract had reference to no specific 200 bushels of corn then existing or set apart, but only entitled the plaintiff, within the limits of 200 bushels, to take at his option, more or less, and that he had exercised his option, when he took the last parcel and paid for it, not to take any more, which was acquiesced in by the defendant; and that the contract had been fully performed on both sides, according to the practical construction which both parties gave to it. *Cameron v. Wells*, 30 Vt. 633.

337. Where the plaintiff, a sub-contractor of the defendant for the construction of a section of a railroad, was prevented from completing his contract by reason of the further construction of the road being enjoined in chan-

cery, without the fault or procurement of the plaintiff;—*Held*, that the defendant was liable as for a breach of his contract, although such injunction was procured without his fault. *Doolittle v. Nash*, 48 Vt. 441.

### 3. Action general, or special.

338. No general action, much less the book action, will lie for the breach of a special contract remaining unexecuted; but only a special action upon the contract, in which the party may recover his damages. *Smith v. Smith*, 14 Vt. 440.

339. No action lies to recover for articles delivered or services rendered in performance of a special contract, while the contract remains open and not rescinded. *Bailey v. Bailey*, 16 Vt. 656.

## VI. DAMAGES.—RECOURPMENT.

340. **General rule.** The law, as the rule of damages for breach of a contract, requires that the defendant make the plaintiff whole; that is, he shall place him in as good a situation as he would have been in by performance. *Ferris v. Barlow*, 2 Aik. 106. 5 Vt. 421.

341. In an action for services, the court instructed the jury that it was the duty of the plaintiff to make the sum in damages, which he was entitled to recover, reasonably certain; that if they found a difficulty in determining this, it would not preclude a recovery, but it was their duty to see that the uncertainty did not benefit the plaintiff—that this should operate against him, and in favor of the defendant. *Held correct.* *Matlocks v. Lyman*, 16 Vt. 113.

342. **Instances.** In an action for breach of an agreement to kiln-dry, grind and pack a quantity of corn, at a stipulated price, averring an unskillful performance, whereby the plaintiff had sustained damage, where the defendant made no proof of non-payment of the price, nor set up a counter claim, the court charged that the damages should be assessed without regard to the sum stipulated to be paid for the labor. *Held correct.* *Foote v. Catlin*, 6 Vt. 44.

343. If the maker of a note procures a person to purchase it and agrees to pay therefor a certain sum, but afterwards denies such agreement and refuses to pay as agreed, such person, as indorsee, may recover the full amount of the note, though he purchased it at a larger discount than the sum named. *Raymond v. Williams*, 7 Vt. 230.

344. If one agrees to pay a certain sum in specific property and fails to pay, he is liable for the full sum stipulated, though the property is worth much less,—because the parties have stipulated the damages. *Harrington v. Wells*, 12 Vt. 505.

345. The defendant received of the plaintiff a quantity of hay and took a bill of sale of the same, describing it as about 25 tons, being all the hay in certain barns and in a certain stack, at \$4 per ton, carrying out the price at \$100, with a receipt of payment appended. At the same time the defendant executed a receipt to the plaintiff for the hay, to be disposed of to the best advantage and accounted for. The defendant having appropriated the hay to his own use, claiming it as his own;—*Held*, in assumption for goods sold, that the plaintiff was entitled to recover for the actual quantity of the hay at its true value, and was not limited by the quantity and price named in the bill of sale. *Crane v. Thayer*, 18 Vt. 162.

346. In an action against a professed millwright for damages sustained by his not constructing a mill in a workmanlike manner, according to his contract;—*Held*, that the plaintiff, prevailing, was entitled to recover his necessary expenses of putting the mill in such condition, after the defendant claimed to have completed his contract; and also what the use of the mill would have been worth to the plaintiff, more than it was, between the dates when the defendant claimed to have completed his contract, and a reasonable time for the making of such reparations. *Clifford v. Richardson*, 18 Vt. 620.

347. Contribution. Where one of several joint contractors pays the whole debt, he may, in a suit at law for contribution, prove the insolvency of any of the joint contractors, and recover an aliquot part of the whole debt paid, having regard only to the number of solvent contractors. *Mills v. Hyde*, 19 Vt. 59.

348. Other instances. In an action against the assignor of a promissory note, signed by two, upon a warranty of its validity, where one of the signers was proved to have been incompetent to contract by reason of insanity;—*Held*, that in estimating the damages, the value of the note as against the other signer must be considered. *Thrall v. Newell*, 19 Vt. 202.

349. Where a bond was conditioned that the obligor should convey certain land to the obligee upon the performance of certain services by the obligee, and the obligee tendered the services, which the obligor wrongfully refused to accept, and refused to convey;—*Held*, in an action for the breach, that the value of the land was not the rule of damages, but that the plaintiff was entitled to recover only what he had lost by being prevented from completing the execution of his contract. *Boardman v. Keeler*, 21 Vt. 77. 33 Vt. 83. 36 Vt. 720.

350. The defendant contracted with the plaintiff to carry a barge load of peas from Canada to New York, but by reason of his want of care and diligence he got them no fur-

ther than Burlington, where the barge got frozen in the ice, and could not be moved for that season. The defendant refusing to forward the peas by railroad, or to deliver the peas to the plaintiff except upon payment of freight, the plaintiff replevied them, and sent them to Boston for a market, which was a judicious disposition of them. In an action for breach of the contract to carry to New York;—*Held*, that the plaintiff was entitled to recover the difference between the net sum realized from the sale in Boston, and the net sum he would have realized from a sale in New York, as determined by the market price there, at the time when the peas would have arrived there, if the defendant had forwarded them according to his contract. *Laurent v. Vaughn*, 30 Vt. 90.

351. In an action for labor in the building of a railroad, under a contract for payment of 75 per cent cash, and, on the completion of the job, 25 per cent in the stock of the corporation at par, it appeared that the excess of cash payments made above the 75 per cent was more than the value of the stock payment of 25 per cent, at the time it became payable by the contract. *Held*, the contract being silent on this point, that the payment of such excess in cash was voluntary and only a waiver of the right to pay so much in stock; and that the plaintiff was entitled, on refusal to convey the stock, to recover the value, at the time when payable, of the balance of the 25 per cent of nominally par stock. *Jones v. Chamberlain*, 30 Vt. 196.

352. In an action for the non-delivery, according to the contract, of goods sold, where payment was not made in advance, the rule of damages is the difference between the contract price and the market value at the time and place of the promised delivery. *Worthen v. Wilmot*, 30 Vt. 555.

353. *Quære*, whether the rule is different where payment is wholly made in advance. *Seemle*, it is not different where the advance payment is but partial. *Ib.*

354. *Held*, that this rule is not varied by the payment of the full price in advance. *Hill v. Smith*, 32 Vt. 433.

355. The only general damages which the purchaser of chattels can recover for non-delivery, whether the price be paid or not, is the difference between the contract price and the market value at the stipulated time and place of delivery, together with the money paid, if any, on the contract. *Copper Co. v. Copper Mining Co.*, 33 Vt. 92.

356. A party claiming special damages from breach of contract, must so conduct the business as to sustain the least damage practicable; and cannot recover for a loss occasioned by his own imprudence or negligence. *Ib.*

357. Special damages cannot be recovered

for breach of contract, unless they are the natural and ordinary, and therefore the known and necessary result of the breach, or were fairly within the contemplation of the parties at the time of entering into the contract. *Ib.*

**358.** The defendant rented to a tenant a house situate on the line of a road, which the plaintiff had contracted with the defendant to build and complete by a day specified—the tenant, in his hiring, relying upon the road being completed as agreed. By reason of its not being so completed the defendant was obliged to discount to the tenant one-half the agreed rent. In an action to recover for the building of the road;—*Held*, that the damage thus claimed to have been sustained by the defendant was too conjectural and remote (as stated) to be regarded as damages naturally and necessarily resulting from the delay in completing the road, so as to be allowed by way of recoupment. *Smith v. Smith*, 45 Vt. 438.

**359.** But where the defendant was obliged, by reason of the road not being completed as agreed, to build a winter road instead for his necessary accommodation;—*Held*, that the expense of building such winter road was proper damages to be allowed in recoupment. *Ib.*

**360.** Where the defendants were bound by contract to repair a drain on premises leased by them to the plaintiff;—*Held*, that if, on request, they refused to repair, the plaintiff should have made the repairs, and the expense would be the measure of the damages; but where the defendants, after notice to repair the drain, promised from time to time to do so, but neglected, and so kept the plaintiff from doing it,—*held*, that the plaintiff could recover his entire damages for the breach, although exceeding the cost of the repairs. *Keyes v. Slate Co.*, 84 Vt. 81.

**361.** Where the plaintiff was prevented by the defendant from completing a contract with him for the manufacture of certain machines;—*Held*, that in estimating the damages for a breach of the contract, the value to the plaintiff of the unfinished machines should be reckoned,—the property not having vested in the defendant. *Allen v. Thrall*, 36 Vt. 711. See *Boardman v. Keeler*, 21 Vt. 78.

**362.** The defendant contracted to purchase of the plaintiff a specified number of bushels of potatoes at a specified price per bushel, and afterwards ordered the plaintiff to stop purchasing, and declined to receive any more. In an action on the contract;—*Held*, that the defendant was not liable to pay for potatoes thereafter purchased by the plaintiff to fill the contract, nor for any loss thereon by freezing or rot; and was liable only for the difference between what it would have cost the plaintiff to procure the potatoes, and the contract price. *Danforth v. Walker*, 40 Vt. 257.

**363.** The plaintiff and defendant were interested, in different proportions, in a promissory note in the hands of the defendant, payable in money and well secured. The defendant, without consent of the plaintiff and without necessity, took a colt in part payment, which he kept on expense until it died. *Held*, that the plaintiff was not obliged to share this loss, but the defendant was liable for the plaintiff's full share of the note. *Childs v. Boyd*, 48 Vt. 582.

**364.** The plaintiff had purchased four undivided fifths of certain land, but failed to obtain the other fifth because the defendant purchased it in violation of his contract with the plaintiff not to do so; whereupon the plaintiff procured partition by the probate court. In an action on the contract;—*Held*, that the true rule of damages was what such one-fifth was worth more than what the plaintiff would have had to pay for the same, except for the defendant's interference and breach of contract; and that it was error to include the expenses of the partition. *Morrison v. Darling*, 47 Vt. 67.

**365.** In actions upon debts due in coin, the value in currency of the amount of the debts in coin, when due, is not the true rule of damages. *Townsend v. Jennison*, 44 Vt. 315. See *Davis v. Field*, 48 Vt. 221.

**366. Entire damages.** Under a contract between a turnpike company and a town, by which the company agreed to support a certain highway bridge of the town for twenty years, in consideration of \$25 a year to be paid by the town, the company performed the contract for eight years, when it refused to proceed further. *Held*, that the rule of damages for such breach of the contract was the difference between what the town had agreed to pay, and the probable expense of performing the contract, and thus assess the entire damages for the remaining twelve years. *Royalton v. R. & W. Turnpike Co.*, 14 Vt. 311.

**367.** The true criterion, whether, in an action upon a continuing contract, damages can be recovered for a non-performance of the whole contract, and so for damages not sustained when the action is brought and suit tried, is, whether there has been such a breach as authorizes the plaintiff to treat it as entirely putting an end to the contract—whether the breach is entire and total, or only partial and temporary—and this may be a question of fact for the jury. *Remelee v. Hall*, 31 Vt. 582.

**368. Accruing damages.** Where there has been a breach of the condition of a bond of indemnity before suit brought, so as to sustain an action, the damages are to be assessed down to the time of trial, although accrued after suit brought. *Spear v. Stacy*, 26 Vt. 61; and see *Lowry v. Walker*, 5 Vt. 181.

**369. How affected by mode of declaring.** If by the fault or neglect of the defendant it is



rendered impossible to estimate the compensation by the stipulations of the contract, the plaintiff may recover upon a *quantum meruit*. But the mere fact that a breach of the contract by the defendant, or his fault or neglect, may embarrass the plaintiff to some extent in his proof, will not necessarily give the plaintiff the right to abandon the contract and recover independent of it. *Myers v. Baptist Society*, 38 Vt. 614.

370. Where a party to a special contract for labor, for which an entire sum was agreed to be paid, has performed a part according to its terms, and has been prevented from performing the residue by the act or default of the other party, he may sue either on the contract to recover damages for the breach of it, or in general assumpsit for the value of what he has done. *Chamberlin v. Scott*, 33 Vt. 80. *Derby v. Johnson*, 21 Vt. 18.

371. In such case, if he sue on the contract he must set it forth specially, and then his damages for what he has done under it must be regulated by the contract price, and he will recover such a proportion of the whole contract price, as the work he has done bears to the whole work to be done under the contract; and may also recover the profit he would have made by being allowed to complete the contract, and the damages he may have incurred in providing labor and means to perform the residue. *Id.*

372. If, in such case, he choose to waive the contract and sue in general assumpsit for work and labor [or in book account], then the measure of damages will be a reasonable compensation for the work actually performed. He is not then limited to recover a *pro rata* share of the contract price. *Id.* See *Preble v. Bottom*, 27 Vt. 249. 21 Vt. 18.

373. The plaintiff contracted to do a job of joiner's work for the defendant, and to complete the job by the 15th of August. The defendant agreed to pay therefor \$100 by the 1st of July, and the balance on the completion of the job. The defendant neglected after demand to pay the \$100 by the day named, and the plaintiff abandoned the work. In an action of book account;—*Held*, that the plaintiff could recover for the work done a *pro rata* compensation according to the contract price. *Preble v. Bottom*.

374. Where a contract for the sale and delivery of articles by a day named has been extended as to the time of delivery, and the purchaser (plaintiff) claims anything by reason of such enlargement of the time, (as larger damages for non-delivery, by increase of the market price during such enlarged time), his declaration must be framed to cover the contract as thus enlarged and altered. If only the original contract be counted upon, the damages must be

assessed as under the original contract. *Hill v. Smith*, 32 Vt. 433. *S. C.*, 34 Vt. 535.

375. It is perfectly well settled in this State, that where there is an entire contract for work to be performed upon certain terms and conditions upon the lands or buildings of the promisee, and the work is performed, but not strictly according to the special stipulations, the laborer may nevertheless recover upon a *quantum meruit* for the labor, and upon a *quantum valebant* for the materials furnished, according to the price stipulated in the special contract, deducting therefrom such damages as the other party may have sustained by failure to perform the work strictly according to the contract. *Morrow v. Huntoon*, 25 Vt. 9. *Joslyn v. Morrow*, 25 Vt. 185.

376. **Recoupment.** Recoupment—a quasi off-set of counter claims not liquidated. *Londonderry v. Andover*, 28 Vt. 416. For further instances, see *Crosby v. School District*, 35 Vt. 623. *Corliss v. Putnam*, 37 Vt. 119. *Phelps v. Paris*, 39 Vt. 511, and *infra*.

377. Where a party has not been guilty of a voluntary abandonment or wilful departure from his contract, has acted in good faith, intending to perform the contract according to its stipulations, but has failed in a strict compliance with its provisions, and where from the nature of the contract and of the labor performed, the parties cannot rescind and stand *in statu quo*, but one of them must derive some benefit from the labor or money of the other—in such case, the party failing to perform his contract strictly may recover of the other, as upon a *quantum meruit*, such a sum only as the contract, as performed, has been of real and actual benefit to the other, estimating such benefit by reference to the contract price of the whole work. *Bragg v. Bradford*, 33 Vt. 35. *Dyer v. Jones*, 8 Vt. 205. *Gilman v. Hall*, 11 Vt. 510. *Blood v. Enos*, 12 Vt. 625. *Bracket v. Morse*, 23 Vt. 554. *Morrison v. Cummings*, 26 Vt. 486. *Hubbard v. Belden*, 27 Vt. 645. *Barker v. Railroad*, 27 Vt. 780. *Swift v. Harri-man*, 30 Vt. 607. *Kettle v. Harvey*, 21 Vt. 301. *Keyes v. Slate Co.*, 34 Vt. 83. *Eddy v. Clement*, 38 Vt. 486.

378. The method of estimating this benefit is, *first*, to deduct from the contract price such sum as will enable the other party to get the contract completed according to its terms;—or, where that is impossible or unreasonable, such a sum as will fully compensate him for the imperfection in the work and the insufficiency of the materials, so that he shall in this respect be made as good, pecuniarily, as if the contract had been strictly performed; and, *second*, to deduct also from the contract price whatever additional damages the breach of the contract may have occasioned him. The remainder will be the benefit which the party

sought to be charged has derived from such part performance of the contract. *Ib.*

379. In an action for the price of lumber furnished under a special contract;—*Held*, that the defendant's damages for non-delivery at the times stipulated were the subject of recoupment in the action, and no plea in set-off was necessary—the same as in case of a failure to meet the contract as to quantity and quality. *Eddy v. Clement*, 38 Vt. 486; and see *supra*.

380. It is not the subject matter of the contract that determines the applicability of this mode of recovery, but the nature of the agreement and of the breach of it. *Steele, J. Ib.* 491.

381. Thus, under a special contract to chop trees upon another's land, where the work was not done strictly according to the contract, but the failure was not wanton, the party was *held* entitled to recover under a *quantum meruit*, what the work was worth to the party benefited. *Dyer v. Jones*, 8 Vt. 205.

382. So, where the contract was to build, on another's land, \$60 worth of stone wall of a given height and thickness at a given price per rod, and some portion of the wall was not of the height stipulated. *Gilman v. Hall*, 11 Vt. 510.

383. So, where the contract was to pasture a given number of cattle in a particular pasture, giving them the entire range, and the party suffered the fences to become so poor that other cattle broke in and consumed the feed, so that a part of the depastured cattle had to be removed by the owner. *Brackett v. Morse*, 23 Vt. 554.

384. The same rule applied to a contract for the construction of lime kilns, imperfectly done. *Morrison v. Cummings*, 26 Vt. 486.

385. So, to a contract to run a saw mill for a year in a good workmanlike manner, the party being dismissed for imperfect work. *Swift v. Harriman*, 30 Vt. 607.

386. So, to a contract for the building of a bridge and highway. *Kelly v. Bradford*, 33 Vt. 35.

387. Also, to a contract for railroad construction. *Merrow v. Huntoon*, 25 Vt. 9.

388. The plaintiff agreed to furnish the defendant lumber necessary for the building of a mill, "as it should be wanted." He did furnish the whole amount of lumber, but not so fast as needed, and the completion of the mill was delayed thereby to the defendant's damage. But, it appearing from the auditor's report that the case was such as required notice to the plaintiff of the size and quantity of lumber wanted from time to time—*Held*, that in order to the allowance of such damage against the plaintiff's claim, it should be found affirmatively that the plaintiff neglected to furnish the lumber within a reasonable time after he was fur-

nished with the necessary description of the lumber required. *Field v. Black*, 42 Vt. 517.

389. **May defeat action.** Where the plaintiff recommended himself as a competent workman and undertook to work as a master-builder, and through his neglect or unskillfulness his employer suffered loss to a greater amount than the sum due for services at the stipulated rate;—*Held*, that this defeated his action for services. *Goslin v. Hodson*, 24 Vt. 140.

390. The plaintiff took the defendant's sheep to pasture and to supply sufficient feed to fatten them for market. The sheep getting poor for want of sufficient pasturage, the defendant took them away before the end of the season, and the loss to the defendant was more than the contract price of keeping. *Held*, that the plaintiff could not recover on the contract, for he had not performed it; nor on a *quantum meruit*, for the loss to the defendant by the breach of the contract was more than the benefit from the keeping of the sheep. *Corliss v. Putnam*, 87 Vt. 119.

391. **Acquiescence.** The mere use of coal kilns erected upon the defendant's land, which were defectively constructed, but the defects not apparent and only to be discovered by use, or by tests, and part payment for the work, were *held* not to amount to an acquiescence, or waiver of a claim for deduction from the contract price, except to the extent of the payment. *Morrison v. Cummings*, 26 Vt. 486.

392. In an action to recover for labor performed under a contract special as to price per day, the defendant, to reduce the recovery, may prove that the plaintiff was unfaithful and indolent, and did not earn the wages stipulated, unless the defendant has acquiesced in the manner of performing the work. To the extent that the defendant, in such case, had paid for the labor, *held*, that he was bound, and could not recover it back. *Morris v. Redfield*, 23 Vt. 295.

393. C had contracted to work for the defendant for an entire term, and while so at work gave the plaintiff a written order, which the defendant accepted, as follows: "I accept this order, so far as I am owing said C, or shall be owing him the first of October next." Soon after, C abandoned his contract and absconded, whereby the defendant sustained more damage than the labor of C was worth. *Held*, that the acceptance by its terms bound the defendant to pay to the extent that he owed C at the date of the acceptance, although C could not have recovered under his contract. *Bellows v. Bingham*, 28 Vt. 243.

394. Where the plaintiff's claim results from an attempt on his part to perform a special contract, the defendant, by accepting what is done under it from time to time, is not precluded

from showing, in defense, that he has received less than enough to compensate him for the damages sustained by the plaintiff's failure to perform the special contract. *Myrick v. Slason*, 19 Vt. 121. *Allen v. Hooker*, 25 Vt. 137. *Smith v. Foster*, 36 Vt. 705. *Andrews v. Eastman*, 41 Vt. 134.

**395.** The plaintiff agreed, for a gross price, to furnish the defendant with wood for her fires for one year, such wood to be good dry wood, and not wood from last-blocks—which was green wood and not fit for burning. The plaintiff furnished wood according to the contract through the winter, but in the summer commenced furnishing such last-block wood, which the defendant used until the fall at an inconvenience, and finally, the plaintiff not furnishing any other kind of wood, the defendant supplied herself elsewhere. The plaintiff did not ask her if she would accept the last-wood upon the contract, nor did she refuse to accept it, nor make any complaint that the plaintiff was not furnishing such wood as he had contracted to furnish. *Held*, that as the plaintiff had stipulated both as to the kind of wood he should furnish and as to the kind he should not furnish, these facts did not constitute such an acceptance of the wood upon the contract as entitled the plaintiff to recover the contract price for good dry wood; and that he was entitled to compensation only to the extent of the benefit actually received by the defendant; and that the defendant had the right to have deducted from the contract price the damages sustained by the non-performance of the entire contract by the plaintiff. *Andrews v. Eastman*, 41 Vt. 134.

**396.** The plaintiff contracted with the defendant, under seal, to build a road in the town of S, and complete it by a specified time. He failed to complete it by the time specified. The defendant did not agree to enlarge the time of performance, but suffered the plaintiff to proceed with the work after the expiration of such time; urged him to under-let a part, which the plaintiff might have done; remonstrated against his delays, and notified him that he should claim damages therefor; was present on different occasions when the selectmen of S accepted portions of the road which were built after the expiration of such time, and made no objections thereto. In an action of general assumpsit for work done;—*Held*, that the defendant had thereby waived his objection to the plaintiff's right of recovery, at all, because he did not complete the whole road by the time specified, but that this did not bar the defendant of his right to insist on a deduction from the contract on account of damage by delay. *Smith v. Smith*, 45 Vt. 433.

**397. Independent stipulation.** *Semble*, that in assumpsit the defendant cannot, under

the general issue, show in reduction of damages the breach by the plaintiff of stipulations independent of those on which the plaintiff sues, although contained in the same instrument. *Keyes v. Western Vt. Slate Co.*, 34 Vt. 81.

**398. Warranty.** In an action for goods sold, or services performed at an agreed price, where there is a warranty accompanying and part of the contract, a breach of such warranty may be given in evidence under the general issue, or in an action on book for the price, in reduction of the damages. *Allen v. Hooker*, 25 187. *Keyes v. Western Vt., Slate Co.* *Walker v. Hoisington*, 43 Vt. 608.

**399.** An offer to perform after a breach of the contract is unavailing to cure the breach. *Clifford v. Richardson*, 18 Vt. 620. *Stevens v. Smith*, 21 Vt. 90. *Winn v. Southgate*, 17 Vt. 355. *Suttons v. Tyrell*, 12 Vt. 79.

**400. Promise of marriage.** In assessing damages for breach of promise of marriage, it is not a legitimate subject for the jury to consider, that the plaintiff might have been worse off by her marriage, by reason of the defendant's want of affection for her. *Piper v. Kingsbury*, 48 Vt. 480.

## CORPORATION.

### I. CORPORATE EXISTENCE, AND PROOF THEREOF.

#### II. STOCK AND STOCKHOLDERS.

#### III. MEETINGS AND RECORDS.

#### IV. OFFICERS AND AGENTS.

#### V. CORPORATE POWERS.

#### VI. CORPORATE LIABILITIES.

#### VII. REMEDIES FOR AND AGAINST CORPORATION.

#### VIII. FORFEITURE AND DISSOLUTION.

### I. CORPORATE EXISTENCE, AND PROOF THEREOF.

**1. Public grant.** In case of a public grant emanating from the same power that can create a corporation, the very grant or charter creates and gives the competency to take,—and, as a corporation, if necessary to that end. *Lord v. Bigelow*, 8 Vt. 445.

**2. In esse from date of charter.** A corporation may be regarded as *in esse* from the date of its charter and before any subscriptions to its stock, for the purpose of contracting and being contracted with in matters relating to its organization, where certain persons named and their successors who shall become subscribers are incorporated, or where only such as shall become subscribers are incorporated, and such subscriptions are afterwards made, although, by the charter, such subscriptions are required

in order to an organization of the corporation. *Hull v. Vt. & Mass. R. Co.*, 28 Vt. 401. *Vt. Central R. Co. v. Clages*, 21 Vt. 30.

3. A corporation may have such an existence by force of the act of the Legislature enacting it,—as where the act incorporates certain persons by name, their associates and successors,—as to be enabled to take a grant of land, vesting in it the title, before it has such an organization as to enable it to enter upon the transaction of its general business. *Vt. Mining Co. v. Windham Co. Bank*, 44 Vt. 489.

4. **De facto.** Where a subscription to the capital stock of a corporation is made directly to the corporation after it is organized, although informally, and while it exists as a corporation *de facto*, and is acting in its corporate capacity and under its corporate name, the subscriber cannot, in a suit upon such subscription, deny the legal organization of the corporation. *Montpelier, &c., R. Co. v. Langdon*, 46 Vt. 284.

5. **Proof of.** The certificate of commissioners under an act creating a railroad corporation, certifying, as required by the act, the amount of stock subscriptions, &c., was *held*, in an action by the corporation, conclusive as to the facts certified, so far at least as concerned the legal organization of the corporation. *Conn. & Pass. R. R. Co. v. Bailey*, 24 Vt. 465.

6. In a suit by a corporation against a stranger, it is sufficient proof of the plaintiff's corporate existence, to show a legal origin by their charter, and an existence *de facto* by their acts. The production of their records is not necessary. *Searsburch Turnpike Co. v. Cutler*, 6 Vt. 315. 11 Vt. 306. 28 Vt. 425.

7. An act passed in 1832 incorporated, as a bank, such persons as should become subscribers to its capital stock, and provided that the corporation "should take no benefit by the act, and that the same should be wholly void, unless the bank should commence and be in operation within one year after the passage of the same." In an action brought by the bank in 1838 upon a note given to it in 1837, the defendant pleaded *nul tiel corporation*, and issue was joined. *Held*, that the production of the charter, and proof that the plaintiffs were doing business as a bank under the charter, and were exercising corporate powers, was at least *prima facie* evidence that the requirements of the charter had been complied with. *Bank of Manchester v. Allen*, 11 Vt. 302 (*contra*, *Wood v. Jefferson Co. Bank*, 9 *Coven R.*, 194).

8. Where the act incorporating a bank required notice of the organization to be given by a certain day, and the bank was afterwards found in operation under the act;—*Held*, in the absence of evidence to the contrary, that the bank must be presumed to have been organ-

ized and competent to act as a corporate body as early as the time prescribed. *Bank of U. S. v. Lyman* (U. S. C. C.), 20 Vt. 666.

9. **Pleading.** In a suit by a corporation standing upon the general issue, the plaintiff is not required to make proof of its corporate existence. Such defense must be made by plea in abatement, or in bar. *Boston Type Foundry v. Spooner*, 5 Vt. 93. *Lord v. Bigelow*, 8 Vt. 445. *Aetna Ins. Co. v. Wires*, 28 Vt. 98.

10. **Estoppel.** An execution debtor is estopped from denying, on *habeas corpus*, the legal existence and corporate capacity of the plaintiff—a corporation—in whose name the judgment against him was recovered. *Sargeant, ex parte*, 17 Vt. 425.

## II. STOCK AND STOCKHOLDERS.

11. **Subscription and assessments.** Where one subscribed to stock in a corporation in the name of others without authority, himself making the prescribed payment, and afterwards assumed such shares, and the stock was set to him and the advance payments put to his credit, he was *held* to occupy the position of an original subscriber. *State ex rel. Page v. Smith*, 48 Vt. 266.

12. The charter of a railroad company required that 10,000 shares of stock should be subscribed for, before the making of any assessment. That number was subscribed for, but the subscriptions had a condition that interest should be allowed and paid by the company on all sums assessed and paid from the time of payment until the railroad should be put in operation. In an action for assessments;—*Held*, that this provision was not an agreement to reduce or pay back a part of the capital stock; that no time being fixed for the payment of such interest, it might be paid out of earnings after the road went into operation; and that the subscription was not avoided thereby. *Rut. & Bur. R. Co. v. Thrall*, 35 Vt. 536.

13. The issuing of preferred stock of a railroad corporation with guaranteed interest, is only a mode of raising money by pledging the original capital, and will not avoid a subscription to the original stock. *Ib.*

14. The charter of a railroad company provided that the directors might require payment of the subscriptions to the capital stock, at such times and in such proportions as they should deem best. One condition of the subscription was, that no assessment should exceed ten dollars on a share. By one single vote of the directors sixteen assessments of five dollars each were laid, payable at different times. *Held*, that this was within the charter and the terms of the subscription. *Ib.*

15. After the defendant's subscription to

the capital stock of a railroad corporation and after the organization of the corporation, an act of the Legislature, accepted by the corporation but without the defendant's consent, authorized an extension of the road beyond the original charter limits. Upon the application of another stockholder, the corporation had been enjoined in chancery from proceeding under the new act, and nothing was done under it thereafter.—*Held*, that the obligation of the defendant's subscription was not affected thereby. *Ib.*

16. **Remedy for assessments.** The charter of a railroad corporation authorized the directors to require the payment of assessments upon the subscriptions to the capital stock, "under the penalty of forfeiture of all previous payments thereon," and there was no other legislation upon the subject. Sundry assessments having been laid, some of which had been paid and some not, the directors, Aug. 15, voted that all stock on which the assessments shall remain unpaid on the 20th Sept. next "shall be and hereby is forfeited to the use of this corporation;" and the treasurer was directed to give immediate notice of the vote to all delinquents; and that all stock forfeited, by virtue of the foregoing resolution, should be sold. *Held*, (1), that the vote was a final declaration of forfeiture, with notice when the right to redeem would be cut off; (2), that the declaration of forfeiture was reasonable as to time; (3), that no sale was necessary in order to make the forfeiture complete; (4), that the company could not declare the stock forfeited, and after that sue the stockholder for past assessments; (5), that the remedy by forfeiture was cumulative, and might be held in reserve until after the remedy by suit had been exhausted; (6), that it was essential to a forfeiture that reasonable actual notice in advance should be given. *Ib.*

17. **Assumpsit lies in favor of a corporation to recover legal assessments upon stock subscriptions, where no other remedy is provided by statute, the charter or by-laws, although the subscription contains no express promise to pay.** *Essex Bridge Co. v. Tuttle*, 2 Vt. 393. 24 Vt. 473.

18. But where the charter provides a remedy, as a forfeiture of the stock for non-payment, and there is no express promise to pay, that is the only remedy. *Ib. Conn. & Pass. R. R. Co. v. Bailey*, 24 Vt. 465.

19. But where the charter provides other remedies than by action, and there is an express promise to pay assessments, such remedies are not exclusive, and an action of assumpsit lies upon such promise. *Ib.*

20. Before a suit can be maintained for assessments upon a subscription to the capital stock of a corporation, actual notice, or notice

pursuant to the charter or by-laws, must be given. *Rut. & Bur. R. Co. v. Thrall*, 85 Vt. 536. *Essex Bridge Co. v. Tuttle*, 2 Vt. 398.

21. Certain persons, including the defendant, associated and formed a joint stock company, and, by their articles, agreed to pay assessments on their shares, and the articles, provided for obtaining an act of incorporation and transferring the property of the association to the corporation. An act of incorporation was obtained, not incorporating those who had signed the articles nor adopting the articles but creating a new company, without mentioning any association already formed. This act was accepted at a meeting of the association, the corporation organized, and the property of the association transferred to the corporation, but the defendant took no part in such meeting, or acceptance of the charter. *Held*, that an action did not lie against the defendant to recover for assessments laid either before or after the organization of the corporation. *Wallingford Mfg. Co. v. Fox*, 12 Vt. 304.

22. The act incorporating the Vt. Central R. Co. made certain persons commissioners for receiving subscriptions to the capital stock, and provided that "every person at the time of subscribing shall pay to the commissioners five dollars on each share for which he may subscribe, and each subscriber shall be a member of said company;" and that when one thousand shares should be subscribed, the commissioners might call a meeting of the stockholders to elect directors, and should deliver to the directors, when elected, the books of subscription and the sums of money deposited on all the shares subscribed. The defendant, after certain other shares, but less than one thousand, had been subscribed for, subscribed for fifty shares, and, instead of the \$5 per share in money, gave the commissioners his promissory note for \$250, payable to "The commissioners of the Vermont Central Railroad Company," on demand for value received. The commissioners accepted the note and delivered it to the corporation upon its organization. In an action upon the note in the name of the corporation;—*Held*, (1), that the note was upon good consideration, for that by its acceptance by the corporation the defendant became entitled to the rights and privileges of a stockholder; (2), that the corporation came *in esse* before its organization, as subscriptions were made, and each subscriber upon subscribing became a corporator. (28 Vt. 407.); (3), that the action lay in the name of the corporation. *Vt. Central R. Co. v. Clages*, 21 Vt. 80. 24 Vt. 33.

23. **Individual liability.** A stockholder made liable for the debts of a corporation, cannot avoid such liability by a transfer of his stock, made for that purpose. *Dauchy v. Brown*, 24 Vt. 197.

24. An act of Nov. 7, 1814, incorporating the Pawlet Manufacturing Company, provided: "That the persons and property of said corporation shall be holden to pay their debts, and when any execution shall issue against said corporation, the same may be levied on the persons or property of any individual thereof." *Held*, that the act created the liability of the stockholder, and the remedy to enforce it was only such as the act gave, viz., by first obtaining judgment against the corporation, the party primarily liable. *Ib.*

25. The charter of a corporation prohibited the contracting of debts exceeding three-fourths the amount of its capital paid in; and provided "if such indebtedness shall exceed the amount aforesaid, the directors and stockholders shall be personally holden to the creditors of said company." *Held*, that this provision applied to those directors and stockholders, and those only, who were such when this provision was violated. *Held*, also—no special remedy being provided in the charter—that such directors and stockholders were jointly liable in a common law action. *Windham Prov. Inst. v. Sprague*, 43 Vt. 502.

26. To prevent a failure of justice, chancery may compel the individual members of an incorporated society, in a proper case, to pay the debts of the society.—*It was so done* in the case of a society incorporated under the statute for the support of the gospel, where they permitted the fund to be wasted which was chargeable with the support of the minister, and there was no property of the corporation from which his judgment at law could be collected. *Bigelow v. Congregational Society*, 11 Vt. 288. *S. C.*, 15 Vt. 370.

27. *Dictum*. If the officers of an insolvent corporation should neglect to call in subscriptions from solvent stockholders, the court of chancery—such stockholders being parties to the bill—would decree payment to a judgment creditor of the corporation, to at least the extent of such collectable unpaid subscriptions. *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313.

28. **Undivided earnings.** A sale or gift of stock in a corporation conveys all undivided earnings and right to future dividends, whether earned before or not. *King v. Follett*, 3 Vt. 385.

29. **A corporation dealing in its own stock.** *Held*, that a bank may take by purchase the stock of a stockholder. *Farmers' & Merchs.' Bank v. Champlain Tr. Co.*, 18 Vt. 131.

30. Whether the purchase by a corporation of its own capital stock operates as a merger, depends upon the intent of the parties, and especially of the corporation, and its option. To produce that result, it seems, some manifestation of such intent should be proved. While

the corporation so owns its own stock, the right of voting upon it is suspended. *State ex rel. Page v. Smith*, 48 Vt. 206.

31. If a sale of its stock by a corporation is otherwise valid, it is not vitiated by the fact that the motive of the directors joining in the sale, and of the purchaser, was to enable the purchaser to vote for such directors at an approaching election; and the purchaser may vote upon it notwithstanding. *Ib.*

32. Where new stock in a corporation is issued that is to share in profits with existing stock, the share owners have the right to take and share, proportionately, in the new stock. But this does not apply to the sale by the corporation of original stock, bought in by the corporation and held as assets, where its identity has been preserved, and it is sold for the payment of liabilities, or for general benefit. *Ib.*

33. Acquiescence in the sale of the stock of a corporation by its directors, where the proceeds went to the use of the corporation, was held to follow, as to the stockholders, from want of seasonable and proper proceedings to set the sale aside. *Ib.*

34. **Treasurer liable to stockholder.** The plaintiff was the owner of certain shares in a corporation on which a dividend had been declared, and the money was in the hands of the treasurer to be paid out. The treasurer refused to pay on demand, claiming that he owned the shares. *Held*, that he was personally liable therefor to the plaintiff in assumpsit for money had and received. *Williams v. Fullerton*, 20 Vt. 346.

35. **Stockholders acquiring preference.** It is not a constructive fraud, for the stockholders of a corporation to avail themselves of their superior advantages to obtain security for debts of the corporation due to themselves, to the exclusion of other creditors; and they will not be postponed for this cause merely. *Whitwell v. Warner*, 20 Vt. 425.

36. **Transfer by certificate.** The transfer of a certificate of stock in a corporation, with an assignment indorsed of the stock thereby represented, and a power to the transferee to effect a transfer of the stock on the books of the corporation, is a valid transfer of the stock, as between the parties, and vests the title in the transferee; and the tender of such certificate, assignment, and power, answers a contract to "furnish" such stock. *Noyes v. Spaulding*, 27 Vt. 420.

37. **Contract to "furnish."** The plaintiff sold the defendant certain shares of railroad stock, and the defendant agreed at a future day to "furnish" the plaintiff the same number of shares of the stock of the same corporation. *Held*, that the contract did not require the return of the same identical shares. *Ib.*

**38. Sale on execution.** The stock of a railroad company was sold on execution against the corporation, and bid in by A, and the execution thereby satisfied in part. *Held*, that under G. S. c. 86, s. 10, the same stock could be re-sold upon an *alias* execution upon the same judgment. *Chandler v. Henry*, 30 Vt. 330.

### III. MEETINGS AND RECORDS.

**39. Pledgee.** The pledgee of stock in a private corporation is not, for purpose of meetings of stockholders, to be regarded as the owner of the stock. *McDaniels v. Flower Brook Mfg. Co.*, 23 Vt. 274.

**40. Notice of meeting and vote.** A corporation, and every member thereof, is bound by a vote of the majority present at a meeting warned agreeably to the laws of the corporation, and not otherwise. If no provision is made for such warning, every member must have personal notice. *Stevens v. Eden Society*, 12 Vt. 688.

**41.** One article in the warning of a fire district meeting was, "to see if the district will vote to purchase a fire engine, hooks, and ladders, and buckets, or any portion thereof for protection against fire, and to raise money to defray the expense of the same, or for any other purpose." The meeting called voted, among other things, "to choose an agent to purchase whatever of fire apparatus the district may vote to buy," and chose an agent. *Held*, that the warning was sufficient to support the vote, and the appointment of the agent. *Hunneman v. Fire District*, 37 Vt. 40.

**42. Adjourned meeting.** All corporations, municipal or private, may transact any business at an adjourned meeting, which they could have done at the original meeting. This is but a continuation of the same meeting. *Warner v. Mower*, 11 Vt. 385. *Schoff v. Bloomfield*, 8 Vt. 472.

**43.** Where only a minority of the directors of a corporation assemble at a called meeting, they cannot lawfully adjourn the meeting to a distant place,—in this case fifty miles. *State ex rel. Page v. Smith*, 48 Vt. 266.

**44. Special and stated meetings.** Every member of a corporation is entitled to notice of special meetings, unless the by-laws excuse it. But where the time and place and object of the meeting are each fixed by corporate statute, or where it is stated and general, as the annual meeting, no notice is required. *Warner v. Mower*, 11 Vt. 385.

**45. Annual meeting.** At the annual meeting, fixed by the by-laws of a corporation, any and all business pertaining to the interest and powers of the corporation may, without previous notice thereof, be transacted, unless restricted by the by-laws;—as the mak-

ing of an assignment of its property for the benefit of its creditors. *Ib.*

**46. Place of meeting.** Where the by-laws of a corporation required the meetings to be held at the counting room of the corporation, and from the record it appeared that the meeting in question was held at the dwelling house of the general agent and clerk, without stating that this was the counting room of the corporation, and there was no evidence about it;—*Held*, that it should be presumed that this was their counting room for the time being—the presumption being in favor of the regularity of the proceedings. *McDaniels v. Flower Brook Mfg. Co.* 22 Vt. 274.

**47. Record and proof.** Where a corporation was required to keep records;—*Held*, that its meetings and doings could not be proved by parol, although no records were kept. *Stevens v. Eden Society*, 12 Vt. 688.

**48.** A vote required to be recorded—as of a village or town meeting—may be proved by parol if not recorded, or if the record is lost or destroyed; but if recorded, it cannot be added to or varied by parol. *Hutchinson v. Pratt*, 11 Vt. 402. *Sluck v. Norwich*, 32 Vt. 818.

**49.** In an action against a fire district (a corporation), the defendant offered to prove by parol, as against the record produced, that the meeting in question voted to adjourn "without day," and that thereupon the voters dispersed and afterwards a few re-assembled and transacted the business recorded. *Held*, that the evidence was not admissible, because this would be to add to and alter the record; and because (in this case) it was immaterial. *Hunneman v. Fire District*, 37 Vt. 40.

### IV. OFFICERS AND AGENTS.

**50. Directors—Assembly.** The directors of a corporation, in the absence of restriction in the charter or by-laws, have all the authority of the corporation itself in the conduct of its ordinary business. It is not important that authority to its agents to contract in its behalf, either under seal or otherwise, should be conferred at an assembly of the directors, unless that is the usual mode of their doing such acts. If they adopt the practice of giving a separate assent to the execution of contracts by their agents, assent so given is of the same force as if done at a regular meeting of the board. *Bank of Middlebury v. Rutland & Washington R. Co.*, 30 Vt. 159; and see *Stark Bank v. U. S. Pottery Co.*, 34 Vt. 144. *State ex rel. Page v. Smith*, 48 Vt. 266.

**51.** Where the statute was, "that the government and direction of the affairs of every such corporation shall be vested in a board of not less than five \* \* \* and a majority of the directors shall form a board, and shall be

competent to transact the business of the company";—*Held*, that such majority when assembled, though without notice to the others, possess all the powers of the entire board,—as, in this case, to authorize a sale of the stock of the corporation. *State ex rel Page v. Smith*.

**52.** Corporations are bound by the acts of servants and agents in their employment, and within their ordinary line of duty, without any formal vote conferring such authority; and the action of directors, though acting separately, if in the usual sphere of directors, binds the corporation. *Foot v. Rut. & W. R. Co.*, 32 Vt. 633.

**53.** The directors of a business corporation, having by the by-laws authority to appoint a treasurer, may do so without any formal meeting; and, in the absence of any prohibition in the charter or by-laws, may agree with him as to his compensation. *Waite v. Mining Co.*, 37 Vt. 608. *S. C.*, 36 Vt. 18.

**54. Compensation.** As a general rule, directors of corporations are not entitled to compensation for their personal services as such, unless rendered under some express contract, or vote of the corporation to that effect. *Hall v. Vt. & Mass. R. Co.*, 28 Vt. 401.

**55. Subordinate agent.** The agent of a corporation, performing the daily routine of its business, but under the supervision and control of a board of directors, has no authority, as agent, to create a lien upon the entire property of the corporation to secure advances to the corporation. *Whitwell v. Warner*, 20 Vt. 425.

**56. Authority to give notes.** It is not within the ordinary powers of the treasurer of a corporation, acting as the financial agent, to give the note of the corporation for the debt of a third person; nor within the ordinary powers of the directors, unless there is an urgent necessity to do so to subserve the interests of the corporation, although there may be a sufficient consideration, technically, to sustain the notes. In an action on such note;—*Held*, that the question of authority was one of fact for the jury, and, where some of the assenting directors were interested in the assumption of the debt by the corporation, that it was a question for the jury whether they acted in good faith. *Stark Bank v. U. S. Pottery Co.*, 34 Vt. 144.

**57. — to indorse notes.** Where a corporation, or joint stock company, intrusts their treasurer to take notes, his indorsement of them will bind the company; and this authority is implied from his being treasurer and being intrusted with the securities, and that they are made payable to the treasurer, or to him as treasurer. *Perkins v. Bradley*, 24 Vt. 66.

**58. Form of indorsement.** The indorsement of a promissory note made payable to a corporation was signed S B, "agent." *Held*,

that this was sufficient, in form, as an indorsement by the corporation. *Lyman v. Sherwood*, 20 Vt. 42; citing *Proctor v. Webber*, 1 D. Chip. 371.

**59. Authority to assign.** It seems, that an officer of a corporation who is intrusted with the collection of its debts, may bind the corporation by an assignment of its dues, without recourse, upon receiving the amount. *Aetna Ins. Co. v. Wires*, 28 Vt. 93.

**60. — to make affidavit.** Under the statute requiring the affidavit of the plaintiff to be filed, stating, &c., in order to warrant process against the body of a debtor;—*Held*, that in case of process in favor of a corporation, the affidavit of the head of the corporation—as, the president of a bank—was sufficient. *Sargeant ex parte*, 17 Vt. 425.

**61. — to receive notice.** Notice to the president of a bank, or to the cashier, by a stockholder, that the stock standing in his name he holds as trustee of another, is notice to the bank. *Porter v. Bank of Rutland*, 19 Vt. 410.

**62. — to make admission.** The admissions of a member of a corporation established for a public purpose and not for private profit, where there is no joint interest, but a mere community of interest, at most, do not bind the corporation—as, to take a debt out of the statute of limitations. *Lyman v. Norwich University*, 28 Vt. 560.

**63. — to contract between themselves.** As to the authority of agents to pledge to each other, individually, the responsibility of the corporation—see *Geer v. School District*, 6 Vt. 76. *Sawyer v. Meth. Ep. Soc.*, 18 Vt. 405. *Rogers v. Danby Universalist Soc.*, 19 Vt. 187.

**64. Interests adverse.** The allowance of an account against a corporation by a committee appointed under the by-laws to audit it, but interested to make the allowance, and the acceptance of it by a vote of the directors which requires the votes of the same committee, as directors, to carry the vote of acceptance, are wholly inoperative to bind the corporation. If all the proceedings had been regular, they would not be conclusive, but might be impeached by showing misconduct, fraud, or mistake. *Waite v. Mining Co.*, 36 Vt. 18. *S. C.*, 37 Vt. 608.

#### V. CORPORATE POWERS.

**65. Power to take grant of lands.** A corporation has capacity to take a grant of lands in fee, unless in a case where it purchases and undertakes to hold real property for purposes wholly outside and foreign to the object of its creation, or unless restricted by its charter or by statute. *Prout. J.*, in *Page v. Heineberg*, 40 Vt. 85.



**66. — of foreign corporation.** The plaintiffs were a corporation, created such by a New Hampshire charter giving them the right to construct and maintain a bridge across Connecticut River, and to take tolls, and they had constructed and were maintaining the bridge, taking tolls of passengers. One Jarvis, owning the lands on the Vermont side up and down the river from the bridge, conveyed to them "the right to control all passage over said land for the purpose of avoiding paying toll to said bridge proprietors, and the right to obstruct any travel over said land for said purpose, with full power to said proprietors to decide in the premises," &c. *Held*, that such a right and interest are the subject of grant and conveyance by deed, as an interest in land, which the plaintiffs, though incorporated in another State, could take. *Prop's. of Claremont Bridge Co. v. Royce*, 42 Vt. 730.

**67.** The plaintiffs put up bar-ways upon said land, to prevent passage across the river elsewhere than by said bridge. The defendant, undertaking to cross said lands in order to avoid the toll, was forbidden by the plaintiffs, but he crossed nevertheless, tearing down the bars. In an action on the case for passing over the land to avoid paying toll, &c.; *Held*, that the plaintiffs could recover. *Ib.*

**68. — without words of perpetuity.** A legislative grant, or a deed, of lands to an aggregate corporation having perpetual succession, requires no words of perpetuity, and is as absolute, and of the same effect, as a grant to a man and his heirs and assigns. *Grammar School v. Burt*, 11 Vt. 632. *Cong. Soc. of Halifax v. Stark*, 34 Vt. 243.

**69. Power to add other business.** Where a corporation is created for manufacturing purposes—as for manufacturing cotton or wool—there is no impropriety in connecting with its ordinary business the business of a retail store, as a convenience or necessity. *Dauchy v. Brown*, 24 Vt. 197.

**70. Municipal corporation—Legislative control.** So far as a municipal corporation is endowed by law with the capacity of contracting, and of acquiring, holding and disposing of property, it stands on the same ground of exemption from legislative control and interference as a private corporation. *Atkins v. Randolph*, 31 Vt. 226. *Poultney v. Wells*, 1 Aik. 180. *Montpelier v. E. Montpelier*, 29 Vt. 19.

**71. Newbury Seminary.** *Held*, that the trustees of Newbury Seminary, a corporation located at Newbury, had no authority to sell and dispose of the property of that institution to the Vermont Conference Seminary, a corporation located at Montpelier. *Stevens v. Wilbard*, 43 Vt. 692. *Wilson, J.*, dissenting.

**72. University of Vermont.** The Act of Nov. 9, 1865 (Sess. Laws 1865, No. 83), au-

thorizing the union of the University of Vermont and the Vermont Agricultural College, two distinct corporations, and to become a new corporation by the name of the University of Vermont and State Agricultural College, transferred to the new corporation all the property of the former University, and, by force of such transfer, substituted the new for the old corporation as to all contract claims, and gave a right of action in the name of the new corporation upon such claims. But in declaring upon such contract it is necessary to aver the organization of the plaintiffs, as well as a vote of the former University to accept the act and surrender its property to the plaintiffs. *University of Vermont & State Agricultural College v. Baxter*, 42 Vt. 99. Also a like vote of the Agricultural College. *S. C.*, 43 Vt. 645.

**73. Deed of corporation.** A corporation may adopt any seal they choose, for the time, the same as a natural person—as a private seal, instead of the corporate seal, to a replevin bond. *Bank of Middlebury v. Rutland & Washington R. Co.*, 30 Vt. 159.

**74.** The sealing of the deed of a corporation with the corporate seal does not import, nor include, a signing by the corporation. *Isham v. Bennington Iron Co.*, 19 Vt. 230.

**75.** A deed of the lands of a private corporation, signed by its president, as such, and sealed with his private seal, in which was recited the vote authorizing it, was *held* good to convey the lands, under the statute of 1815 (Slade's Stat. 160). *Warner v. Mower*, 11 Vt. 385.

**76.** The conveyance of its lands by a corporation can be only by a deed executed in the manner prescribed by the statute in such case. *Wheelock v. Moulton*, 15 Vt. 519. *Isham v. Bennington Iron Co.*, 19 Vt. 230. 23 Vt. 611. *Pope v. Henry*, 24 Vt. 560. *Miller v. Rutland & Washington R. Co.* 36 Vt. 452.

**77.** The corporators or shareholders of a corporation cannot, as such, convey the real estate of the corporation, though they all join in the deed; and although the same deed conveys all the shares of stock in the corporation, it does not convey the real estate. *Wheelock v. Moulton*. *Isham v. Bennington Iron Co.*

**78.** The statute of Nov. 3, 1815, which provided and specified the mode in which private corporations might convey their real estate, superseded the statute of March 6, 1797, as respects such conveyances, and, while it was in force, was the uniform and only mode of conveying lands by corporations. *Isham v. Bennington Iron Co.* *Davis, J.*, dissenting.

**79.** Under the statute authorizing a corporation to convey lands "by an agent appointed by vote for that purpose" (R. S. c. 60, s. 3; G. S. c. 65, s. 3), it is not essential to the validity of such deed that the vote should be

recited in it. *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

**80.** Under this statute, William Wallace, the agent so appointed, made the deed in this form: "The Flower Brook Manufacturing Co., by William Wallace their agent, a corporation," &c., "in consideration," &c., "do give, grant," &c. All the covenants were in the name of the corporation. The *testimonium* clause was: "In witness whereof we have set our hand and seal," &c., and the deed was signed "William Wallace, Agent for Flower Brook Manufacturing Co.," and sealed—the corporation having no corporate seal. The deed did not recite the vote of the corporation. The acknowledgment was: "Personally appeared William Wallace, Agent of the Flower Brook Manufacturing Company, signer and sealer of the above written instrument, and acknowledged the same to be his free act and deed," &c. *Held*, that the deed and acknowledgment were sufficient in form as the deed and acknowledgment of the corporation. *Id.*

**81.** The president of a railroad company having authority by vote of the corporation to execute a mortgage of the road and its franchise, made a mortgage deed, wherein, reciting the vote, he conveyed in his own name, as—"I, M C, as I am President, as well as by the power and authority vested in me by the vote aforesaid," &c. The covenants were in his individual name,—"I, the said M C," &c.—"*In witness* whereof I have hereto set my hand and seal," &c., Signed "M C," with his private seal attached.—*Acknowledged* "to be his free act and deed, and the free act and deed of said corporation." *Held*, that this was not the deed of the corporation, and that the recording of it was not constructive notice of its existence and contents. *Miller v. Rut. & Washington R. Co.*, 36 Vt. 452.

**82. Contract to convey.** A contract to convey land by a corporation is not required to be executed or ratified with the same formality as the actual conveyance. *Conant v. B. Falls Canal Co.*, 20 Vt. 263. *Isham v. Bennington Iron Co.*, 19 Vt. 245. *Miller v. Rutland & Washington R. Co.*

## VI. CORPORATE LIABILITIES.

**83. Public use.** There is no implied contract by the State, in the charter of a turnpike or other private corporation, that their property, or even their franchise itself, shall be exempt from the common liability of the property of individuals to be taken for public use. *White River T. Co. v. Vt. Central R. Co.*, 21 Vt. 590. 27 Vt. 379.

**84. Liability for torts.** A corporation—as a railroad corporation—is liable for torts even, when committed by its agents within the ap-

parent scope of their authority, or in pursuit of the general purpose of the charter; in other words, where the departure from the charter powers is not such as to be notice to all that the agent is departing from the proper work of the corporation, it is liable for such acts of its agent. *Jones v. West. Vt. R. Co.*, 27 Vt. 399. *Lyman v. White River Bridge Co.*, 2 Aik. 255. *Sabin v. Vt. Central R. Co.*, 25 Vt. 363.

**85. Unauthorized act ratified.** Although the contract of a corporation may be strictly *ultra vires*, yet if not interfered with by the stockholders or the State, and it is not of a class of contracts expressly prohibited, and there is reasonable ground to suppose that the agents of the corporation may have acted in good faith, courts will not listen to the objection when raised by the corporation itself, or by one having no interest in the question, except for the purposes of unjust advantage. *Noyes v. Rut. & Bur. R. Co.*, 27 Vt. 110. *Rut. & Bur. R. Co. v. Proctor*, 29 Vt. 93. *Sturges v. Knapp*, 81 Vt. 62; and see *post* 90.

**86.** Where the agent of a corporation, without authority, procured of the orators, upon the credit of the corporation, funds which came to the use of the corporation;—*Held*, either, (1), that the corporation by accepting and appropriating the avails of the agent's contract, after becoming aware of all the facts, had thereby ratified the act of the agent in borrowing and using the money in their business, in its entirety and with all its conditions; or (2), that, if not a ratification, then the application of the orators' funds by the agent to the business of the corporation was an unauthorized act, and, as such, a misapplication of the orators' funds, and so the orators could reclaim them, into whosoever hands they had come, and in whatever form they might exist, and however changed from the original. Under the circumstances of this case, the latter view was taken. *Whitwell v. Warner*, 20 Vt. 425.

**87.** An agent of a corporation, but not authorized to lease its lands, did execute to the orator a contract to lease its land and a water privilege for a certain rent, upon the faith of which the orator took possession and made permanent erections, of which the corporation was cognizant, and for several years received the agreed rent. *Held*, that the corporation had thereby ratified the contract, and the execution of a lease was decreed. *Conant v. Bellows Falls Canal Co.*, 29 Vt. 263.

**88.** If a corporation, or its principal agents and officers, are cognizant of some party being on their land making permanent erections under a claim of title, and make no objections, this is held a ratification of a sale or contract to convey, made by their agent. *Conant v. B. Falls Canal Co.* *Pope v. Henry*, 24 Vt. 560.

89. Where a corporation has a right to pass a particular vote, and the objection to it is only to the formality of the proceeding, the defect may be cured by subsequent ratification;—as by subsequent action under it, or vote to pay in accordance with it. *Richardson v. Vt. & Mass. R. Co.* 44 Vt. 618.

99. **Who may question validity of corporate acts.** If a contract by a corporation is not in violation of some public law, or contrary to public policy, it seems that only the immediate parties to it, as the corporation itself, or the stockholders, who are parties by representation, hold such a legal position in relation to the contract, as to entitle them to raise the question of its validity on account of the alleged want of capacity to make it; but if the contract be in violation of some public law, or against public policy, in such sense as to make it void and of no effect to any intent, any person standing in a relation of interest to the subject matter of the contract and to be affected by its operation, might undoubtedly set up and insist on such fatal vice in it, for the purpose of clearing himself from the consequences of its being carried into effect. *Barrett, J., in Vt. & Can. R. Co. v. Vt. Cent. R. Co.*, 34 Vt. 2.

#### VII. REMEDIES FOR AND AGAINST CORPORATIONS.

91. **Generally.** Where a corporation—as a town—has sustained special damage in its corporate capacity, it has the same right of redress as an individual in like circumstances;—applied to the case where the defendant town neglected to remove its pauper from the plaintiff town, as it was its duty to do. *Sheldon v. Fairfax*, 21 Vt. 102;—and to the case where the plaintiff town suffered damage to its highway, by the discharge of the water of a stream upon it by the defendants. *Shrewsbury v. Brown*, 25 Vt. 197.

92. **Procedure.** Where corporate rights and interests are affected in any way injuriously, generally speaking and unless some special ground be shown, they must be asserted and defended, both at law and in equity, in the corporate name, and not in the name of stockholders, creditors, &c. *Bradley v. Richardson* (U.S. C. C.), 23 Vt. 720.

93. A corporation may maintain the action of book account. *Insurance Co. v. Cummings*, 11 Vt. 503.

94. In an action of book account against the defendant as a corporation, the question of its corporate existence cannot be raised by the defendant before the auditor, but only by plea before judgment to account. *Hunneman v. Fire District*, 37 Vt. 40.

95. Assumpsit lies against a corporation—as a town—upon an implied, as well as on an ex-

press promise. *Poultney v. Wells*, 1 Aik. 180. *Gassett v. Andover*, 21 Vt. 342.

96. A corporator named in a charter was allowed to recover against the corporation, afterwards organized, for his necessary services in procuring subscriptions to its stock required by its charter before an organization could be perfected, as upon an implied promise of payment. *Hall v. Vt. & Mass. R. Co.* 28 Vt. 401.

97. Charges against a railroad company for services in procuring their act of incorporation, disallowed—there having been no subsequent promise to pay; and no previous promise could be implied, since the defendants, then having no legal existence, were incapable of employing the plaintiff, or of making an express contract. *Ib.*

98. The corporators, named in an act, voted to pay “all reasonable expenses” to be incurred by a committee of their number in procuring stock subscriptions. Held, that this was not limited to cash expenditures, but included also personal services. *Ib.*

99. Trespass, or other proper action, may be maintained against corporations for torts authorized or commanded by them. *Lyman v. White River Bridge Co.*, 2 Aik. 255. 27 Vt. 107. *Sabin v. Vermont Central R. Co.* 25 Vt. 363. 22 Vt. 372.

100. **Indictment.** An indictment lies against a corporation,—as, a railroad corporation—for the erection and maintenance of a common nuisance, by its officers and agents. *State v. Vt. Central R. Co.* 27 Vt. 103.

101. An indictment against a party named, described the defendants as “a corporation duly chartered and incorporated by the legislature of this State,” but, there was no averment that the company had ever accepted the charter, or organized under it. Held, that there was no sufficient averment that the corporation was *in esse*. But held, that a description of the party as “a corporation existing under and by force of the laws of this State, duly organized and doing business,” was sufficient, and that a statement of time and place, when and where the defendants became a corporation, was unnecessary. *State v. Vt. Central R. Co.*, 28 Vt. 583.

102. **Pleading.** As to political corporations, as towns, created by public statutes, it is not necessary in pleading to aver their corporate existence, nor to make proof thereof. *Briggs v. Whipple*, 7 Vt. 15.

103. **Foreign corporation.** A private corporation of another State is subject to suit in the courts of this State, where jurisdiction has been acquired. *Day v. Essex Co. Bank*, 13 Vt. 97. 46 Vt. 707.

104. G. S. c. 33, s. 24, prescribing the mode of service of process upon a corporation, has reference exclusively to corporations within this

State. *Hall v. Vt. & Mass. R. Co.*, 28 Vt. 401.

105. The statute of limitations does not commence running against a foreign corporation, until it has attachable property within this State. (G. S. c. 63, s. 15.) *Ib.*

#### VIII. FORFEITURE AND DISSOLUTION.

106. It is not every irregularity, or want of conformity with the directions of the charter, that annihilates a corporation; and a charter may even be forfeited, and still the corporate capacity remain. *Phelps, J.*, in *Searsburg T. Co. v. Cutler*, 6 Vt. 323-4.

107. The power of the court to vacate a charter upon information, is to be exercised in discretion. It was refused where the violation was not fraudulent, and no existing danger to the community seemed to require it. *State v. Essex Bank*, 8 Vt. 489. 24 Vt. 238.

108. It is the generally received doctrine in this State, that a legal surrender of the franchise to be a corporation, may be presumed where there has been an entire non-user of corporate franchises, and a neglect to choose corporate officers, for a sufficient length of time, but that time not decided (*Penfield v. Skinner*, 11 Vt. 296); yet—*Held*, in an action by a corporation once organized, that such presumption did not arise from the fact of its having, some ten years before, disposed of its personal property, and thereafter neglected to choose corporate officers and ceased to do business. *Brandon Iron Co. v. Gleason*, 24 Vt. 228.

109. Under a provision of an act of incorporation that the charter shall become void, *unless*, &c., the question of forfeiture cannot be put in issue collaterally, as in an action for assessments, but only by direct proceedings brought by the State to vacate the charter. This is a matter exclusively between the corporation and the State, which may waive the forfeiture; and, until judgment of ouster, the legal existence of the corporation continues. *Conn. & Pass. R. R. Co. v. Bailey*, 24 Vt. 465.

As to particular *Corporations*, see appropriate titles—as ASSOCIATIONS; BANKS; RAILROAD COMPANY; SCHOOLS, II.; TOWNS; TURNPIKE COMPANY; VILLAGE.

#### COSTS.

##### I. AT LAW.

1. *In the county court and inferior tribunals.*

2. *In the Supreme Court.*

##### II. IN CHANCERY.

##### I. AT LAW.

1. *In the county court and inferior tribunals.*

1. **By force of statute.** It is only by force of our statutes, that costs are ever taxed and allowed. *Tyler v. Frost*, 48 Vt. 486.

2. **Suits by the State.** Costs can in no case be taxed against the State. *State v. Harrington*, 2 Tyl. 44.

3. In an action by the State Treasurer, costs for his travel are not taxable. *Swan, Tr., v. Colfax*, 2 Tyl. 258.

4. **Want of jurisdiction.** Where an action is dismissed for want of jurisdiction, no costs are taxable. *Barlow v. Burr*, 1 Vt. 488 (Changed by G. S. c. 30, s. 42).

5. The authority given by the Statute of Nov. 5, 1830, to tax costs and issue execution therefor, where a suit is dismissed for want of jurisdiction, is consistent with the taking of a recognizance for costs and pursuing the recognizor therefor. *Colony v. Maek*, 8 Vt. 114.

6. Under G. S. c. 30, s. 42, allowing a defendant "reasonable costs" where a suit is dismissed for want of jurisdiction, the court allowed him only his costs in the supreme court, where he omitted to raise the question of jurisdiction until after a verdict against him. *Chadwick v. Batchelder*, 46 Vt. 724.

7. **No such person.** Where a writ was abated on the plea that there was no such person in existence as the plaintiff, a judgment entered up for the defendant's costs, and execution thereon, were held to be void. *Gray v. Parker*, 16 Vt. 652.

8. **Discontinuance.** The "reasonable costs," named in G. S. c. 30, s. 42, will not be allowed to a party, where, after service of a process upon him, and before the return day, and before any costs have accrued to him, the plaintiff gives him a written notice of discontinuance, or that he shall not enter the suit. *Mead v. Arms*, 2 Vt. 180.

9. Any costs, in their nature taxable, made before service of the notice should be paid or tendered with the service of the notice. *Hutchinson, J.*, *Ib.*

10. The same is true of a verbal notice of discontinuance, given under such circumstances as to afford a reasonable protection to the defendant, and where the claim for costs is in the judgment of the court unreasonable—and this rests wholly in the discretion of the court. *Fullam v. Ives*, 37 Vt. 659. See *Hill v. Dunlap*, 15 Vt. 645. *Clark v. Scofield*, 16 Vt. 699. (*Semble*, *Wright v. Doolittle*, 5 Vt. 390 *contra*,—overruled.)

11. Nor will costs be allowed a defendant, where, after service of the writ, and before and without entry of the suit in court, the defendant by his own act has extinguished the cause of

action, as by becoming a bankrupt on his own petition—although no notice of discontinuance was given. *Clark v. Scofield*, 16 Vt. 699.

12. A sued out a justice writ against B and had it served, but did not procure the writ to be returned and entered. B appeared, but the justice was not present. *Held*, that A was not liable to B for his costs and expenses, in an action. *Stevens v. Wilkins*, 8 Vt. 231. *Overruled* by *Mann v. Holbrook*, 20 Vt. 523.

13. Where A had sued out a writ against B, returnable before a justice, and had caused it to be served, and, after B had incurred costs and expenses in preparing for his defense, gave B notice of the discontinuance of the suit;—*Held*, that A was liable to B, in an action on the case, to the extent, at least, of such taxable costs. *Griffin v. Farwell*, 20 Vt. 151.

14. So also, where the party, after service of his writ, omitted to appear and proceed with his suit in any mode, and the justice did not appear, whereby the other party suffered loss, he was *held* liable in an action on the case. *Mann v. Holbrook*, 20 Vt. 523—overruling *Stevens v. Wilkins*, 8 Vt. 231.

15. Where the term of office of a justice expired during the trial of a cause before him;—*Held*, that the defendant therein could not recover, in an action against the plaintiff therein, the costs of his defense. *Johnson v. Kingsbury*, 28 Vt. 436.

16. During the pendency of an action upon a penal statute, and after one judgment for the plaintiff and a review, the statute was repealed without any saving clause, and the suit was thereafter dismissed on the defendant's motion. *Held*, that the defendant was entitled to costs only after filing his motion. *Sumner v. Cummings*, 23 Vt. 427.

17. The general rule is, that where the plaintiff has a good cause of action when he commences his suit, and something transpires pending the action which extinguishes it, the plaintiff may discontinue his action, neither party recovering costs, or, in some cases, the plaintiff is entitled to judgment for nominal damages and costs up to that time. *Peck, J., in Wheeler v. Fuller*, 39 Vt. 312.

18. **As depending on recovery of damages.** A plaintiff cannot have a judgment to recover costs, unless there be a recovery for damages, at least nominal. *Stevens v. Briggs*, 14 Vt. 44.

19. **Payment pending suit.** Payment of a debt, after suit brought and costs incurred, will not prevent a judgment for nominal damages and costs, unless the claim for costs has been released or waived. *Belknap v. Godfrey*, 22 Vt. 288.

20. **Several suits.** A party having several securities for one demand may pursue them all to judgment, and, although he can have but one

satisfaction for his debt or damages, he is, unless restricted by statute, entitled to the costs of each suit. *Stillman v. Barney*, 4 Vt. 331.

21. Where three suits were brought by the same party in interest, but in the names of different nominal plaintiffs, against the same defendant and for the same matter, and so brought in order to save the party's rights in case of some exigency in regard to testimony or ruling of law possible to occur, and a trial and recovery were had in one, and the others were abandoned and judgment therein for defendant;—*Held*, that full costs should be taxed for the plaintiff in the case tried, and, in the other cases, only such costs for the defendant as applied exclusively to those cases. *Barker v. Troy & R. R. Co.* 27 Vt. 766.

22. **Several issues.** Though the court does not adopt the English practice of taxing costs both ways where some of the issues are so found, yet where the defendant, before impaneling the jury, offered the plaintiff a judgment on one count, which was declined, and the other issues were found for the defendant, the plaintiff was allowed his costs as of a judgment, but no costs for the trial by jury. *Clark v. Rice*, 6 Vt. 33. Now regulated by G. S. c., 33, s. 17.

23. The statute which provides that each party shall recover costs upon the issues or claims on which he shall prevail (G. S. c. 33, s. 17) applies only in cases where the issues are several and distinct, and not to the constituent parts of a single general issue or claim;—it applies to issues and claims made by the pleadings, and not to those arising on the testimony on the trial. *Brainerd v. Casey*, 37 Vt. 479.

24. **Discretion.** The county court may, in their discretion, disallow costs to the plaintiff upon a claim which he fails to establish, although he prevails in the suit. *Sanborn v. Chittenden*, 27 Vt. 171. 35 Vt. 34.

25. How far the taxing of costs is discretionary. *Sumner v. Cummings*, 23 Vt. p. 434.

26. **Book account.** The statute of Nov. 16, 1819 (Slade's Stat. 138), regulating costs in mutual actions of book account, applied only to cases where the second action was commenced after a recovery in the first. *Gale v. Cooper*, 11 Vt. 597. See G. S. c. 125, s. 23.

27. Where the then defendant in an action on book, who had "personal notice of the suit," though the writ was not personally served upon him, appeared and defended that suit, but omitted to present his account, and judgment passed against him, from which he appealed, but, before entry, paid that judgment;—*Held*, that on a subsequent recovery of judgment by him, in an action on book, for the matters of account so omitted in the former suit, he was not, under G. S. c. 125, s. 33, entitled to costs. *Scott v. Niles*, 40 Vt. 573.

28. In book account, the county court, without G. S. c. 83, s. 17, has a discretionary power to deny full costs to the plaintiff, where he fails to sustain his full claim. *Watts v. Kavanagh*, 35 Vt. 34; and see *Sanborn v. Chittenden*, 27 Vt. 175. *Briggs v. Brewster*, 23 Vt. 100. *Gilbert v. Earl*, 47 Vt. 9.

29. Costs may be properly apportioned in this action. *Briggs v. Brewster*.

30. **Restriction as to amount.** The restriction as to the amount of costs recoverable by the plaintiff, does not apply to a case referred with all demands. If the action only were referred, it might be otherwise. *Baker v. Blodget*, 1 Vt. 141.

31. Under the statutes limiting the plaintiff's costs to the amount of his debt or damages, "except costs that may accrue from continuances at the request of the defendant," &c., the rule of taxation is, to add to the amount of costs equalling the damages, the costs of the term in which the defendant obtains the continuance, but not the costs of any subsequent term. *Davis v. Tarble*, 2 Aik. 259.

32. In actions of trespass on the freehold, in order to deprive the plaintiff of full costs in case of a recovery for less than seven dollars damages (G. S. c. 125, s. 22) the defendant must make no question in regard to the plaintiff's right, either of title, or possession. If he put the plaintiff upon proof of his title or possession, or attempt to show a counter title, or right of possession in himself, full costs will be allowed. *Powers v. Leach*, 22 Vt. 226. 24 Vt. 546.

33. Whether the attempt to show a license brings the "right of title or possession \* \* in question," would seem to depend upon the nature of the act complained of. The right of possession, in such case, is brought in question, where the act is an unequivocal act of possession,—as where the defendant makes permanent erections, as, a stone wall enclosing the plaintiff's land, cuts trees, &c. *Id.*

34. In trespass on the freehold, brought in the county court, the main question was one of boundary between the lands of the parties. The jury found the line to be as the defendant claimed, but that he had cut beyond that line, upon the plaintiff's land, trees to the value of \$3.50, and gave verdict for the plaintiff for that sum. The defendant did not claim "right of title or possession" beyond that line, but only denied the fact of committing any act of trespass beyond the line. *Held*, that under G. S. c. 125, s. 22, the plaintiff could recover no more costs than damages. *Brainerd v. Casey*, 37 Vt. 479.

35. Where the plaintiff recovers only nominal damages, the court may, under G. S. c. 33, s. 18, restrict the plaintiff's costs in their discretion, although the case is one where the title

of real estate comes in question, as in G. S. c. 125, s. 22. *Clary v. McGlynn*, 46 Vt. 347.

36. **Cases of set-off.** Under the declaration on book in offset, neither party recovers costs, unless he recovers both before the auditor and in the original suit;—and then not the costs of two actions, but only, in addition to his costs in the original suit, his costs before the auditor, and an attorney fee on the judgment to account, and on the acceptance of the report, and the court and clerk fees paid. *Martin v. Trobridge*, 3 Vt. 9.

37. The restriction of the plaintiff's costs to the amount of the debt or damages recovered, in actions before a justice, or appealed by the plaintiff, applies to the sum finally recovered, though this be a balance upon a plea, or declaration on book in offset, and continuances may have been occasioned thereby. *Ellenwood v. Parker*, 3 Vt. 65.

38. The plaintiff sued on book account. The defendant duly pleaded a contract in set-off. The plaintiff had judgment on the report of the auditor; and afterwards the defendant recovered a larger sum on his set-off, and a judgment for the balance. The defendant was allowed to tax a term fee and travel at each term, and an attorney fee when he prevailed in a trial, but no costs before the auditor, and no attorney fee on the judgment to account, or on the acceptance of the report. *Anon*, 27 Vt. 786.

39. **Set-off of costs.** Set-off of costs in counter suits and judgments in the same court, rendered at different terms, was made on motion. *Sellick v. Munson*, 2 Vt. 13.

40. **Case of several defendants.** It is a general rule, that travel and attendance be separately taxed for all the defendants in ejectment. *Boynton v. King*, 1 Tyl. 30.

41. In actions *ex contractu*, the defendants are entitled to tax only one travel, term, and attorney fee, though they plead separately, where the trial is joined and upon the general issue. In actions *ex delicto*, the defendants may always tax separate travel, and, if they plead separately, they may tax separate term fees. But it has not been usual to allow separate attorney fees, unless the trials, or, at least, the judgments are separate. *North Bank v. Wood*, 11 Vt. 194. *Shrewsbury v. Strong*, 10 Vt. 591.

42. In an *audita querela* by a town to vacate a judgment or process in favor of several persons, growing out of a petition by them for the laying of a road, the town became non-suit. *Held*, that the defendants were entitled to costs only as for a single defendant. *Shrewsbury v. Strong*.

43. In actions of tort against several defendants, separate travel and attendance before a justice, and separate travel and term fees in the county court, are taxable for each defendant, unless, by joining in a plea in bar, or in some

other way, their interests are so identified, that the success of the defense, as to each, depends upon the success as to all. The general issue in such action is regarded as several, although in form joint. No more attorney fees are taxable than there are distinct trials. *Downer v. Flint*, 28 Vt. 527. *Hale v. Merrill*, 27 Vt. 788.

**44. Costs on appeal and review.** Construction of statutes regulating costs in cases appealed or reviewed. *Parsons v. Young*, 2 Vt. 484. *Robinson v. Whitcher*, 2 Vt. 568. *Plumley v. Marsh*, 15 Vt. 306.

**45.** Both parties appealed from the judgment of a justice. The defendant, without tendering payment of the judgment, or a confession, entered his appeal in the county court, and the case was there litigated to judgment for the plaintiff. *Held*, that the plaintiff's costs should be taxed the same as if he had not appealed. *Hill v. Powers*, 16 Vt. 516.

**46.** In an action for assault and battery, the plaintiff at Sept. term, 1840, recovered judgment for \$15, damages. The defendant reviewed, and at the next term the plaintiff recovered judgment for \$6.50 damages. *Held*, that the plaintiff's costs were limited to the amount of damages last recovered. *Plumley v. Marsh*, 15 Vt. 306.

**47. Appeal from probate court.** Where an administrator appealed from an allowance against him on settlement of his account in the probate court, and succeeded in reducing that balance, the court refused costs to each party. *Phelps v. Slade*, 10 Vt. 192.

**48.** The allowance of costs being discretionary on appeals from the probate court, none were allowed to either party on an appeal from the allowance of an administrator's account, where he successfully resisted a large claim made by the appellants, but was made chargeable with about twenty five dollars more than was found in his hands by the probate court. *Reynolds v. McGregor*, 16 Vt. 191.

**49.** The general rule that the party prevailing recovers taxable costs, was *held* to apply to the case of an appeal, by an executor, from a decree of the probate court disallowing a will, which was established in the county court, and that judgment affirmed in the supreme court. *Brigham v. Executors*, 15 Vt. 788.

**50.** Liability of executors and administrators for costs. See *O'Hear v. Skeeles*, 22 Vt. 152.

**51.** In appeals from commissioners of claims, costs should abide the event of the suit and be taxed as in other civil suits, unless there are some peculiar circumstances in the case. *Sargeant v. Sargeant*, 18 Vt. 330.

**52. Special proceedings.** On *scire facias* to obtain a new execution under G. S. c. 47, s. 48, and *seq.* where the levy of the former execution had not noticed an existing mortgage, the defendant made defense and all the ques-

tions litigated were decided against him. *Held*, that he was not entitled to costs, although the plaintiff turned out the property to the levying officer. *Pratt v. Jones*, 25 Vt. 308.

**53.** On the dismissal of a petition to set aside a justice's judgment, rendered by default without notice (G. S. c. 38, s. 7), the court in its discretion refused costs—the statute being silent as to costs. *Held* correct. *Tyler v. Frost*, 48 Vt. 486.

**54.** Costs of witnesses before commissioners, appointed on petition that a railroad company be required to establish a depot, were allowed to the company, which prevailed,—distinguishing this from cases for the laying out of highways. *Bliss v. Conn. & Pass. R. Co.*, 47 Vt. 715.

**55.** In order for the court to pass upon a disputed question of costs before auditors, referees or commissioners, the costs should be taxed by them, and their report should state the facts involved, material to a proper decision *Id.*

**56. What is taxable.** The act of 1807, allowing as costs a fee of two dollars for each term of court, applies to cases pending, and relates back to terms of court before the act was passed. *Pearl v. Harrington*, Brayt. 47.

**57.** An attorney fee is not taxable upon a hearing before referees. *Baker v. Blodget*, 1 Vt. 141.

**58.** Whenever an action is tried, though not decided,—as, where the jury do not agree, or the case in the supreme court is heard and continued for judgment, or for further argument,—a jury fee is taxable in the former case, and a full judgment fee in the latter; and a full attorney fee in each. *Walker v. Sargeant*, 18 Vt. 352. *Pollard v. Wheelock*, 20 Vt. 370.

**59.** No party in any court in this State is to tax for travel beyond the limits of the State. *Mattoon v. Mattoon*, 22 Vt. 450. (1850.)

**60.** A party testifying cannot tax fees as a witness, either for himself, or for another party joined with him. *Hale v. Merrill*, 27 Vt. 788.

**61.** The statute requiring witness certificates to be signed and sworn to does not take away the power of the court to hear evidence, *viva voce*, concerning costs, and to allow the travel and attendance of witnesses without any certificate. *Higgins v. Haynard*, 5 Vt. 73.

**62.** Costs are not allowed for witnesses not testifying, unless it is shown affirmatively that they were summoned in good faith, and for such cause and occasion as would justify their attendance at the expense of the other party. *Bliss v. Conn. & Pass. R. R. Co.*, 47 Vt. 715.

## 2. In the supreme court.

**63. Petitions.** Where a new trial was

granted on the defendant's petition and he finally recovered, costs were allowed to be taxed in his favor from the commencement of the original action. *Shaw v. Johnson*, Brayt. 47.—But where a new trial was granted for no fault of the plaintiff, costs were allowed only from the commencement of the new trial. *Hogg v. Wolcott*, 1 Tyl. 141.

64. Mode of taxing costs on a petition for a new trial. *Burr v. Palmer*, 23 Vt. 244.

65. On the granting or refusing of writs of *certiorari*, *mandamus*, or other like writs resting in the discretion of the court, no costs will follow, unless specially allowed by the court. *Myers v. Pownal*, 16 Vt. 426. *Sumner v. Hartland*, 25 Vt. 641.

66. Discretion. The supreme court cannot exercise a discretion as to allowing costs, upon trials had in the county court, on appeals from probate, or commissioners. *Allen v. Rice*, 24 Vt. 647.

67. Where costs depend upon the discretion of the court trying the cause, and that court omits to exercise its discretion in the matter, the supreme court will not exercise its discretion as to the costs. *Batchelder v. Tenney*, 27 Vt. 784.

68. Revision of taxation below. The supreme court will not reverse a judgment of the county court as to costs, and then tax the costs below; but the party excepting to the disallowance of costs must set forth in his exceptions the items of costs incurred and claimed. *Redfield, C.J.*, in *Sumner v. Hartland*, 25 Vt. 641.

69. Costs ought to be taxed when the judgment is rendered in the county court, so that any question in respect thereto may be heard with the exceptions in the supreme court. *Ellenwood v. Parker*, 3 Vt. 65.

70. The supreme court is unable, on petition or appeal from the clerk, to correct errors in taxing costs which are not apparent upon the face of the taxation, unless such errors are disclosed either by proof, or by a report of the facts from the clerk. It is the better practice to require an appellant from the clerk's taxation, to procure a report from the clerk of his finding upon all questions of fact material to be understood in passing upon the alleged error, so that the court may be relieved from hearing testimony upon these minor matters. *Steele, J.*, in *Carver v. Adams*, 40 Vt. 552.

71. On writ of error. The plaintiff, having succeeded on his writ of error and having recovered final judgment in the action, was held entitled to his full costs on the writ of error, irrespective of the amount of damages recovered. *Baker v. Blodget*, 1 Vt. 141. 22 Vt. 456.

72. Distinction taken as to allowance of costs in the supreme court, between exceptions and writ of error. *Barlow v. Burr*, 1 Vt. 488. (Denied in *Downing v. Roberts*, 22 Vt. 457.)

73. Where judgment is affirmed on writ of error not operating as a *superseas*, execution issues for the costs only. *Herring v. Selding*, 2 Aik. 12.

74. On exceptions. Where a party prevails in the supreme court upon the exceptions taken, he recovers his costs in that court. The court does not allow him an execution immediately therefor, but they are to be adjusted in the final taxation in the cause, by adding them to his other costs, if he prevails ultimately, or by deducting them from the costs of the other side, if his adversary ultimately prevails. *Stevens v. Hollister*, 19 Vt. 605.

75. A case in the supreme court on exceptions is considered as a distinct matter, beginning and ending in itself, so that the party prevailing there on the exceptions is entitled to his costs there, the same as if a writ of error had been brought, and this without reference to the amount of damages recovered, or to the final event, and although a balance may be found against him. *Pollard v. Wheelock*, 20 Vt. 370. *Baker v. Blodget*, 1 Vt. 141. *Downer v. Frizzle*, 10 Vt. 541. *Stewart v. Martin*, 16 Vt. 397. *Bardwell v. Perry*, 19 Vt. 292. *McCrillis v. Banks*, 19 Vt. 442. *Scott v. Lance*, 21 Vt. 507. *Downing v. Roberts*, 22 Vt. 455.

76. Where both parties except, and neither party prevails on his exceptions, costs in the supreme court will be allowed to neither. *Mills v. Hyde*, 19 Vt. 59. *Green v. Shurtliff*, 19 Vt. 592.

77. Security for costs. The supreme court will not order security for costs to be given in a case standing in that court on exceptions. *Livermore v. Bond*, 19 Vt. 607.

## II. IN CHANCERY.

78. In general. In chancery, costs must be expressly awarded, or they are lost; and if the final decree is silent as to costs, they cannot be granted on a subsequent application, unless there is a rehearing on the merits. *Conable v. Bucklin*, 2 Aik. 221.

79. To entitle a party to costs in chancery, costs must be awarded by the decree; and on an appeal (*semble*) the supreme court can make no order as to the costs in the court of chancery. *Gladding v. Warner*, 36 Vt. 54.

80. The general rule in chancery is, that there can be no appeal or rehearing for costs only; and the supreme court will rarely, if ever, reverse a decree on the question of costs alone. *Mott v. Harrington*, 15 Vt. 185. *Lyman v. Little*, 15 Vt. 576. *Sumner v. Hartland*, 25 Vt. 641. *Sanders v. Wilson*, 34 Vt. 318.

81. No instance is found, in which the supreme court has disturbed a decree of the court of chancery on the question of costs alone. *Hall, J.*, in *Hastings v. Perry*, 20 Vt. 272. *Sanborn v. Kittredge*, 20 Vt. 632.



82. Where the orator's bill in the court of chancery was dismissed, and on appeal that decree was reversed and an affirmative decree was ordered for the defendant, costs were allowed to the defendant in both courts. *Davis v. Smith*, 43 Vt. 269.

83. **Bill to redeem.** On a bill to redeem, which was also for discovery and relief, where the orator prevailed, the court refused costs to the defendant. Had there been a seasonable and proper tender, and a refusal, the orator would have been entitled to costs. *Smith v. Bailey*, 10 Vt. 163.

84. On a bill to redeem, the court refused costs to the defendant where he contested the right to redeem; and refused costs to the orator, because he had not actually tendered the amount due in equity. *Smith v. Blaisdell*, 17 Vt. 199. 31 Vt. 187.

85. On a bill to redeem, where the orator had made an insufficient tender, the defendant was allowed his costs, and also the costs of a proceeding by the defendant to get possession of the premises, including the costs of a writ of possession, and for executing it. *Cree v. Lord*, 25 Vt. 498.

86. Although the subject of costs in chancery is within the discretion of the court, yet there are certain principles and rules upon the subject which confer rights that the court are bound to recognize and secure to parties. Thus, unless some reason be disclosed to the contrary, the prevailing party is entitled to recover his costs. *Thrall v. Chittenden*, 31 Vt. 183.

87. Thus, on a bill to redeem against a mortgagee in possession, the mortgagee shall have his costs, unless some reason be shown to the contrary,—even though the prayer of the bill be granted and it be found, on accounting, that the mortgage debt has been more than satisfied out of the rents and profits. To decide otherwise would be error. *Ib.*

88. On a bill to redeem, where the right to redeem was denied, and that was the question litigated;—*Held*, that the ordinary rule of putting the costs upon the orator in a bill to redeem did not apply, and the orator was allowed his costs. *Hills v. Loomis*, 42 Vt. 562.

89. —**to foreclose.** Where the defendant in a bill to foreclose a mortgage proved payment, except the sum of \$5.57;—*Held*, that as he had so nearly established a defense, either no costs should be allowed the orator, or a very small proportion, not exceeding the amount of the debt—he having put the defendant to the proof of payment. *Killam v. Jenkins*, 25 Vt. 643.

90. After the time of redemption had expired upon a decree of foreclosure rendered *pro confesso*, the court refused a decree that the defendant pay the costs. *Binney v. Wetherbee*, 10 Vt. 322.

91. **Unnecessary costs.** One-third the orator's costs of taking testimony was disallowed, for unnecessary prolixity. *Sanborn v. Bruley*, 47 Vt. 170.

92. **Master's fees.** The fees of masters in chancery, fixed in the schedule of fees, were designed only for the ordinary service of standing masters, and not as the fixed rate of compensation to masters specially appointed for extraordinary service, or to standing masters to whom a matter is specially referred requiring extraordinary service. In case of such extraordinary services, the master is to be allowed a reasonable compensation, irrespective of the schedule of fees, and such sum is to be treated as taxable costs,—the amount of compensation being subject to the revision of the court. *Claflin v. Celley*, 48 Vt. 3.

93. **Illustrative instances of taxation.** Cases illustrating the discretionary action of the court of chancery in allowing, denying, and apportioning costs. *Lynde v. Wright*, 1 Aik. 383. *Mover v. Hutchinson*, 9 Vt. 242. *Smith v. Bailey*, 10 Vt. 163. *Beardsley v. Hatch*, 11 Vt. 151. *McConnell v. McConnell*, 11 Vt. 290. *Keeler v. Eastman*, 11 Vt. 293. *Waterman v. Cochran*, 12 Vt. 699. *Ward v. Sharp*, 15 Vt. 115. *Mott v. Harrington*, 15 Vt. 185. *Pinnock v. Clough*, 16 Vt. 500. *Barrett v. Sargeant*, 18 Vt. 365. *Blodgett v. Hobart*, 18 Vt. 414. *Washburn v. Bank of Bellows Falls*, 19 Vt. 278. *Day v. Cummings*, 19 Vt. 496. *Hopkins v. Adams*, 20 Vt. 407. *Stearns v. Wrisley*, 30 Vt. 661. *Soule v. Albee*, 31 Vt. 142. *Sanders v. Wilson*, 34 Vt. 318. *Therasson v. Hickok*, 37 Vt. 454. *Weston v. Cushing*, 45 Vt. 531.

## COUNTY COURT.

### I. ORIGINAL JURISDICTION.

### II. APPELLATE JURISDICTION.

#### I. ORIGINAL JURISDICTION.

1. **Suit in favor of the county.** Under the statute authorizing the county court, or a justice, to take cognizance of any suit in favor of or against the county (G. S. c. 11, s. 15);—*Held*, that a *qui tam* action brought by a common informer, where half the penalty went to the county, was triable by the court and jury of the county, though they were liable as county tax-payers. *Colgate v. Hill*, 20 Vt. 56.

2. **Original jurisdiction, as determined by the "matter in demand."** An action was brought to the county court for the recovery of a certain number of fixed penalties exceeding, in the whole, a justice's jurisdiction, but evidence was given tending to prove only

so many as would bring the case within the jurisdiction of a justice. *Held*, that the county court should have dismissed the case for want of jurisdiction. *Putney v. Bellows*, 8 Vt. 272.

3. In cases where the jurisdiction depends upon "the matter in demand," although on the face of the writ the county court has jurisdiction, yet if, upon the plaintiff's own evidence, it appears that his claim is not, as to amount, within the jurisdiction, the suit will be dismissed—as where, in debt or assumpsit, acknowledged payments before suit brought have reduced the demand below the court's jurisdiction. *Southwick v. Merrill*, 3 Vt. 320. *Miller v. Livingston*, 37 Vt. 467; and see *Stevens v. Howe*, 6 Vt. 572. *Bank of Rutland v. Crampton*, 28 Vt. 330. *Scott v. McDonough*, 39 Vt. 203.

4. **Joining several demands.** Notwithstanding the statute taking away the concurrent jurisdiction of justices of the peace and the county court, the county court has jurisdiction of an action embracing several demands, although one, or each of them, is within the jurisdiction of a justice, if all combined exceed his jurisdiction. *Keyes v. Weed*, 1 D. Chip. 379. *McFarland v. McLaughlin*, 2 D. Chip. 90. 8 Vt. 274. *Cook v. Porter*, 1 Tyl. 450.

5. **Action on note.** The jurisdiction of a justice upon a note is governed by what appears to be due by the whole note itself, and as the clerk would make up the sum upon default. The county court is not ousted of jurisdiction by payments not indorsed. *Bank of Middlebury v. Tucker*, 7 Vt. 144.

6. **Increase by interest.** The interest which is incident to a debt, whether it be a note or an account, and recoverable when the suit is commenced, has the same effect in giving jurisdiction, as so much principal;—as, where it is an item on the debtor side of the plaintiff's book, in the action of book account. *Nichols v. Packard*, 16 Vt. 91.

7. In an action against an officer for not keeping property attached so that it could be levied upon, where the damages demanded and actually recovered, including interest on the execution, exceeded \$100;—*Held*, that the county court had jurisdiction, although the original judgment was less than \$100. *McOrmsby v. Morris*, 28 Vt. 711.

8. In assumpsit for use and occupation, brought in good faith, the county court has original jurisdiction, if apparent in the writ, although the largest sum due and which the plaintiff could hope to recover, at the date of the writ, was less than \$100, but where at the time of trial, by accumulation of interest, the demand exceeds \$100. *Hall v. Wadsworth*, 28 Vt. 410.

9. **Severance of defendants.** In an action brought in the county court by a surety against

his principal and a co-surety jointly, to recover for money paid by reason of his suretyship, the case was, that his claim against the principal exceeded in amount a justice's jurisdiction, whereas his claim against the co-surety for contribution was within a justice's jurisdiction. The court, under the statute, discharged the principal and rendered judgment against the co-surety for less than \$100. *Held*, that the judgment was regular—that as the plaintiff was entitled to recover of the principal more than \$100, this gave the county court original jurisdiction of the case; and this was not lost by discharging him, rather than the other defendant. *Powers v. Thayer*, 30 Vt. 861.

10. **Uncertain damages—Plaintiff's good faith.** In an action sounding in damages merely, and where the *ad damnum* brings the case within the jurisdiction of the county court, although the evidence may not, it is always a matter of discretion whether the court will dismiss the action; and they should not do this after a reference and report; and should never do it in a case admitting of doubt, even in the mind of the plaintiff. *Learned v. Bellows*, 8 Vt. 79. *Ladd v. Hill*, 4 Vt. 164.

11. Where the question whether the jurisdiction belongs to the county court or to a justice is doubtful, the case will not be dismissed for want of jurisdiction. *Hefflin v. Bell*, 30 Vt. 184.

12. In an action, as on a contract or trespass *de bonis*, the value of the property furnishes no absolute rule of decision as to the original jurisdiction of the county court. In order to justify a dismissal for want of jurisdiction, other facts are required to be blended with the question of value, showing, at least, the probable consciousness of the plaintiff that he was not entitled to an amount of damages beyond the power of a single magistrate to award him. Where the exceptions were silent as to every consideration except the value of the property, and the decision dismissing the suit appeared to have proceeded upon that ground alone, the judgment was reversed. *Spafford v. Richardson*, 13 Vt. 224. *Joyal v. Barney*, 20 Vt. 154.

13. The jurisdiction of the county court will be sustained, in a case of open damages, although the amount recovered is less than the limit of a justice's jurisdiction, where the plaintiff when he commenced his suit had reasonable expectation of recovering more, and brought his suit in the county court in good faith. *Clark v. Crosby*, 37 Vt. 188. *Gale v. Bonyea*, 1 D. Chip. 208. *Ladd v. Hill*, 4 Vt. 164. *Kittridge v. Rollins*, 12 Vt. 541. *Spafford v. Richardson*, 13 Vt. 224. *Cooley v. Aiken*, 15 Vt. 322. *Waters v. Langdon*, 16 Vt. 570. *Manuell v. Briggs*, 17 Vt. 176. *Henry v. Tilson*, *Id.* 479. *Brainard v. Austin*, *Id.* 650. *Joyal v. Barney*, 20

Vt. 154. *Sandborn v. Chittenden*, 27 Vt. 171. *Powers v. Thayer*, 30 Vt. 361. *Scott v. Moore*, 41 Vt. 205. *Hall v. Wadsworth*, 28 Vt. 410.

14. It will make no difference on this question, whether the plaintiff's misapprehension of his rights was in a mistaken valuation of property, or in a mistaken notion of the law determining his claim. *Brainerd v. Austin*.

15. In such case, if any portion of the plaintiff's evidence tends to show damages beyond the jurisdiction of a justice, this should be regarded as conclusive as to the jurisdiction of the county court, irrespective of the defendant's evidence. A liberal rule should be adopted to sustain the jurisdiction. *Joyal v. Barney*, 20 Vt. 154. *Waters v. Langdon*, 16 Vt. 570. *Ladd v. Hill*, 4 Vt. 164.

16. Where upon the writ the county court has jurisdiction, but the case is one of open damages, or depends upon an estimate, or appraisal, or valuation of property, a motion to dismiss for want of jurisdiction is addressed to the discretion of the county court; and the decision of that court upon that question cannot be reviewed in the supreme court. *Clark v. Crosby*, 37 Vt. 188. *Ladd v. Hill*, 4 Vt. 164. *Morrison v. Moore*, *Id.* 264.

17. The decision of the county court sustaining the jurisdiction was held conclusive, although none of the plaintiff's evidence set the damage as above a justice's jurisdiction. *McGray v. Wheeler*, 18 Vt. 502.

18. In a like case, the county court dismissed the action, and the decision was held conclusive. *Kittridge v. Rollins*, 12 Vt. 541. *Collamer, J.*, dissenting. (In *Cooley v. Aiken*, 15 Vt. 323, *Williams, C. J.*, says he was opposed to this decision.)

19. In an action of assumpsit in the common counts only, brought returnable to the county court, the plaintiff's specification was, "To balance of money paid out and services buying butter [for defendant], \$225." After the plaintiff had put in his evidence and rested and the defendant had commenced putting in his evidence, the defendant discovered an error in one of the bills of butter, which had been in his own possession, by which said balance was reduced to \$125. This error was unknown to both parties until then, and the suit was brought in good faith to the county court, the plaintiff supposing that more than \$200 was due him, and his original book, put in the case, showing a balance of about \$300. On the defendant's motion to dismiss the action for want of jurisdiction, the county court refused. Held correct. By *Prout, J.*: The matter in demand and in controversy was the amount of the plaintiff's claim, as unaffected by unintentional errors not known or discovered when the action was commenced. *Scott v. Moore*, 41 Vt. 205.

20. **Trespass on freehold.** In trespass on

the freehold, setting the *ad damnum* at \$20 is conclusive as to the original jurisdiction of the county court. *Doubleday v. Marstin*, 27 Vt. 488.

21. **The question in the supreme court.** *It seems*, that where the county court has jurisdiction of the parties and of the subject matter, the case will not be dismissed by the supreme court, because the amount of the plaintiff's claim was less than that prescribed for the original jurisdiction of the county court, unless it appear by the exceptions that such objection was there taken. *Powers v. Thayer*, 30 Vt. 361.

## II. APPELLATE JURISDICTION.

22. If a justice of the peace has no jurisdiction of the cause, the county court on appeal has none, and whenever, at any stage of the proceedings, the defect is discovered, the suit must be dismissed. *Richardson v. Denison*, 1 Aik. 210.

23. A new declaration, filed in the county court on appeal, is but an amplification of the one before the justice. It cannot give a jurisdiction which did not before exist; nor should it be construed to take away one which before did exist. *Perkins v. Rich*, 12 Vt. 595. *Thompson v. Colony*, 6 Vt. 91.

See JURISDICTION.

## COVENANTS.

### I. ACTION IN GENERAL.

### II. COVENANTS FOR TITLE.

1. *Of seisin.*
2. *For quiet enjoyment*
3. *Against incumbrances.*
4. *To warrant and defend.*

### III. COVENANTS IN LEASES.

#### I. ACTION IN GENERAL.

1. **Kind of contract.** In an indenture, each covenant is to be considered as only the covenant of the party who is to perform it, and as his language, and not that of the other party. The signature of the other party only indicates his acceptance of the covenant in the terms in which it is made. *Olcott v. Dunklee*, 16 Vt. 478.

2. An action of covenant will not lie upon an agreement by a lessee to pay rent, contained in a lease by deed poll not signed and sealed by the lessee, although the lessee accepted the lease and held and occupied under it. *Johnson v. Muzzy*, 45 Vt. 419. *Peck, J.*, dissenting.

3. Where the time for the performance of a sealed contract is extended by parol, an action

of covenant will not lie upon it, as extended, but the action must be *assumpsit*, treating the enlargement as having incorporated into itself the original terms of the contract, and so all as resting in parol. *Sherrin v. Rut. & Bur. R. Co.*, 24 Vt. 347. *Barker v. Troy & Rut. R. Co.*, 27 Vt. 766.

4. In an action of covenant by one of the covenantees in a deed *inter partes*, where the covenant was in form to the covenantees jointly, he was allowed to recover for an injury to his several interest, upon that covenant which referred specially to that interest;—the court adopting the rule, that where the interest in the subject matter secured by the covenant is several, although the terms of the covenant may more naturally bear a joint interpretation, yet if they do not exclude the inference of being intended to be several, they shall be so taken,—shall have a several construction put upon them. *Sharp v. Conklin*, 16 Vt. 355. See *Catlin v. Barnard*, 1 Aik. 9.

5. **Pleadings.** In covenant, the general issue is *non est factum*. *Non infregit conventionem* is always to be pleaded in bar. *Phelps v. Sawyer*, 1 Aik. 150.

6. Under a plea of *non est factum* to a declaration in covenant for rent, the defendant cannot give in evidence that a third party was in adverse possession of the premises when the lease was executed and when it was assigned to the defendant, since the lease and assignment were operative to pass the term as between the parties and their legal privies. *University of Vt. v. Joslyn*, 21 Vt. 52.

## II. COVENANTS FOR TITLE.

### 1. Of seisin.

7. **Nature of this covenant.** A covenant in a deed of lands that the grantor is well seized of the premises in fee simple, is a covenant of title, and, if broken at all, is broken when made, and becomes a chose in action not assignable. *Williams v. Wetherbee*, 1 Aik. 233. *Garfield v. Williams*, 2 Vt. 327. *Catlin v. Hurlburt*, 3 Vt. 403. *Richardson v. Dorr*, 5 Vt. 9. *Mills v. Catlin*, 22 Vt. 98. *Clark v. Conroe*, 38 Vt. 469. *Sweeney v. Brooks*, 30 Vt. 692.

8. The covenant of seisin is an assurance to the grantee that the grantor has the very estate, in quantity and quality, which he purports to convey. *Clark v. Conroe*; and a seisin in fact merely, with claim of title, does not satisfy the covenant. *Richardson v. Dorr*, 5 Vt. 9. 22 Vt. 106.

9. **Breach.** A life estate in the granted premises, outstanding at the time of the execution of the deed, constitutes a breach of the covenant of seisin, without eviction. *Mills v. Catlin*, 22 Vt. 98.

10. To satisfy the words of a covenant of seisin in fee, it must appear that the covenantor had not only an estate in fee, but that he was seized of the lands and had a right to the possession. Showing an estate less than a fee, or a title less than the whole, or a tortious possession, would be showing a breach of the covenant. *Richardson v. Dorr*, 5 Vt. 9. *Mills v. Catlin*. *Downer v. Smith*, 38 Vt. 464.

11. An outstanding right to draw off the water of a *natural spring of water*, situate upon lands conveyed, is a breach of the covenant of seisin in the deed conveying the premises by metes and bounds, and describing them as a parcel of land. *Clark v. Conroe*, 38 Vt. 469.

12. Where the defendant conveyed lands by warranty deed, containing the usual covenant of seisin, and had title to only an undivided half;—*Held*, that he was liable for a breach of the covenant as to the one-half, and the plaintiff was entitled to recover one-half the consideration paid for the land with interest. *Downer v. Smith*, 38 Vt. 464.

13. **Declaration.** In an action on the covenant of seisin, the declaration must set forth a deed which is legally sufficient. *Crane v. Col-lard*, *Brayt*. 49.

14. **Trial.** In an action upon the covenant of seisin and right to convey, it is no defense that the same deed contained a covenant of warranty upon which the defendant remains contingently liable to the plaintiff's assignee by deed of warranty, but the court may make a rule for the defendant's protection. *Catlin v. Hurlburt*, 3 Vt. 403.

15. In such case, execution should be ordered stayed, until the plaintiff shall have caused the defendant to be released from any covenants in his deed which run with the land conveyed. *Ib.* *Blake v. Burnham*, 29 Vt. 437.

16. **Damages.** In an action for breach of the covenant of seisin, the general rule of damages is the consideration paid with interest thereon. *Garfield v. Williams*, 2 Vt. 327. *Catlin v. Hurlburt*, 3 Vt. 403. *Richardson v. Dorr*, 5 Vt. 9. *Blake v. Burnham*. *Downer v. Smith*, 38 Vt. 464. *Flint v. Steadman*, 36 Vt. 210.

17. But where the plaintiff has occupied the lands and is saved from liability to account for the rents and profits, these may be allowed as against the interest. *Flint v. Steadman*.

18. Damages, beyond the price agreed and simple interest thereon, will not be given because the covenantee has paid *annual* interest on his notes given for the price, or has paid taxes on the land. *Blake v. Burnham*, 29 Vt. 437.

19. In an action upon the covenant of seisin, it does not go in mitigation of damages that the plaintiff had used the land,—as by cutting timber upon it,—for he is liable for this to the right owner. *Catlin v. Hurlburt*. 3 Vt. 403.

20. In such action, where the grantee's title had become perfect by 15 years' possession before trial;—*Held*, that nominal damages only were recoverable. *Garfield v. Williams*, 2 Vt. 327.

### 2. For quiet enjoyment.

21. **Construction.** A covenant in a deed of lands: "That said grantee shall hold the premises, so that neither I, my heirs or assigns, or any person claiming under me or them, or under New Hampshire, shall ever have any right, title, interest or demand thereto, but shall by this deed be forever barred and excluded," was *held* to be not precisely a covenant of warranty, nor a covenant of seisin; but was a covenant for quiet enjoyment as against the claims specified, and was not broken by any dormant right, title or claim, not put in exercise to the prejudice of the grantee's claim. *Everts v. Brown*, 1 D. Chip. 96.

22. A covenant for quiet enjoyment was *held* to be implied from the language of a perpetual lease in the *habendum*: "To have and to hold, use, occupy, possess and enjoy, &c., as the lessee might choose or see proper, without interruption, &c., and to his heirs, executors, &c." *Knapp v. Marlboro*, 29 Vt. 282.

23. **Breach.** Where, at the time of a conveyance with warranty, the grantee finds the premises in the possession of one claiming under a paramount title, this amounts in law to an eviction, to the extent of the adverse right claimed, without any other act on the part of the grantee, or the claimant, and is a breach both of the covenant for quiet enjoyment and of warranty. *Russ v. Steele*, 40 Vt. 310. *Clark v. Conroe*, 38 Vt. 469.

24. The covenant for quiet enjoyment applies merely to the acts of those claiming by title, and to rights existing at the time it was entered into. *Knapp v. Marlboro*, 34 Vt. 285.

25. A covenant for quiet enjoyment, in a lease, relates to the lessor's title and right to grant the premises leased and the possession of them during the term, and not to the possession and enjoyment of them, in fact, by the lessee as against those who have no right to disturb him. It is a covenant that the lessee shall not be rightfully disturbed in his possession and enjoyment during the term, and not that he shall not be disturbed at all. *Underwood v. Birchard*, 47 Vt. 305.

26. The defendants, as trustees, leased trust property to the plaintiff, then in the possession of third parties under an agreement with the defendant's predecessor in the trust. Said parties refused to surrender to the plaintiff, and continued in possession during his term. It did not appear that they were entitled, under said agreement, to hold as against the plaintiff,

nor that they had any other title by which they could rightfully keep him out. *Held*, that the plaintiff was not kept out by title elder and better than his own, so as to constitute a breach of the covenant of quiet enjoyment in the lease. *Id.*

### 3. Against incumbrances.

27. **What is an incumbrance.** A deed of land containing a stipulation that the grantee shall build and maintain the partition fence, creates an incumbrance which runs with the land. *Kellogg v. Robinson*, 6 Vt. 276.

28. A covenant against incumbrances is not broken by the fact that there appears upon the town records a pre-existing mortgage of the lands, not discharged, if the mortgage had, in fact, been paid and satisfied before the making of the covenant. *Judevine v. Pennock*, 15 Vt. 683.

29. The existence of a highway is an incumbrance upon land conveyed, and is embraced in a covenant against "incumbrances" although the highway is open and notorious; and parol evidence is not admissible that it was not so intended. *Butler v. Gale*, 27 Vt. 789. (Changed by G. S. c. 24, s. 81.)

30. The fact that real estate was put in the grand list to its then owner on the 1st of April preceding its conveyance, and that taxes were voted and assessed upon it against him after the conveyance, does not constitute a breach of the covenant in the deed against incumbrances, until such taxes have become legally fixed upon the land so as to become a definite burden upon it which the grantee may properly remove by payment; and the taxes do not so become fixed upon the land, until the preliminary remedies against the goods, chattels or body of the person against whom the taxes were assessed have been exhausted; but when so fixed, the burden may be referred to and date from the date of the list. Until then the lien rests upon a contingency and cannot be regarded as a present incumbrance. *Hutchins v. Moody*, 30 Vt. 655. 31 Vt. 719.

31. A lien for taxes becomes a fixed incumbrance upon land, within the covenant against incumbrances, where the collector, by some official act, proceeds so far as to indicate or manifest his intention to pursue the land for the purpose of enforcing the collection of the taxes, agreeably to the statute. *Hutchins v. Moody*, 34 Vt. 433.

32. A covenant against incumbrances except a mortgage of an amount stated, was *held* broken where the mortgage debt exceeded that amount. *Potter v. Taylor*, 6 Vt. 676.

33. **Date of breach.** In an action of covenant broken upon a covenant against incumbrances, the defendant pleaded that he had

kept and performed his covenant,—and issue joined. The plaintiff proved that there was a mortgage existing upon the premises, when the defendant's deed, containing the covenant, was given. The defendant proved that, before the commencement of the suit, he had paid up the mortgage. *Held*, that this was not pertinent to the issue joined; that the covenant was broken when made, and that a subsequent payment of the mortgage did not tend to prove that there had been no breach of the covenant. *Judevine v. Pennock*, 14 Vt. 438. *Richardson v. Dorr*, 5 Vt. 9.

34. The covenants of seisin, and against incumbrances, if broken at all, are broken as soon as made, and so the right of action then accrues, and is not assignable, and does not run with the land to a subsequent grantee. *Swasey v. Brooks*, 30 Vt. 692.

35. Whether assignable. Covenants not running with the land are assignable in equity, so as to pass to the assignee the right to enforce them by action in the name of the covenantee; or, in equity, in his own name, in a case proper to be proceeded with in a court of equity. *Hagar v. Buck*, 44 Vt. 285.

36. Declaration. A breach of the covenant against incumbrances must be specially assigned, setting forth the incumbrance complained of; whereas, a general assignment of breaches of the covenant of seisin and of good right to bargain and sell, is sufficient. *Mills v. Catlin*, 22 Vt. 98.

37. A declaration on a covenant against incumbrances, created by an ancient deed, must connect the defendant's title with such deed, or it is ill on demurrer. *Kellogg v. Robinson*, 6 Vt. 276.

38. Damages. In an action on the covenant against incumbrances, the plaintiff can recover nominal damages only on account of the incumbrance of a mortgage, unless he has made payments thereon; but he may recover damages to the extent of such payments, though made after the commencement of his suit. *Potter v. Taylor*, 6 Vt. 676. *Richardson v. Dorr*, 5 Vt. 9.

39. The warrantee in a deed, who paid off an incumbrance, was allowed to recover on the warranty the sum paid, although he took an assignment to himself of the demands constituting the incumbrance. *Alden v. Parkhill*, 18 Vt. 206.

40. A claimed an easement in the plaintiff's land to have and repair a drain, which land had been conveyed by the defendant to the plaintiff, with covenants against incumbrances. A entered upon the land to clear the drain, when the plaintiff informed the defendant of A's claim, and the defendant told him A had no such right and told him to sue A. The plaintiff did not sue A, but interfered with A's

use of the drain, for which A sued him and recovered judgment. The plaintiff gave the defendant notice of the suit and asked him to defend it, but he neglected. In an action upon the covenant;—*Held*, that the plaintiff was not bound to sue A, but was at liberty to interfere with A's operations and test his right in that way;—*Held*, further, that the plaintiff was entitled to recover the damage he had sustained in consequence of the breach of the covenant, and all such costs and expenses as he had fairly and in good faith incurred in attempting to maintain and defend his title in the suit with A. *Smith v. Sprague*, 40 Vt. 43. See *Park v. Bates*, 12 381. *Pitkin v. Learitt*, 13 Vt. 379. *Turner v. Goodrich*, 26 Vt. 707.

#### 4. To warrant and defend.

41. Nature and extent of this covenant. A covenant to warrant and defend against all lawful claims is something more than one for quiet enjoyment. It is a covenant to defend, not the possession merely, but the land and the estate in it. *Williams v. Wetherbee*, 1 Aik. 233. *Russ v. Steele*, 40 Vt. 310.

42. It extends to all lawful adverse claims, however limited, which necessarily affect the full and complete possession and enjoyment of the premises to which it relates—as, a right of way in an adjoining proprietor, to be used as occasion might require, *Russ v. Steele*;—or, an outstanding right to a spring of water. *Clark v. Conroe*, 38 Vt. 469.

43. In a contract to convey lands by a warranty deed, the usual covenants of seisin and against incumbrances would be intended as to be included. *Bowen v. Thrall*, 28 Vt. 382.

44. A covenant in a conveyance against all lawful claims of all persons, was *held* to extend to a claim of the University of Vermont for rent chargeable upon the land. *Keith v. Day*, 15 Vt. 660.

45. A covenant in a conveyance that the grantor will warrant and defend against all persons claiming the premises from or under D, or the grantor, extends only to valid claims, and not pretenses of claims without legal foundation and right. *Gleason v. Smith*, 41 Vt. 293.

46. A covenant of warranty in a deed is a security to the grantee for such an interest only as the deed, in its premises, purports to convey. *Bowen v. Thrall*, 28 Vt. 386. *Mills v. Catlin*, 22 Vt. 104.

47. A grant of land, simply as "lot No. 19," does not by force of the description, *ex vi termini*, as in case of the grant of a mill site, carry with it any appurtenances; but the appurtenances, if any, which pass with the land, must be ascertained *aliunde* the deed; and the extent of a covenant of warranty, in such case,

"to warrant and defend the above granted and bargained premises," is limited to the *subject matter* of the grant. *Swasey v. Brooks*, 30 Vt. 692.

48. Where one having no title to land conveys it with covenants of warranty, and subsequently acquires title thereto, his title enures to his grantee by operation of law, in discharge of his covenants. *Middlebury College v. Cheney*, 1 Vt. 336. *Blake v. Tucker*, 12 Vt. 39. *Carbee v. Hopkins*, 41 Vt. 250. *Cross v. Martin*, 46 Vt. 14.

49. **Breach—Eviction.** To support an action on the covenant of warranty, there must have been an eviction, or some disturbance or hindrance in the enjoyment, tantamount. *Rich v. Wait*, N. Chip. 68.

50. To constitute a breach of the covenant of warranty, an eviction of the grantee, or his assignee, by a lawful title in the evictor, existing before or at the time of the grant, is indispensably necessary. *Swasey v. Brooks*, 34 Vt. 451. *Pitkin v. Leavitt*, 13 Vt. 384.

51. Final judgment in ejectment against the grantee in a deed constitutes a breach of the covenant of warranty, although he continues in possession, but under a title afterwards purchased in. *Drury v. Shumway*, 1 D. Chip. 110.

52. An adverse possession in a stranger at the date of the deed is not, of itself, a breach of the covenant to warrant and defend; but if it has then ripened into a title, it is an eviction, and constitutes a breach of the covenant. *Phelps v. Sawyer*, 1 Aik. 150.

53. In an action on the covenant of warranty, it is a sufficient breach to show that the covenant has been prevented by elder and better title from entering and enjoying the premises. This is equivalent to an eviction. *Park v. Bates*, 12 Vt. 381. *Brown v. Taylor*, 13 Vt. 631. *Turner v. Goodrich*, 26 Vt. 707.

54. It is a sufficient breach of this covenant to show that, by reason of an older and better title, the plaintiff has been kept out of possession, or that he has been compelled to buy in an older and better title, or to pay a mortgage to protect his title. *Peck, J.*, in *Boyd v. Bartlett*, 36 Vt. 14.

55. A paramount outstanding title, with actual possession under it, is a constructive eviction of the grantee in a deed, and is, of itself, a breach of the covenant for quiet enjoyment, or of warranty contained in the deed. *Clark v. Conroe*, 38 Vt. 469.

56. A title outstanding at the time of entering into a covenant of warranty, which is elder and better than that of the covenantor, and which is asserted by bringing suit against the covenantee in possession of the land, and which he is compelled to buy in to prevent being dispossessed of the land, amounts in law to a

breach of the covenant. *Turner v. Goodrich*, 26 Vt. 707.

57. A final recovery in ejectment against the grantee, by virtue of an older and paramount title, is a sufficient breach of the covenant of warranty to entitle him to maintain an action, without being actually put out of possession. *Williams v. Wetherbee*, 1 Aik. 233. *S. C.*, 2 Aik. 329.

58. So, also, is a decision of the supreme court, on an appeal from chancery, adjudging a mortgage to be a valid incumbrance older than and paramount to the plaintiff's title under his deed, with a mandate to the court of chancery directing that decision to be carried out by a decree—although the amount due on the mortgage was not then definitely ascertained. *Boyd v. Bartlett*, 36 Vt. 9.

59. A deed of land described it simply as lot No. 19 in a certain town, *habendum*, &c., "with the *appurtenances thereof*;" and contained a covenant to warrant and defend "the above granted and bargained premises." In an action on this covenant by a subsequent grantee against the grantor, he claimed to recover upon the ground that a recovery had been had against him for flowing back water upon land situate above No. 19, by means of a mill-dam upon lot 19 which was upon that lot at the date of the defendant's deed, and had remained of the same height ever after. It not appearing that the dam, before the date of the defendant's deed, did in fact set back the water upon the land above No. 19, nor that the defendant exercised or claimed the right so to flow the land;—*Held*, that no breach of the covenant was shown. *Swasey v. Brooks*, 30 Vt. 692.

60. **Runs with the land—Right of assignee to sue.** The covenant of warranty runs with the land, and is intended for the benefit of the ultimate grantee in whose time it is broken. The right of the first covenantee is not extinguished upon his becoming himself a grantor and covenantor, but to some purposes still subsists; yet, the cause of action for breach of the original covenant primarily attaches in the last grantee, as being the person for whose sake the covenant was created, and the only person directly injured by its breach. But in case an intermediate grantor has made satisfaction for such breach to his own grantee, then the right of suing upon the prior covenant is in him alone. *Williams v. Wetherbee*, 1 Aik. 233. 26 Vt. 294. *Russ v. Steele*, 40 Vt. 310.

61. Where an assignable estate in lands is conveyed by deed, as a fee simple, and covenants running with the land, as a covenant of warranty, are given to fortify the title, such covenant may be sued by any one in the estate, at the time of the breach, although the covenant is general—as, "to warrant and defend the premises," without naming heirs, or as-

signs—or, where it is in the name of the grantee only. *Smith v. Perry*, 26 Vt. 279.

62. As a general rule, the right of the grantee in a deed, or of any intermediate assignee, to sue for the breach of a covenant running with the land—as a covenant of warranty—after parting with the estate, depends upon his having made satisfaction to the party evicted. But where a judgment had been recovered against the plaintiff (an intermediate assignee), by his grantee who had been evicted, although such judgment had not been satisfied, and the plaintiff's suit was brought with the privity and for the benefit of the party evicted;—*Held*, that the action could be maintained; and, such action being against the estate of the original warrantor, which was in the course of settlement, the plaintiff was allowed to take judgment for full damages, under a rule, that if any other sum should be allowed against the estate for breach of the same covenant, it should be deducted from the damages recovered in this action. *Ib.*

63. An intermediate grantee who has conveyed the estate, without warranty, cannot sue for breach of a covenant running with the land, which accrued after his conveyance. *Keith v. Day*, 15 Vt. 660. 26 Vt. 294.

64. Where one sues, as assignee, for breach of a covenant running with the land, he must prove a legal assignment to himself going back to the covenantee. *Beardsley v. Knight*, 4 Vt. 471.

65. A quit-claim deed is sufficient to pass such previous covenants as go with the land. *Beardsley v. Knight*, 10 Vt. 185.

66. Collateral warranty. The common law as to collateral warranties is not adopted in this State. The plaintiff inherited land from his father, which was set out to his mother as her dower. The mother, by deed of warranty, conveyed the land as in fee to a stranger. *Held*, that such collateral warranty did not bar the plaintiff from recovering the land after the death of his mother. *Lyman v. Hollister*, 12 Vt. 407.

67. Declaration. In declaring for breach of the covenant of warranty, it is not indispensable to aver that the recovery constituting a breach was by elder and better title, but it is sufficient if averred that it was elder and independent, and has prevailed. *Williams v. Wetherbee*, 1 Aik. 233.

68. But on trial it must be proved that such recovery was by elder and better title, or else that the covenantor was vouched in to defend. *S. C.*, 2 Aik. 329; but see 13 Vt. 384.

69. In an action upon covenants passing to an assignee, there is a distinction between declaring by an assignee, and against him. In the latter case, it is enough to say generally that the estate has come to the defendant by assign-

ment; whereas in the former, the plaintiff, being privy to the *mesne* conveyances, must set them forth sufficiently to show title in himself. But in such case, it is a sufficient setting forth of the assignment of the covenant, to state that the several grantors successively conveyed the premises by deed in fee simple, giving the dates of the deeds, omitting the operative parts and the formalities of their execution;—for the assignment of the covenant is but the legal consequence of its union with the land. *Williams v. Wetherbee*, 1 Aik. 233.

70. Damages. In an action for breach of covenant of warranty of title, the rule of damages, in this State, is the value of the land at the time of the eviction, or decision made against the title, without regard to the consideration of the deed. *Park v. Bates*, 12 Vt. 381. *Devey v. Shumway*, 1 D. Chip. 110;—to which is to be added interest, and actual cost of a former suit where the decision was against the title. *Williams v. Wetherbee*, 2 Aik. 329;—legal costs and necessary expenses of the action of ejectment. *Pitkin v. Leavitt*, 13 Vt. 379. 40 Vt. 46.

71. If the covenantee be obliged to purchase in the outstanding title, all necessary expenses, including costs of suit while pending, and counsel fees, are recoverable as damages. *Turner v. Goodrich*, 26 Vt. 707. 26 Vt. 752–3.

72. In an action on the covenant of warranty, after eviction by suit, the rule of damages is the value of the land at the time of the eviction, the costs and damages which the plaintiff has been obliged to pay to the adverse party, with interest, his own costs in the suit, with interest, and necessary expenses, which include counsel fees. *Keeler v. Wood*, 30 Vt. 242; and see *Smith v. Sprague*, 40 Vt. 43.

73. In an action upon the covenant of warranty, after an eviction by judgment in ejectment, the amount recovered for betterments in the ejectment suit was *held* properly taken into account in assessing the damages. *Drury v. Shumway*, 1 D. Chip. 110.

74. Where the defendant in his deed to the plaintiff covenanted against all lawful claims of all persons, and the land was subject to an outstanding charge of a perpetual annual rent, which the defendant failed to keep down and suffered to run behind, by reason whereof the plaintiff was evicted in ejectment;—*Held*, in an action on such covenant, that the measure of damages was not the rents and costs recovered in such action of ejectment, but, as in ordinary cases, the value of the land at the time of the eviction. *Keith v. Day*, 15 Vt. 660.

75. Warrantor vouched in. Where one gives a covenant of warranty or indemnity, he is not bound by a judgment against the covenantee in a suit of which he had not notice—this being strictly *inter alios*; but the covenantee



may, but at his peril, pay a claim even without suit, and yet recover of his warrantor by proof that it was a claim that could not be resisted. *Castleton v. Miner*, 8 Vt. 209.

76. Under a deed with warranty, if the covenantee finds some one in possession of the land, he may bring his action for possession, and, if he fail to recover, this is *prima facie* a breach of the covenant, without notice to his warrantor to defend the title; and, with such notice, the judgment is conclusive against the warrantor and his representatives. *Redfield*, C. J., in *Turner v. Goodrich*, 26 Vt. 708. *Park v. Bates*, 12 Vt. 881. *Brown v. Taylor*, 13 Vt. 631. 30 Vt. 87. *Pitkin v. Leavitt*, 13 Vt. 379.

77. A warrantor or covenantor, not vouched in to defend, has no control over, and is not bound by, the proceedings in the suit. *Knapp v. Marlboro*, 31 Vt. 674.

78. **Defense to action for price of land sold.** In an action to recover the price of land sold, where the plaintiff, claiming the land by a title which was spread upon the town record, conveyed it with the usual covenants of warranty, and the defendant had not been disturbed by any adverse claim;—*Held*, that defect of title, arising from the form of a previous conveyance to the plaintiff, was not a defense, but that the defendant's remedy was upon the covenants. *Dix v. School District*, 22 Vt. 309.

### III. COVENANTS IN LEASES.

79. **Expulsion of tenant.** To an action of covenant upon a lease for rent, the defendant pleaded an expulsion from the premises by a third person under adverse claim of title. A replication, with a special traverse, that the defendant was not expelled "from the entire premises," was *held* sufficient,—for the rent is apportionable, and the plea purporting to be an answer to the entire cause of action, was not so in fact. *University of Vt. v. Joslyn*, 21 Vt. 52.

80. To an action of covenant upon a lease for rent, a plea is insufficient which avers that, before the execution of the lease, a third person, named, entered upon the premises and expelled the plaintiff and continued in possession to the day of the demise, and on that day occupied and held the same, claiming the same by adverse title, and that such disseisor has so continued in adverse possession until the time of pleading, excluding as well the plaintiff as the defendant from the demised premises, where the plea does not connect the defendant with the disseisor's title, and does not aver that his title was paramount to the plaintiff's. *Bennett*, J. *Ib.*; and see *Undervood v. Birohard*, 47 Vt. 305.

81. The plaintiff, tenant of leased premises, had paid part of the rent for the year, when the defendant, his landlord, ejected him, taking the crops, &c. In an action on the covenant for

quiet enjoyment;—*Held*, that the true rule of damages was the difference between the two conditions of continuing under the lease to the end of the year, and of being ejected as he was; and that this required the deduction from his gross loss of all the unpaid rent, although the defendant could not have recovered it by action. *Merritt v. Closson*, 36 Vt. 172.

82. **Covenant to repair, &c.** A lessee covenanting to carry on the leased premises in a good husbandlike manner, and maintain the buildings, &c., is bound at all times to perform these covenants; and, for a breach, the lessor may maintain an action before the termination of the lease, and recover his actual damages. *Buck v. Pike*, 27 Vt. 529.

83. **Assignments.** The covenant arising out of the words "yielding and paying" is an implied, as distinguished from an express, covenant, and the lessee is not made liable thereby for rents accrued after an assignment of his term. *Kimpton v. Walker*, 9 Vt. 191.

84. In an action of covenant by the assignee of the reversion against the lessee, upon his express covenant to pay the rent to the lessor, or his assigns;—*Held*, that it was no defense that the lessee had assigned the term to another, and that the plaintiff had accepted him as tenant and had received from him one year's rent. *Shaw v. Partridge*, 17 Vt. 626.

85. In an action of covenant for rent by the lessor against the assignee of the term, it is not necessary in the declaration to allege, nor on trial to prove, an entry and possession by the assignee. If the title and possessory right passed, the assignee became possessed in law of the term, and an actual possession is not material. *University of Vt. v. Joslyn*, 21 Vt. 52. *Pingry v. Watkins*, 15 Vt. 488. *S. C.*, 17 Vt. 379.

86. The landlord may declare against an assignee of his lessee for a share of the rent reserved in the lease, proportioned to the relative value of that part which the defendant holds by the assignment. *Pingry v. Watkins*.

87. **Quare**—Whether, upon an allegation that all the estate, interest, &c., of the lessee in the premises came to the defendant by assignment, proof that part only of the premises leased was assigned makes a variance.—"I should incline to the contrary opinion." *Royce*, J. *Ib.*

88. But without an assignment of the lessee's whole estate and interest in the premises assigned, there can be no legal assignment; the conveyance of a less interest is at most an underlease, or a conveyance in the nature of one. *Ib.*

89. In an action of covenant for rent against the assignee of the lessee, the declaration averred that all the estate, &c., of the lessee came to and vested in the defendant by assignment, and that the defendant entered into possession under the assignment and retained the posses-

sion until the rent became due. Under a plea denying the assignment and the defendant's possession—and issue joined;—*Held*, that the fact of the assignment was the only material part of the issue, and that proof of that entitled the plaintiff to a verdict. *Pingry v. Watkins*, 17 Vt. 379.

90. A lessor by perpetual lease, reserving rent, has an assignable interest in the estate which he can transfer with such covenants as run with the land, or to his assigns. *Shaw v. Partridge*, 17 Vt. 626.

91. In a lease, a covenant to convey to the lessee upon certain conditions during the term, runs with the land, and passes to the assignee at law, although not named. *Hagar v. Buck*, 44 Vt. 285.

### CRIMES.

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#### I. IN GENERAL.

1. **Age of capacity.** Capacity for crime in persons above the age of seven years, is, in the last analysis, always a question of fact. As the result of observation and experience, the law assumes, *prima facie*, that persons above

fourteen years of age are capable of crime, but subjects that assumption to the effect of proof as to the real fact. The intermediate period is called by Blackstone "the dubious stage of discretion." In reference to capacity during this period the law makes no presumption, but leaves it to be determined by the jury upon the evidence. *Barrett, J.*, in *State v. Learnard*, 41, Vt. 589.

2. Under an indictment charging the respondent, as principal, in a burglary and larceny the evidence was that the acts were done by his children, a boy above and a girl below the age of fourteen years, by his command and coercion, he remaining at home, a mile distant from the place of the burglary. *Held*, that the court could not charge, as matter of law, that the duress of the girl should be referred to the presence and influence of the boy, and not to the duress of the respondent; that the question of duress of the girl, and of her capacity for crime, were questions of fact for the jury upon the whole evidence, and not for the court upon any selected part of the evidence, nor upon the whole evidence. *Ib.*, and see *State v. Potter*, 42 Vt. 495.

3. **Felony.** Felony, as existing at common law, is not known to the laws of this State, as crimes do not work a forfeiture of the estate. (See *post* 187-8, 195.) But offenses are distinguishable into what may be termed crimes and misdemeanors; the former punishable capitally, or by confinement in the State prison, and the latter by fine, or imprisonment in the county jail; and, as there is no difference in the mode of trial which can operate against the right of the accused, no reason exists in this State, why one indicted for what would be a felony at common law, may not be convicted of a misdemeanor. *Isham, J.*, in *State v. Scott*, 24 Vt. 180. See *State v. McLeran*, 1 Aik. 311.

4. Thus, under an indictment for an assault with intent to commit murder, there may be an acquittal of the specific offense charged, and a conviction for a common assault. *State v. Coy*, 2 Aik. 181.

5. So, under an indictment for manslaughter, in one count, there may be a conviction for an assault and battery. *State v. Scott*, 24 Vt. 127.

6. **Party forcibly brought within jurisdiction.** In a prosecution for a crime committed in this State, the respondent cannot object that he was forcibly and against his will taken in Canada and brought into this State, and without the consent of the authorities of Canada. *State v. Brewster*, 7 Vt. 118.

7. **Change of venue.** The supreme court has no power to order a change of venue in a criminal case; nor has the county court authority to try such case in any other county than that in which the offense was committed. *State*

v. *Howard*, 31 Vt. 414. (Changed by Stat. 1865, No. 1.)

## II. OFFENSES AGAINST LIFE AND PERSON. G. S. CH. 112.

### 1. *Homicide and murderous assaults.*

8. **Distinction between murder and manslaughter.** If one inflict a mortal wound with a deadly weapon upon a vital part, it is a presumption of fact that he designed the natural consequences of his act, and it is murder, unless he shows that the result was not designed, or that it was done in heat of blood upon legal provocation, or was justifiable. *State v. McDonnell*, 32 Vt. 491.

9. In case of a homicide not justifiable, if the design to kill be formed deliberately, for ever so short a time before the giving of the mortal wound, or if formed without such provocation as the law regards as sufficient justification for anger and heat of blood, the offense is murder. *Ib.*

10. If in a mutual combat, without previous malice, and after mutual blows given, one party draws his knife and, in the heat and fury of the fight, deals the other a mortal wound, this is but manslaughter, although the blow was given with the purpose to kill. *Ib.*

11. The doctrine that malice is presumed, *prima facie*, from the mere fact of killing, questioned. *Ib.* 538; and see *State v. Patterson*, 45 Vt. 314.

12. **Favorable construction.** In trials for murder, it is the duty of the court, upon common principles of humanity and justice, *first*, to pronounce the prisoner innocent until he is proved guilty; and, *secondly*, after he is shown to have committed a homicide, to look for every excuse which may reduce the guilt to the lowest point consistent with the facts proved. *Redfield, C. J.*, in *State v. McDonnell*, 32 Vt. 538.

13. A charge was *held* erroneous, and a new trial granted after conviction for murder, because, there being testimony tending to prove a case of manslaughter only, and this being the respondent's theory, the court omitted to call the jury's attention to it in that light, and only called their attention to the distinction between murder and manslaughter by the announcement of abstract propositions and definitions, without any application of them to the evidence which tended to prove the case to be one of manslaughter. *Ib.* 491.

14. **Manslaughter.** *Held*, that if a man, in order to effect sexual connection with a female, not his wife, uses artificial means—as an instrument to perforate the hymen—and is guilty of such carelessness or negligence as to endanger the life or personal safety of the girl,

and her death is caused thereby, he is guilty of manslaughter, although she consented to the connection and the operation. *State v. Center*, 35 Vt. 878.

15. On a trial for manslaughter, the circumstances of the killing were shown by the prosecution, and exculpatory evidence was given by the defense. The court charged the jury that "if they were convinced beyond a reasonable doubt that the death of the deceased was occasioned by the shot fired by the respondent, then the prosecution had made out the killing in the manner charged \* \* \* that all killing is presumed to be unlawful; and where the fact of killing is established, it devolves on the party who committed the act to excuse that killing—to show that it was justified—in order to escape the legal consequences which attach to the commission of the act." *Held* erroneous—and that the jury should have been instructed, in substance, that upon all the evidence they must find, beyond a reasonable doubt, that the crime charged in the indictment was committed by the respondent, in order to warrant his being found guilty. *State v. Patterson*, 45 Vt. 308.

16. **Carrying weapon.** The prisoner having the right to use reasonable force to expel the deceased from his premises;—*Held*, that he had the right to go prepared with a loaded pistol, to defend himself against any assault the deceased might make upon him while in the exercise of that right; and that if he only intended to use the pistol in such an emergency in defending his own life, or against the infliction of great bodily harm, the carrying it for such a purpose would be lawful; nor could the carrying of the pistol for such lawful purpose, be treated as in itself carelessness. *State v. Carlton*, 48 Vt. 636.

17. **Murderous assaults.** There is a well recognized distinction between an assault with intent to murder, and an assault with intent to kill. In the former case, the proof must be such as shows that, if death had been caused by the assault, the assailant would have been guilty of murder; and, in the latter case, the proof need only be such as that, had death ensued, the crime would have been manslaughter. *State v. Reed*, 40 Vt. 603.

18. The offense named in G. S. c. 112, s. 23, viz.: an assault, *being armed with a dangerous weapon*, with intent to kill, &c., is a different offense from that named in s. 18, which is for an assault "with intent to kill," simply. *Ib.*

19. Under a statute punishing an assault "with intent to kill or murder," (G. S. c. 112, s. 23);—*Held*, that the statute embraces two offenses in the alternative; that each offense might be charged by separate counts in the same indictment, or, as in this case, both may

be charged in the conjunctive in the same count—"with intent to kill *and* murder"—since the intent to murder includes the intent to kill and, if proved, merges the latter, and, if not proved, but the intent to kill is proved, there may be a conviction of the lower offense; as, on an indictment for murder, there may be a conviction for manslaughter. *Ib.*

20. Under an indictment for an assault with intent to kill, the intent, like the assault, must be proved beyond reasonable, not possible, doubt. *State v. Daley*, 41 Vt. 564.

21. **Torture.** An indictment lies for torturing one accused of crime, to extort a confession from him,—this being contrary to the common law and the constitution of Vermont. *State v. Hobbs*, 2 Tyl. 380.

22. **Evidence of intent.** In a prosecution for assault and battery the respondent offered to prove that the person assaulted was a quarrelsome and fractious man, but without offering to prove that the respondent had knowledge of such fact. *Held*, that the offer was properly rejected. *State v. Meader*, 47 Vt. 78.

23. Where one is charged with an assault, the intent with which the party assaulted came to be connected with the assault, especially if he be a witness, may be important for the defense; and such intent may be shown by the acts of the assaulted party, and his declarations connected with his acts—as, previous affrays, threats, &c. *State v. Goodrich*, 19 Vt. 116.

#### 2. Rape and Assault with intent.

24. In a trial for rape, the court charged that if the respondent commenced and entered upon the sexual intercourse with the girl's consent, but she then withdrew her consent, and the respondent forcibly continued the intercourse after he had knowledge of her dissent, it would be rape. *Held*, as applied to the facts of the case, no error;—the girl being only 12 years old and of small stature, the daughter of the respondent's wife, and of his family, &c. *State v. Niles*, 47 Vt. 82.

25. Upon a trial for rape, where the woman alleged to have been forced is examined as a witness for the prosecution, she may be asked on cross-examination, whether at a specified time and place she had not illicit intercourse with a person named. *State v. Johnson*, 28 Vt. 512. *Bennett*, J., dissenting. Affirmed, *State v. Reed*, 39 Vt. 417.

26. In a prosecution for rape, evidence that the prosecutrix afterwards complained of the act is only admissible as confirmatory of the evidence given by her. Mere lapse of time before such complaint is not the test of the admissibility of such evidence;—this only affects its weight with the jury. *State v. Niles*, 47 Vt. 82.

27. The particulars of such complaint cannot be given in evidence. The rule is, that it is competent to prove that the prosecutrix made complaint, and that an individual, without naming him, was charged. *Ib.*

28. If one lay hold of a woman and use force upon her with the intention and for the purpose of having sexual intercourse with her by force and against her will, he may be convicted of an assault with intent to commit a rape, although, after resisting for awhile, she finally yielded, and sexual connection was then had with her, with her consent. *State v. Hartigan*, 32 Vt. 607.

29. Under an information for an assault with intent to commit a rape, a conviction may be had, though the proof be that a rape was actually committed; and such conviction would be a bar to a prosecution for the rape, on the ground that the less offense is a necessary element in, and constitutes an essential part of, the greater, and both are in fact one transaction. *State v. Smith*, 43 Vt. 324. (See Stat. 1870, No. 5, s. 9.)

### III. OFFENSES AGAINST PROPERTY—G. S. CH. 113.

#### 1. Arson.

30. In an indictment for burning a public building, it is not necessary to allege that it was *of*, or *belonged to*, any one. *State v. Roe*, 12 Vt. 93.

31. Under C. S. c. 104, s. 4, which provides, "If any person shall willfully and maliciously set fire, with intent to burn, to any dwelling house, &c.;"—*Held*, that the offense defined is an attempt at arson by the application of fire directly to, or in immediate contact with, the building, and that it is not necessary, to a conviction under this statute, that there should be an actual burning of some portion of the building. *State v. Dennin*, 32 Vt. 158.

#### 2. Burglary.

32. **Inn.** *Held*, that a guest at an inn may commit burglary by leaving his own room and breaking into the room of another guest, or into other parts of the house where he has no right to be. *State v. Clark*, 42 Vt. 629.

33. **Noctanter.** The respondent was discovered within an inn in the commission of a burglary at half-past three in the morning of August 3d, and the testimony of the witness was, that "it was then dark—day-light was approaching, but that he could not see to distinguish a man's face in the hall where he was without a light, and that none of his guests were up." The court charged the jury that, if they believed this testimony, the offense was com-

mitted "in the night time." *Held*, not erroneous. *Id.*

34. Indictment for burglary committed "between the hours of twelve at night and nine of the evening succeeding";—*Held* ill on demurrer, because uncertain whether the act charged was committed by night, or by day. *State v. Mather*, N. Chip. 32.

35. **Indictment—Intent.** An indictment for burglary alleged the breaking and entering of the dwelling house of A, with the intent to steal the goods of A in said dwelling house then being, and having so entered, stole the goods of B found in said house. *Held*, good. *State v. Brady*, 14 Vt. 353.

36. In an indictment for burglary, the intent may be set forth as an intent to steal "the goods and chattels in said dwelling house then and there being," without stating the ownership of the goods. *State v. Clark*, 42 Vt. 629.

### 8. Larceny.

37. **What is.** Under an indictment for stealing sheep, the court say:—If the respondent took the sheep and changed their local position, however little, and did this with the felonious intent charged, it was enough to constitute the offense. *State v. Carr*, 13 Vt. 571.

38. A bailee of goods who has a qualified possession—as a servant—is guilty of larceny, if he privately eloids and converts them. *State v. White*, 2 Tyl. 352.

39. If the finder of goods lost neglects to advertise them, but conceals or privily converts them, he is justly chargeable with larceny. *State v. Jenkins*, 2 Tyl. 377.

40. Where one hired a horse under the pretense that he wanted the horse to drive to A and would return soon, but intended wholly to deprive the owner of the property and to convert it to his own use, and he drove the horse beyond A, when he was arrested;—*Held*, that this was larceny, although he had not sold or disposed of the horse; and *it seems*, that the getting possession of the horse under such false pretense and with such intent, would be larceny. *State v. Humphrey*, 32 Vt. 569.

41. **Original taking in another jurisdiction.** One who feloniously steals property in another State of the Union, or in Canada, and brings it into this State, is guilty of larceny in this State, and may be here tried and convicted. *State v. Bartlett*, 11 Vt. 650. *State v. Mockridge*, *Id.* 654.

42. **Indictment.** An indictment for stealing "two five dollar bank bills or notes of the value," &c., was *held* ill on demurrer, because not averring that the bills contained a promise to pay money, &c. *State v. Emery*, Brayt. 131. (Altered by Stat. 1870, No. 5.)

43. In an information for stealing a horse,

the horse was described as "of a bay or brown color." *Held*, that this was not cause for arresting judgment. *State v. Gilbert*, 13 Vt. 647.

44. In an indictment for larceny, the property was described as "one feather bed." *Held*, sufficient. *State v. Parker*, 47 Vt. 19.

45. Since the Revised Statutes, which made horse-stealing larceny simply, there is no objection to joining, in the same count of an indictment, the stealing of a horse, saddle and bridle, &c. *State v. Nutting*, 16 Vt. 261.

46. An indictment charged in one count the stealing, at one time, of one horse, one buggy and one harness, the property of W. *Held* not objectionable for duplicity. Horse stealing is by statute larceny, and nothing more; differing from ordinary larceny only in the extent of fine to be imposed. The indictment charges but one offense. *State v. Cameron*, 40 Vt. 555.

47. So, an indictment charging in one count the stealing of different articles belonging to different persons, but at the same time and place, is not bad for duplicity. It charges but one larceny. *State v. Newton*, 42 Vt. 537.

48. **Intent is for the jury.** On trial for stealing, whatever the circumstances of the taking, it must be left to the jury to determine whether the taking was with felonious intent. *State v. Smith*, 2 Tyl. 272.

49. **Evidence.** Where goods are stolen, and the whole or part of them are found concealed on a person, this is *prima facie* evidence that he stole them; and unless he can show that he came by them honestly, must conclude him guilty. *State v. Jenkins*, 2 Tyl. 377.

50. The prisoner was indicted for larceny. The stolen goods were found concealed some 100 rods from his house, he showing where they were. *Held*, that it was properly left to the jury to find, under the circumstances stated, whether the goods were found in the prisoner's possession, as if found upon his person or in his house; and that, if so, no explanation being given, they would be warranted in finding him guilty. *State v. Brewster*, 7 Vt. 118.

51. On a trial for larceny, the evidence for the prosecution tended to prove that the respondent, Sept. 9, 1866, hired a horse and wagon at Rutland for a short ride, but absconded and never returned them; that the owner next day began a search, and continued it until Oct. 17, 1866, when the team was found at Mechanicsville, N. Y., the witness not stating in whose possession, or under what circumstances, it was found. *Held*, that this made out a *prima facie* case for the prosecution. *State v. Cameron*, 40 Vt. 555.

52. On a trial for stealing a horse and wagon, the respondent put in testimony that his brother purchased the property of a stranger. *Held*, that the prosecutor might show, as tending to contradict this, that this brother was then on

the jail limits, had failed in business, and had no visible means to pay his debts. *Ib.*

**53. Question of value.** Where the jurisdiction of the county court, in case of larceny, depends upon the value of the property stolen, and the property is of uncertain value, it would be apparently impracticable to raise or settle the question of jurisdiction except by a traversable plea on that ground. *Collamer J., in State v. Carr*, 18 Vt. 571. 16 Vt. 265.

**54.** But where the jury by their verdict find that the value of the property stolen is less than the value which gives the jurisdiction, the case must be dismissed. *State v. Nutting*, 16 Vt. 261.

**55. Receiving.** An indictment lies against the receiver of goods stolen, though the thief has not been convicted. *State v. S. L.*, 2 Tyl. 2 249. (The information joined a count for stealing with a count for receiving. This is now authorized by Stat. 1870, No. 5).

**56.** An indictment charged the respondent with *receiving and aiding to conceal* goods stolen. The copy furnished the respondent omitted the charge of *aiding to conceal*. After conviction the respondent moved for a new trial for this cause, which motion was overruled. On exceptions, *held* not to be error. *State v. Fuller*, 39 Vt. 74.

#### 4. False Pretenses.

**57. Indictment—Sufficiency.** An information charging that the respondent was a common cheat, and did by divers false pretenses and false tokens cheat and defraud the good people of this State, was *held* ill on demurrer, because no particular acts constituting the fraud were set forth. *State v. Johnson*, 1 D. Chip. 129.

**58.** Slade's Stat. c. 81, s. 30, providing that "if any person shall by false tokens, messages, letters, or by other fraudulent, swindling or deceitful practices, obtain or procure from any other person any money," &c., was *held* not to embrace the case of false declarations or pretenses merely. *State v. Sumner*, 10 Vt. 587.

**59.** In an indictment for obtaining goods by false pretenses, it is necessary to allege distinctly and positively, as in case of larceny, that the goods were the property of some person named, or else some excuse must be stated for not naming him,—as that they belonged to some person to the jurors unknown. *State v. Lathrop*, 15 Vt. 279.

**60.** Also, the time and place of procuring the goods must be set forth. For defect herein judgment was arrested. *State v. Bacon*, 7 Vt. 219.

**61. Conspiracy to cheat, &c.** An indictment for a conspiracy must aver, either the criminal purpose of the conspiracy, or else the unlawful means by which it was intended to

accomplish a purpose not of itself criminal; and a defect herein will not be aided by averments of overt acts done in pursuance of the conspiracy. *Kellogg. J. in State v. Keach*, 40 Vt. 118.

**62.** Thus, an indictment charging the conspiracy to have been to obtain divers goods of certain persons "by divers false pretenses and subtle means and devices," and "to cheat and defraud them thereof," was *held* ill, in that the charge to cheat and defraud does not necessarily import a criminal offense; and that the description of the means employed is too vague and general, not specifying or describing those acts, but only their quality, which are styled "false pretenses" and "devices." *Ib.* See *State v. Noyes*, 25 Vt. 415.

#### 5. Wounding, &c., of Cattle, &c.

**63. Offense at common law.** The wounding and torturing of a living animal, with wicked and malicious motives, was *held* indictable at common law as a misdemeanor. *State v. Briggs*, 1 Aik. 226. (Since made punishable by statute. G. S. c., 113. ss. 25, 26.

**64.** Under an indictment charging that the respondent confined certain colts in his barn-yard in B, and then drove them upon scythes fixed in a bar-way of the yard *leading into the inclosure of D*, the proof was that the bar-way led into the meadow of the respondent. *Held*, not material, and no variance. *Ib.*

**65.** A mere invasion of private property, without a disturbance of the peace, is but a private trespass and is not indictable at common law. Thus, upon an indictment for that "with force and arms the defendant feloniously and willfully, mischievously and wickedly" did kill a certain steer, the property of another, the judgment was arrested after verdict. *State v. Wheeler*, 3 Vt. 344.

**66. Statute.** Under a statute against the wounding of "cattle or other beasts," an indictment for the wounding of a certain "red, three year old steer" was *held* sufficient. *State v. Abbott*, 20 Vt. 537.

#### 6. Willful Mischief.

**67.** In an indictment under G. S. c., 113, s. 49 for cutting, &c., a pipe "used as an aqueduct for the conveyance of water," it is not necessary to allege the quantity or value of the pipe, nor its location, whether above or under ground. *State v. Jones*, 33 Vt. 443.

### IV. FORGERY AND COUNTERFEITING. G. S. CH. 114.

**68. Forgery—what is.** It is an indispensable element in the crime of forgery, that the

forged paper must be such that, if genuine, it might injure another; and the paper must be so set forth in the indictment that it shall appear to be of that character, or the indictment is bad. *State v. Briggs*, 34 Vt. 501.

69. An indictment for the forging of a "bond" under G. S. c. 114, s. 1, was held ill, which described the instrument as "a certain writing purporting to be a bond, with condition thereto annexed, signed, sealed and executed by A, and dated Jan'y 8, 1853, with intent to injure and defraud the said A, &c." without stating that it was executed to any person, or what the condition was—although it was alleged that the instrument could not be more particularly described, because it was in the possession of the respondent. *Ib.*

70. A letter signed and directed to a person asking for a loan of money, adding: "I send this line by my daughter. Please send the money the same way" is, it seems, the subject of forgery under the name of an "order drawn on any person." *State v. Nevins*, 23 Vt. 519.

71. The severing from a promissory note an indorsement of payment, leaving the note entire, is not a forgery within the statute, but a misdemeanor,—a cheat, an offense at common law, punishable by fine and imprisonment. *State v. McLeran*, 1 Aik. 311. 27 Vt. 314.

72. An indictment charging such offense as forgery under the statute, may be sustained as an indictment for a misdemeanor at common law, treating the words, *contra formam statuti*, as surplusage. In such case neither a demurrer, nor motion in arrest, can be sustained. *State v. McLeran*. *State v. Phelps*, 11 Vt. 116. *Brackett v. State*, 2 Tyl. 167.

73. **Indictment.** In an indictment for forgery, the instrument must be set forth in words and figures, unless in certain excepted cases,—as where the instrument is in the possession of the person charged,—in which case that fact must be alleged. *State v. Parker*, 1 D. Chip. 298.

74. Where an indictment for forgery improperly describes the import of the obligation of the contract forged, this defect is not cured by reciting the instrument *in haec verba*. *State v. Bean*, 19 Vt. 530.

75. An indictment for forgery alleging the alteration of the word *birch* to *batch*, by erasing the letters *ir* and inserting *at*, was held supported by evidence only of the erasing of the letters *ir* and inserting *at*, without regard to the letter *c*. *State v. Rowley*, Brayt. 76.

76. An indictment for forgery alleged the forging of "a certain paper writing, purporting to be an order for money, together with a certain false and forged acceptance written thereon, drawn upon the President, Directors and Company of the Bank of Vergennes, a banking corporation duly organized," &c.,

setting out the paper in *haec verba*: (Date.) "Bank of Vergennes, pay to self or bearer, twenty-nine hundred dollars, \$2,900. John Gill." (Indorsed) "Good for twenty-nine hundred dollars. H. C. Horton, Teller." Held, after verdict, that the indorsement was properly charged as an acceptance; that the indictment was sufficient without alleging the authority of the teller to accept, the respondent being bound by the representation made by his forgery; and that as the instrument was set out in *haec verba*, the question of variance between it and the corporate name of the bank did not arise; that the paper was properly named as an order for money; and might have been described as a bill of exchange. *State v. Morton*, 27 Vt. 310.

77. There is no duplicity in an indictment, in alleging that the respondent forged and caused to be forged and aided and assisted in forging;—these being only the same offense, under the statute, and in legal contemplation the same act. *Ib.*

78. **Evidence.** Upon an indictment against several for forgery of a bank check, evidence of an agreement between the defendants to procure money from banks by means of forged paper, is admissible, although such agreement does not have reference to any or the particular bank. *Ib.*

79. **Witness.** The person whose name is forged is a competent witness for the State in a prosecution for the forgery. *State v. Phelps*, 11 Vt. 116.

80. A new trial refused, where the respondent's wife confessed that she committed the forgery for which he had been convicted. *State v. J. W.*, 1 Tyl. 417.

81. **Counterfeiting—Jurisdiction.** The jurisdiction of the U. S. courts under the acts of Congress, and that of the courts of this State, under the statutes of the State, over the crime of counterfeiting, are concurrent within the State. *State v. Randall*, 2 Aik. 89.

82. **Indictment.** The statute against "uttering, passing or giving in payment" any counterfeited bank bill, &c. (G. S. c. 114, s. 4), makes these acts distinct and independent, and either one constitutes an offense, provided the party had knowledge that the bill, &c., was counterfeit. An indictment for uttering, passing and giving in payment, &c., was held good on demurrer, without alleging that the counterfeit was passed as and for a true bill. These words are not in the statute, and *quare*, whether, if the indictment had been for giving in payment only, these words would have been necessary. *State v. Wilkins*, 17 Vt. 151.

83. Under this statute against the uttering, &c., of any counterfeit "bank bill or promissory note";—held, that an indictment naming such counterfeit as a "bank note" was sufficient—these three words being synonymous. *Ib.*

84. The allegation in an indictment for uttering a counterfeit bank bill, that the bill uttered "was made in imitation of, and did then and there purport to be a bank note for the sum of five dollars issued by," &c., was *held* to be merely an allegation that the bill was a fiction and pretense, and was not an attempt to set forth the forged bill according to its legal *purport*, so as to allow the question of variance to be raised between such allegation and the tenor of the bill, as set forth in words and figures. *Ib.*

85. In an indictment for passing a counterfeit bank bill, the bill was set forth as "purporting to have been issued by the Andover Bank, a banking company incorporated by the Legislature of the Commonwealth of Massachusetts, made payable to E F or bearer." *Held*, on the authority of *State v. Wilkins*, 17 Vt. 151, and of a long used form, that these words in italics should be construed not as an allegation of the purport of the bill, but of the essential fact of the actual existence or incorporation of such bank. *State v. Wheeler*, 35 Vt. 261.

86. In an indictment for passing a counterfeit bank bill, it is not necessary to set forth words or figures upon the margin of the bill, which do not add to or qualify it, as set forth—such as "*Capital stock \$100,000, secured by pledge of \$100,000 Pennsylvania 6 per cent. bonds.*" *Ib.*

87. **Evidence.** On trial for counterfeiting, &c., bank bills, it is not necessary to produce the charter of the bank, but it is sufficient to prove that such bank was in operation, issued bills such as were attempted to be imitated, &c.,—and, in case of an indictment for counterfeiting the bills of the Bank of the United States, the case was *held* well left to rest upon the general knowledge which the jurors, in common with the other citizens of the United States, possessed, as to the existence of the bank. *State v. Randall*, 2 Aik. 89.

88. That the signatures to a bank bill are counterfeit, may be proved by one who has become acquainted with the handwriting of the president and cashier in course of business, though without having seen them write. *State v. Lawrence*, Brayt. 78. *State v. Ravelin*, 1 D. Chip. 295.

89. **Description of the thing counterfeited.** An averment in an indictment that the coins intended to be counterfeited were "current silver coin of this State and of the United States, called *half-dollars*," is not equivalent to the words of the statute, "made current by the laws of this or the United States";—*Held* ill on demurrer. *State v. Bowman*, 6 Vt. 594.

90. Under the statute against counterfeiting "coin in the similitude of any gold or silver coin current by law or usage in this State" (G. S. c. 114, s. 10), it was *held* sufficient to allege

that the counterfeit coin was in the similitude of the current money and silver coin of the United States, called half dollars, without averring that they were current by law or usage in this State. The court will take judicial notice of this. *State v. Griffin*, 18 Vt. 198.

91. Under an indictment for coining, it is not necessary to aver of what materials the counterfeit coin was made. If this be averred it need not be proved. *Ib.*

92. An allegation in an indictment that the respondent "ten pieces of false, forged and counterfeit coin, &c., did forge, make and counterfeit, &c.," was *held* sufficient notwithstanding the ambiguous use of the word *counterfeit*. *Ib.*

93. The word *counterfeited* construed as *counterfeit*, in *State v. Randall*, 2 Aik. 89.

94. **Instruments for counterfeiting.** Under the statute making it a crime to have in possession "any die, stamp or other instrument or tool for the purpose of forging or counterfeiting," &c.;—*Held*, that a *crucible*, for the purpose of melting, mixing, &c., metals for the purpose of counterfeiting, did not fall within the statute. *State v. Bowman*, 6 Vt. 594.

95. The statute against having in possession any mould, &c., or other tool or instrument adapted and designed for making any counterfeit coin, &c. (G. S. c. 114, s. 10), was *held* to reach every part of the apparatus for coining—as the half of a mould, or mould for but one side of the coin. *State v. Griffin*, 18 Vt. 198.

## V. OFFENSES AGAINST PUBLIC JUSTICE. G. S. CH. 115.

### 1. Perjury.

96. **Judicial proceeding.** In an indictment for perjury it is material that it should appear that the oath was taken in a judicial proceeding. This is matter of substance. *State v. Chamberlin*, 30 Vt. 559.

97. In an indictment for perjury in an answer in chancery, it was alleged that A B "*exhibited* his certain bill of complaint in the court of chancery against" the respondent, &c., setting forth the material substance of the bill and prayer, and concluding, "as in and by said bill remaining filed of record in said court of chancery will more fully appear," and then set forth the false swearing—the indictment being according to the form in 2 Ch. Cr. Law, 886. *Held*, on motion in arrest, that this sufficiently set forth that the answer was sworn to in a *judicial proceeding*. *Ib.*

98. So, where the indictment alleged that C D "*brought* a petition of divorce addressed to the supreme court," &c., "stating in her petition," &c., and then stated the substance of the petition and prayer, and proceeded—



"whereupon it became necessary to take the testimony of witnesses *in the premises*," and then stated that the respondent appeared, &c., and "made his deposition as to facts *in the premises*," &c., and then set forth the false swearing;—*Held*, on demurrer, that the pendency of a judicial proceeding sufficiently appeared, and that the perjury was committed therein—that the words, "*facts in the premises*," refer to the petition and are equivalent to *facts stated in the petition*. *State v. Sleeper*, 37 Vt. 122.

99. So, where the allegation was that C D "*petitioned the supreme court*," &c. *State v. Magoon*. *Ib*.

100. The statute requiring that the complaint in a bastardy prosecution should be in writing;—*Held*, that an indictment for suborning a woman to commit perjury in making and swearing to a complaint in such case, not alleging that such complaint was in writing, did not show that the false swearing was in a proper judicial proceeding, and was *held* ill on motion in arrest. *State v. Simons*, 30 Vt. 620.

101. Perjury cannot be predicated of testimony given by way of disclosure as a trustee, where that part of the testimony alleged to be false was not reduced to writing and signed by the trustee, as required by G. S. c. 34, s. 14. *State v. Trask*, 42 Vt. 152.

102. Perjury may be committed in the swearing to a false affidavit made in support of a petition for a new trial. *State v. Chandler*, 42 Vt. 446.

103. **Material to the issue.** Where perjury is assigned on written documents, from the recital of which it appears that the perjury is material, the express allegation of its materiality may be omitted. *State v. Chamberlin*, 30 Vt. 550.

104. In an indictment for perjury, it should plainly appear on the face of the indictment that the false evidence was material to the issue in a judicial proceeding; or else it should be expressly alleged that it was material. If so expressly alleged, it is not necessary to show, by a statement of the issues or otherwise, *how* it was material. *State v. Sleeper*, and *State v. Magoon*, 37 Vt. 122. *State v. Chandler*, 42 Vt. 446.

105. **False.** To warrant a conviction for perjury, that part of the respondent's testimony which the indictment alleges to have been material, must be found to have been false. *State v. Trask*, 42 Vt. 152.

106. The indictment alleged, in substance, that it was a material question, &c., whether the respondent had paid for certain sheep, and that he falsely and maliciously testified that he had paid for the sheep at a certain time and place [named], whereas in fact he had not at the time and place named, nor any where

else, paid for said sheep, but at the time he so testified he was still indebted for said sheep. *Held*, that it was error to charge that if the respondent did so testify, and this was false and the respondent knew it to be false, it was perjury; for however material in fact were the time and place of payment, they were not alleged to be material, and the trial was bound to proceed upon the basis that they were not. *Ib*.

107. **Form of averment.** In an indictment for perjury, false swearing in relation to several separate and distinct facts may be charged in one count. *State v. Bishop*, 1 D. Chip. 120.

108. An allegation that the respondent "*falsely, willfully and corruptly*" swore, is sufficient without the word "*knowingly*." *State v. Sleeper*, and *Magoon*, 37 Vt. 122.

109. **Evidence.** On trial for perjury in a deposition, the prisoner is not estopped from proving its truth by the fact that he afterwards, in the same cause, swore in open court that a material matter stated as a fact in his deposition was not true. *State v. J. B.*, 1 Tyl. 269.

110. On trial for perjury committed in a trial before a justice, on a day named in the indictment under a *vide licet*, the justice's record may be read, though it appear from it that such trial was upon a day other than the one named in the indictment. *State v. Clark*, 2 Tyl. 277.

111. An answer in chancery appeared, from the jurat upon it, to have been sworn in C county. On a trial for perjury in the answer;—*Held*, that it was competent for the prosecution to allege in the indictment and prove, that the answer was in fact sworn to in O county. *State v. Chamberlin*, 30 Vt. 559.

112. **Prima facie case.** On a trial for perjury, the government, by proving the falsity of the oath, makes a *prima facie* case of corrupt swearing to what was false. If occasioned by surprise, inadvertency, or by mistake, the proof thereof should come from the respondent. *Ib*.

113. **Arrest of judgment.** In an indictment for subornation of perjury, the verb expressing that the witness *testified* was omitted. *Held*, that this omission, although by manifest mistake, could not be supplied by intendment, and was not cured by verdict. *State v. Leach*, 27 Vt. 817.

## 2. Suppressing evidence.

114. **Attempt.** The attempt, whether successful or not, to prevent another from appearing as a witness in a criminal prosecution, whether bound so to appear or not, is indictable and punishable as a misdemeanor at common law; and this, without reference to the guilt or innocence of the original party, or the sufficiency of the proceedings against him.

*State v. Keyes*, 8 Vt. 57. *State v. Carpenter*, 20 Vt. 9. *Badger v. Williams*, 1 D. Chip. 137.

115. An indictment, according to Chitty's form, for an attempt to prevent one from attending as a witness in a criminal prosecution, was held sufficient after verdict, where the respondent's knowledge of the existence of such prosecution, or of the obligation of the witness so to attend, was not directly averred, but only implied to a certain extent in the description of the offense. *State v. Keyes*.

### 8. Impeding an officer.

116. **What is.** Evidence that the respondent, being present, advised a person against whom a deputy sheriff had a precept for his arrest, to draw a line on the ground and to forbid the officer to pass it, and that if the officer should pass the line he could lawfully knock down or kill the officer, was held to sustain an indictment for impeding and hindering an officer in the execution of his office, where the party acted according to such advice, and committed personal violence upon the officer. *State v. Caldwell*, 2 Tyl. 212.

117. To constitute the statute offense of impeding or hindering an officer in the execution of his office, the impediment or hindrance must be while the officer is in the actual discharge of the duties of his office; and it is not enough that the act may, in its remote consequences only, have the effect of preventing the officer from discharging his official duty. Thus, where a writ had been served upon the respondent and returned to the justice, and the evening before the day set for trial the respondent, under some pretense, obtained the writ from the justice and carried it away, and on the day of trial refused to deliver it up and denied that he had received it, whereby the suit failed;—Held, that this was not an offense against the statute. *State v. Lovett*, 3 Vt. 110.

118. **Authorized person.** Impeding, in the service of a writ, a person specially authorized by a justice to serve it, is not impeding "an officer in the execution of his office," within the meaning of G. S. c. 115, s. 13. *State v. McOmber*, 6 Vt. 215.

119. **Extent of right to impede officer.** An officer, or other person specially authorized, in good faith attaching personal property as the property of the defendant in the process, although such defendant may have no attachable interest therein, cannot be forcibly resisted in making the attachment, nor can the property be forcibly recaptured, even by the real owner of the property. *State v. Downer*, 8 Vt. 424. *State v. Buchanan*, 17 Vt. 573.

120. It is no defense to an indictment for forcibly resisting an officer in the execution of his office in the making of an attachment, or

for an assault and battery, that the property which he was about to attach was not the property of the defendant in the process, but was the property of the respondent. *Id.*

121. The owner of personal property may assert his claim thereto, where it is about to be attached as the property of another, and may make use of any peaceable means to prevent its attachment, or to keep or regain possession of it, when this can be done without using any force or violence against the officer—without violence to his person, or threats of personal violence. Under these circumstances, the defendant's ownership is a defense to an indictment for impeding the officer in the execution of the process. *State v. Miller*, 12 Vt. 437;—and to an action of trespass for carrying away the property. *Merritt v. Miller*, 13 Vt. 416.

122. A sheriff, for the purpose of arresting the defendant in his own dwelling house upon civil process, broke open the outer door, and, having entered, attempted to arrest him, when the defendant forcibly resisted him. Held, the breaking being unlawful, that the attempt to arrest was unlawful, and that resistance by the defendant was lawful; and that an indictment did not lie against the defendant therefor. *State v. Hooker*, 17 Vt. 658. 19 Vt. 154.

123. **Indictment.** An indictment under the statute for impeding an officer in the execution of his office (G. S. c. 115, s. 13), charging resistance to the service of process, must set forth the process, the mode in which it was attempted to be executed, the particular mode of the resistance, and the respondent's knowledge of the character in which the officer claimed to act. *State v. Downer*, 8 Vt. 424. *State v. Burt*, 25 Vt. 373.

124. An indictment for such offense was held ill under the statute, but good for an assault at common law. *Id.*

125. **Conspiracy to impede.** The offense of a conspiracy to impede an officer in the execution of his office is not merged in the offense of impeding him. The two offenses are distinct and independent, and of the same grade. *State v. Noyes*, 25 Vt. 415.

126. In an indictment for such conspiracy, it is not necessary to set forth the process, nor the means to be used to effect the conspiracy. *Id.* See *State v. Keach*, 40 Vt. 113.

127. The unlawful agreement is the gist of the offense of conspiracy. In an indictment therefor, it is not necessary to charge the execution of the unlawful agreement, nor to prove it on trial, if charged. *Id.*

## VI. OFFENSES AGAINST THE PUBLIC PEACE. G. S. CH. 116.

128. **Challenge.** An indictment for sending a written challenge to fight a duel does not

lie upon Sec. 20 of Slade's Stat. 270, against inferior crimes, viz: breach of the peace, "by threatening, quarrelling, *challenging*," &c. *State v. S. S.*, 1 Tyl. 180.

**129. Threats.** Threats, in order to violate that sense of security which is the public peace, and so constitute a breach of the peace under the statute, must be of some grievous bodily harm, and be put forth in a desperate and reckless manner, accompanied by acts showing a formed intention to execute them,—must be intended to put the person threatened in fear of bodily harm and must produce that effect, and be of a character calculated to produce that effect upon a person of ordinary firmness. *State v. Benedict*, 11 Vt. 236.

**130. Annoyance.** A grand juror's complaint charged that the respondents did break and disturb the public peace, by ringing and causing to be rung and tolled a certain church bell and, well knowing that one P was then living, did report and aver that said P was dead and was to be buried on the next succeeding day, and did ring the said bell with intent to have it believed that said P was then dead, and with intent to annoy, harass and vex said P and his family and friends. *Held*, that this did not charge a breach of the peace under the statute (G. S. c. 116, s. 1); and judgment was arrested. *State v. Riggs*, 22 Vt. 321.

**131. Complaint for breach of the peace.** The complaint, under G. S. c. 116, s. 1, charged that M, at, &c., on, &c., "in and upon one W did make an assault, and him the said W did then and there with fists, clubs, sticks, and iron instruments, strike, beat, bruise and wound, to the great injury of the said W, and thereby and by his tumultuous and offensive carriage, and by threatening and challenging the said W, the said M did disturb and break the public peace, contrary," &c. *Held*, that the complaint charged but one offense, viz: a breach of the peace, and was not objectionable for duplicity. *State v. Matthews*, 42 Vt. 542.

**132.** The statute enumerates several modes of disturbing and breaking the public peace, but the offense is one. *Id.*

**133.** The words "tumultuous and offensive carriage, threatening, quarrelling and challenging," alone, would be insufficient, as not constituting such a statement of facts as import with sufficient certainty a breach of the peace; but the facts which constitute such offensive and tumultuous carriage, &c., should be alleged. But the assaulting, beating and striking, in this case, import a breach of the peace, and these other words may be treated as descriptive of the circumstances accompanying the assault, and are harmless, and might be stricken out. *Id.*

**134.** A complaint alleging that the respondent "did disturb and break the the public peace by tumultuous and offensive carriage, \* \* \*

by threatening, quarrelling with, challenging, assaulting, beating and striking" L, sufficiently shows the means by which the offense was committed. Such complaint was *held* good. *State v. Hanley*, 47 Vt. 290.

**135. Swearing the peace.** *Quere*—Whether the common law remedy of swearing the peace against one who threatens an offense, exists in this State. *Redfield, J.*, in *State v. Benedict*, 11 Vt. 239. (See G. S. c. 31, s. 12.)

## VII. OFFENSES AGAINST CHASTITY, MORALITY AND DECENCY. G. S. CH. 117.

**136. Adultery—Proof of the act.** To warrant a conviction upon an indictment for adultery, it is not sufficient to prove that the parties were found in bed together under circumstances warranting the presumption of an illicit intent between them, since this constitutes a distinct offense under another section of the same statute; and a presumption of guilt should not be drawn from the opportunity to commit a crime, when the *corpus delicti* is not proved. *State v. Way*, 6 Vt. 311.

**137. —not a felony.** Adultery was not a felony at common law, nor a crime punishable in the common law courts; nor is it made a felony by the statute which declares it a crime to be punished by imprisonment in the state prison. *State v. Cooper*, 16 Vt. 551.

**138.** Under the statute making it burglary in the night time to break and enter any dwelling house, &c., with intent to commit the crime of "murder, rape, robbery, larceny, or any other felony" (G. S. c. 113, s. 7), the respondent was indicted for so breaking and entering with intent to commit *adultery*. After verdict, judgment was arrested;—for that adultery was not a felony. *Id.*

**139. Particeps as a witness.** On trial for adultery, the *particeps* was not allowed to testify to the fact. *State v. Annice*, N. Chip. 9.

**140. Proof of marriage.** On such trial it is necessary to prove a marriage in fact. Reputation and cohabitation alone are not sufficient; otherwise, by *Chipman, C. J.* in an action for *crim. con.* *Id.*

**141. Blanket act.** The law is the same in a prosecution under the "blanket act." (G. S. c. 117, s. 3.) *State v. Rood*, 12 Vt. 396.

**142.** An indictment under the "blanket act" must charge the illicit intent to be *between them*,—that both parties had the illicit intent. *State v. Willis*, Brayt. 181.

**143. Bigamy—Indictment.** An indictment for polygamy under the statute (G. S. c. 117, s. 5), alleging both marriages to have been had in other States, and charging that the respondent feloniously cohabited with the second wife in this State, was *held* bad, on motion in arrest, for not alleging that such second mar-

riage was unlawful in the State where it was had. *State v. Palmer*, 18 Vt. 570.

144. An indictment for bigamy was *held* ill on demurrer, because the time and place of the first marriage were left blank. *State v. LaBore*, 26 Vt. 765 (Changed by G. S. c. 117, s. 8.)

145. **Evidence of marriage.** Upon a trial for bigamy;—*Held*, that evidence that the person by whom a marriage ceremony was performed in another State was, in the one case, reputed to be and that he acted as a justice of the peace, and, in the other case, as a minister of the gospel, was *prima facie* proof of such person's official or ministerial character. *State v. Abbey*, 29 Vt. 60.

146. **Incest.** An indictment in one count for incest, charging the offense as committed on a day named, "and on divers other days and times between that day and" a certain later day named, was *held* ill on motion in arrest. *State v. Temple*, 38 Vt. 37.

147. In a trial for incest, under an indictment in one count, the court admitted evidence of distinct offenses on different occasions at remote periods of time, after the respondent's counsel had insisted that the State should be confined in the proof to a single occasion. *Held* erroneous. *Ib.*

148. **Indecent exposure of person.** Where a man indecently and purposely exposed his private parts to a woman, and solicited her to have sexual intercourse with him, although no third person was present;—*Held*, that he was indictable, under G. S. c. 117, s. 11, for "open and gross lewdness and lascivious behavior." *State v. Millard*, 18 Vt. 574.

149. **Procuring miscarriage.** It is not essential to constitute the offense of attempting to procure "the miscarriage of a woman pregnant with a child," under G. S. c. 117, s. 10, that the *fœtus* should then be alive. *State v. Howard*, 32 Vt. 380.

150. **House of ill-fame.** The offense of keeping a house of ill-fame is local, and must be described as committed in a particular town; and the prosecutor is confined in his proof to the town, and cannot, as in other cases, prove an offense within the county; but a more particular description of the house is not required. *State v. Nixon*, 18 Vt. 70.

151. This offense does not depend upon the motive of the person keeping the house. Although alleged in the indictment that it was kept for filthy lucre and gain, such purpose need not be proved, nor what was the actuating motive of the offender. *Ib.*

152. **Obscene publication.** An indictment for selling an obscene publication should ordinarily set it forth in *haec verba*, as in indictments for libel or forgery; but this may be excused, where the publication is of so gross a

character that spreading it upon the record would be an offense against decency, and, so alleging it, it may be described in general terms. *State v. Brown*, 27 Vt. 619.

153. **Disturbing remains of the dead.** The statute offense of disturbing "the remains of any dead person" was set forth in an indictment as disturbing "the dead body of Benjamin P. Calfe, then lately before laid in a coffin and interred," &c. *Held* sufficient. *State v. Little*, 1 Vt. 381.

#### VIII. OFFENSES AGAINST PUBLIC POLICY. G. S. CH. 119.

154. **Play actors.** Under a statute providing that "if any company of players or persons whatever shall exhibit any tragedies, comedies, &c., each person so exhibiting shall forfeit and pay," &c. (G. S. c. 119, s. 16.)—*Held*, that an information was ill which charged that the defendant exhibited tragedies, &c., without alleging that he was one of a "company of players or persons," &c. *State v. Fox*, 15 Vt. 22.

155. **Military enlistment.** Under G. S. c. 119, s. 29, prohibiting the enlisting of "any person in this State for military service without this State," &c., an indictment was *held* good on demurrer, which charged that the defendant at Fairfax, in the county of Franklin, enlisted one E O, &c.,—omitting the averment that E O was in this State at the time of the enlistment—since the enlistment could not have been at Fairfax, as alleged, unless E O was at that time in this State. *State v. Cook*, 38 Vt. 437.

156. **Killing deer.** A complaint for violation of the statute against killing deer (Act 1865, No. 184), which prohibited such killing for ten years, alleged the offense to have been committed on a certain day named—which date was in fact within said period of ten years. *Held* sufficient, without a distinct averment that the offense was committed within such period. *State v. Norton*, 45 Vt. 258.

#### IX. CRIMINAL PROCEDURE.

##### 1. Proceedings before justice.

157. **Complaint—by town grand juror.** From 1797 to 1801, town grand jurors were not general informing officers, and could not prefer a complaint for theft. *Brackett v. State*, 2 Tyl. 152. 11 Vt. 344. (Since changed.)

158. — **by private prosecutor.** A warrant, upon the complaint of a private informer, cannot legally issue without oath of the complainant; and this must appear by the magistrate's certificate. *State v. J H*, 1 Tyl. 444.

159. Any person may make complaint to a justice of the peace for a crime or misdemeanor,

for the purpose of having an examination and commitment, taking the oath required by the constitution and giving the security required by the statute. After binding over or commitment for trial, the prosecution then becomes public and must be conducted by the officer appointed for that purpose, unless it be for some offense where the complainant has an interest in the prosecution and conviction of the offender. *State Treasurer v. Rice*, 11 Vt. 339. 28 Vt. 315. (See G. S. c. 124, s. 8, and *seq.*)

160. In case of a prosecution for a high crime or misdemeanor commenced by a private prosecutor, where he had no pecuniary interest in the conviction, a recognizance taken as well to the prosecutor as the treasurer of the State for the appearance of the respondent, was held void. It should have been to the treasurer alone. *Id.*

161. —by State's attorney. State's attorneys have authority, by information, to bring persons accused of offenses before justices, and to cause them to be bound up;—that they are only to aid town grand jurors in such prosecutions, is unreasonable and absurd. *Treasurer v. Brooks*, 23 Vt. 698.

162. Where some officer other than the State's attorney is authorized to commence suits in behalf of the State, the defendant cannot claim, as a matter of right, that the suit should be dismissed because not prosecuted by the State's attorney. *State v. Bradish*, 34 Vt. 419.

163. **Complaint must show authority of prosecutor.** It is indispensable that a complaint in a criminal prosecution should show, on its face, that it is presented by one having the proper authority. *State v. Soragan*, 40 Vt. 450.

164. Thus, a complaint for a violation of an ordinance of the city of Burlington was presented by "Leverett B. Englesby, city attorney, within and for the county of Chittenden." Held, that the words "city attorney," applying as well to another city as to the city of Burlington, were too indefinite to show the necessary authority, and there being no such county officer, the complaint was held ill on demurrer. *Id.*

165. —and of magistrate. A complaint for violation of an ordinance of the city of Burlington was directed "To David Read, Esq., recorder of the city of Burlington, within and for the county of Chittenden." Upon demurrer, it was objected that there was no such officer as recorder of the county. Held, that these last words of misdescription could be rejected, and, leaving the previous true description to stand, the complaint was sufficient. *Id.*

166. **Memorandum of names of witnesses.** G. S. c. 15, s. 87, requiring a memorandum of the names of the witnesses in support of the prosecution to be subjoined to a grand juror's

complaint, has always been held to be *directory*, and the omission to be no cause for quashing the proceedings. *Bennett, J., in Downer v. Baxter*, 30 Vt. 474.

167. The objection to an omission of such memorandum must be taken at the earliest opportunity, or it is waived. It is not reached by a demurrer. *State v. Norton*, 45 Vt. 258.

168. It is not ground for abatement of a grand juror's complaint, that the names of the witnesses to support it are not subjoined to it. *State v. Hanley*, 47 Vt. 290.

169. **Minute of presentment.** Under the statute which provides that every complaint, &c., in a criminal prosecution "shall be void," unless the magistrate shall make a minute of the true day, &c., when presented;—Held, that a recognizance taken by a justice for appearance to the county court, where no such minute was made, was void. *State v. Cook*, 6 Vt. 382.

170. But a judgment rendered upon such complaint, or process, is valid, until set aside or reversed. *Allen v. Huntington*, 2 Aik. 249. 25 Vt. 350. 32 Vt. 628.

171. **Venue—Waiver.** Where a party was prosecuted before a justice for an offense committed in a town other than the place of trial, or where the respondent resided, and this appeared in the complaint, and he raised no objection thereto until after the close of the opening argument for the prosecution;—Held, that the objection was waived, and that the justice acted properly in proceeding with the trial to judgment. (G. S. c. 31, s. 2.) *State v. Meader*, 47 Vt. 78.

172. **Misjoinder.** A complaint before a justice for several offenses of the same character, was held sufficient on demurrer in the county court, where, as to one count, the justice had no jurisdiction to try, but only to inquire and bind over, or discharge, and as to the others he had jurisdiction to try, and did try and convict, making no order as to the first count. This is not a misjoinder. He might bind over or discharge on the first count, and convict on the others. *State v. Peck*, 32 Vt. 172.

173. **Warrant.** The warrant attached to a criminal complaint is process issued merely to bring the respondent into court; and, when in court, the proceedings against him on the complaint may be had, whatever the warrant or service which brought him may have been. A plea in abatement for defective service of the warrant should be either rejected, or overruled. *State v. Clark*, 44 Vt. 636.

174. **Record.** The justice's record in a criminal case must show the place where his court was held, that it may be seen to have been within his commission. *Brackett v. State*, 2 Tyl. 152.

175. An appealing party in a criminal case went to trial on a complaint as recited in the justice's record, a copy of the original complaint not being sent up;—*Held* sufficient, on motion in arrest, the record sufficiently showing what the complaint was, and it being sufficient as recited. *State v. Kelly*, 47 Vt. 294.

176. **Appeal.** *Held*, that in a criminal prosecution before a justice, the respondent is not deprived of his appeal by pleading guilty before the justice. *State v. Little*, 42 Vt. 430. (G. S. c. 31, s. 63.)

177. The duty of a justice to receive payment of a fine and cost, where the respondent appeals, is suspended when the time prescribed by the statute, within which the respondent had a right to pay, has expired,—that is, 12 days before the session of the court to which the case is appealed—and can be revived only in the event that neither party enters the appeal during that term. *State v. Wooley*, 44 Vt. 363.

178. The act of procuring the affirmance of the judgment of a justice in a criminal case appealed, is in the nature of a motion to the county court, and need not be done personally by the officer to whose duties it most properly pertains. Where such judgment was affirmed on application of the prosecuting town grand juror;—*Held*, that it was competent for the county court to decide whether the State was properly represented, and that there was no error herein. *Ib.*

## 2. Indictment and information.

179. **Constitution.** Article V. of the amendments to the U. S. Constitution, providing that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except," &c., has reference only to proceedings in the tribunals of the United States. *State v. Keyes*, 8 Vt. 57.

180. **Grand jury.** It is no cause for quashing an indictment against a town, that one of the grand jury who returned the bill was a rated inhabitant of the town. The objection is one which it is not competent for the town to make, since the interest of the juror was to shield the town from indictment. *State v. Newfane*, 12 Vt. 422.

181. **Caption.** In an information or complaint by a State's attorney, or town grand juror, it is not necessary to aver that it is made upon his oath of office. *State v. Sickle*, Brayt. 132. *State v. Comstock*, 27 Vt. 553.

182. An indictment commenced thus:—"The grand jurors within and the body of the county," &c. *Held*, on motion in arrest, that the omission of the word *for*, after the word "and," did not vitiate the indictment. *State v. Brady*, 14 Vt. 353.

183. The commencement of an indictment, as follows—"The grand jurors *for the people of the State of Vermont*, upon their oath present," &c.—was considered proper, and was held sufficient on motion in arrest. *State v. Nixon*, 18 Vt. 70.

184. On motion in arrest, defects in the caption of an indictment, or even the omission of the caption, cannot be noticed. *Ib.* *State v. Thibeau*, 30 Vt. 100. *State v. Gilbert*, 13 Vt. 647.

185. **Conclusion.** The conclusion of an indictment, "contrary to the statute," &c., is good. *State v. Newton*, 42 Vt. 537.

186. **Indorsement.** "True Bill," instead of "A True Bill," is a sufficient indorsement of an indictment. *State v. Davidson*, 12 Vt. 300.

187. The foreman of a grand jury signed his name to the indorsement, "a true bill," upon an indictment found, but without appending to his name the word "*foreman*." A motion to quash for this cause was overruled. *Held* correct. *State v. Brown*, 31 Vt. 602. (G. S. c. 37, s. 14.)

188. **Minute of presentment.** The clerk's minute upon an indictment was as follows: "Orleans County Court, Dec. T., 1838, received and filed this 29th, 1838." *Held* a sufficient minute of "the true day, month and year," where, by reference to the records of the term, it appeared that it could only signify the 29th day of the month of December. *State v. Bartlett*, 11 Vt. 650.

189. An objection to an indictment that a minute of the true day, &c., when the same was exhibited was not entered upon it, as required by statute (G. S. c. 62, ss. 8, 10), must be made before pleading the general issue, or it will be treated as waived. *State v. Butler*, 17 Vt. 145.

190. **Form and substance—English language.** The statute requiring judicial proceedings to be in the English language does not preclude, in either civil or criminal pleadings, the use of the Arabic numeral figures in universal use to express numbers,—as dates, sums, amounts, &c. *State v. Hodgeden*, 3 Vt. 481. *Hyde v. Moffat*, 16 Vt. 271. *Clark v. Stoughton*, 18 Vt. 50. *State v. Paddock*, 24 Vt. 315.

191. The words *Anno Domini*, or, by contraction, A. D., have become English by adoption, and are sufficient in an indictment, as equivalent to *the year of our Lord*—or, they might be omitted altogether as the prefix to a date, as being superfluous. *State v. Hodgeden*. *State v. Gilbert*, 13 Vt. 647. 22 Vt. 436. *State v. Clark*, 44 Vt. 636.

192. **Vi et armis.** The omission of *vi et armis* is not fatal where the averments show that the criminal act was committed with force and violence. *State v. Hanley*, 47 Vt. 290;—

or when these words may be fairly implied from the other words used—as, from the word *feloniously* in larceny. *Brackett v. State*, 2 Tyl. 152.

**193. Statutable offense.** It is not, in general, necessary in an indictment for a statutable offense to follow the exact wording of the statute. It is sufficient if the offense be set forth with substantial accuracy and certainty to a reasonable intendment. *State v. Little*, 1 Vt. 331. 6 Vt. 598.

**194.** If a statute enumerates offenses disjunctively, the indictment should charge them conjunctively, in cases where there is no repugnancy in the offenses, or in the penalty. *State v. Woodward*, 25 Vt. 616.

**195. General rules.** Distinction between felonies and misdemeanors, as to indictment and proceedings in trials. *State v. Wheeler*, 3 Vt. 344-347.

**196.** Where the act complained of becomes a crime only from its peculiar relations or circumstances, and without them would not be unlawful, those relations or circumstances must be set forth in the indictment. *State v. Day*, 3 Vt. 188.

**197.** In an indictment, every fact and circumstance which is a necessary ingredient to constitute the offense should be stated, and an omission to set forth such facts is fatal. If all the facts stated may be true, and still the person indicted not guilty of the offense charged, the indictment is insufficient, and no sentence can be pronounced thereon. *State v. Northfield*, 13 Vt. 565.

**198.** An indictment set forth a term of the county court as held and a certain cause astried before the chief judge,—naming him. *Held* ill on demurrer;—that it was not necessary to name any of the judges, but, being named, the averment could not be rejected as surplusage; and if either was named, enough should have been named to constitute a quorum, or it should have been averred that the others were disqualified. *State v. Freeman*, 15 Vt. 722.

**199. Time and place.** Where a single and distinct offense is charged to have been committed on a day certain—as liquor selling—the indictment is not rendered ill by the addition, “and at divers other times,” &c. This last may be rejected as surplusage. *State v. Munger*, 15 Vt. 290. (1843.)

**200.** An indictment for liquor selling charged that the respondent on, &c., at, &c., “sell and dispose of,” &c. *Held*, after verdict, that the auxiliary, *did*, to the word “*sell*” would be supplied by intendment. *State v. Whitney*, 15 Vt. 298. 31 Vt. 321. See *State v. Leach*, 27 Vt. 317.

**201.** In an indictment, every traversable fact must be directly alleged, with time and place. *State v. LaBore*, 26 Vt. 765. *State v. Litch*, 38 Vt. 67.

**202.** An indictment alleged the offense to have been committed at a day in the future. After verdict, the judgment was, for this cause, arrested on motion. *State v. Litch*.

**203.** It is a fundamental rule of criminal pleading, that the material facts must be averred with certainty as to time and place. The year, month and day must be particularly stated, though not necessary so to be proved; and a defect herein is not cured by verdict. *Steele, J.*, in *State v. O'Keefe*, 41 Vt. 694.

**204.** Judgment arrested after verdict, where, in an indictment for larceny, the offense was charged as committed on “the second day of March Anno Domini one thousand eight.” *State v. G. S.*, 1 Tyl. 295.

**205.** So, in an indictment for obtaining goods by false tokens, &c., where both the time and place of obtaining the goods were wholly omitted. *State v. Bacon*, 7 Vt. 219.

**206.** So, under a complaint for liquor selling charging the offense as committed “on or about the 2nd day of January, A. D. 1867.” *State v. O'Keefe*, 41 Vt. 691.

**207.** So, a complaint for liquor selling, charging the sale as made on a certain day of the month, but omitting the year, and alleging a former conviction in 1863, but omitting the month and day, was *held* ill, on demurrer, in both respects. *State v. Kennedy*, 36 Vt. 563.

**208. Words of statute.** Where a statute punishes a common law offense by its legal or common law designation, without enumerating the acts which constitute it, it is necessary in an indictment to use the terms which technically charge the offense named at common law. But this is not necessary in an indictment upon a statute, where the statute is of itself complete, and embraces and enumerates all the elements constituting the crime the legislature had in view; and where the statute so describes the offense, or creates it, it is sufficient that the indictment lay the offense in the words of the statute. *State v. Daley*, 41 Vt. 564. *State v. Cook*, 38 Vt. 487. *State v. Jones*, 38 Vt. 443. *State v. Clark*, 44 Vt. 636.

**209. Negating exception.** Where a statute created an offense,—as by the words “give away”,—and a subsequent statute qualified the words,—as by enacting that these words should not be construed to apply to giving away under certain circumstances;—*Held*, that the qualification need not be negated in an indictment. By *Redfield*, C. J.—This rule never extends beyond a qualification in the same section. *State v. Freeman*, 27 Vt. 523.

**210.** An indictment against one as an accessory after the fact, under a statute enacting that “every person not standing in the relation of husband and wife,” &c., “to an offender, who shall harbor and conceal,” &c., “such offender,” &c., “shall be deemed an accessory

after the fact," &c., was *held* bad, on motion in arrest, for not alleging that the defendant did not stand in the relation of husband, &c. *State v. Butler*, 17 Vt. 145. (G. S. c. 120, s. 16.)

211. By *Redfield, J.* The *quality* required in the person to commit the offense, must be stated. Where the exception is in a separate section of the statute, or in a proviso, or exception distinct from the enacting clause, this is matter of defense and need not be alleged; but if the exception is contained in the body of the enacting clause, it is in the nature of a condition precedent and must be alleged. *Id.*, 149. 45 Vt. 261.

212. So, an indictment on the statute prohibiting "any secular labor," &c., on the Sabbath, "except such only as works of necessity and charity" (G. S. c. 93, s. 1.), was *held* bad, for not alleging that the act charged was not a work of necessity, or charity. *State v. Barker*, 18 Vt. 195.

213. *Bennett, J.* Where the exception is in the body of the statute which enacts the offense, and enters into it as a part of its description, it is necessary to state all the facts which constitute the offence; and to do this, the exception must be negated. If the exception is distinct from the enacting clause, it then becomes matter of defense and need not be negated. *Id.*, 197. 45 Vt. 261.

214. An indictment for polygamy under the statute (G. S. c. 117, ss. 5-6), providing (s. 5.), "If any person who has a former husband or wife living shall marry another person," &c., "he or she shall, except in the cases mentioned in the following section, be deemed guilty of the crime of polygamy," &c. Sec. 6. then provides, "The provisions of the preceding section shall not extend to any person divorced," &c., &c. *Held*, that it was not necessary to allege that the defendant was not within any of the specified exceptions. *State v. Abbey*, 29 Vt. 60.

215. By *Isham, J.* The question is, whether the exception is so incorporated with and becomes a part of the enactment, as to constitute a part of the definition or description of the offense; for it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. It is the nature of the exception, and not its location, which determines the question. Nor does the question depend upon any distinction between the words "provided" or "except," as they may be used in the statute. The exception should be negated only when it is descriptive of the offense, or defines it; where it affords matter of excuse merely, it is to be relied upon in defense. The question is one not only of pleading but of evidence, and where the exception must be negated in the indictment, the allegation must be proved by the

prosecutor, though it involve the proof of a negative. *Id.*, 66-7. See *Wilson, J.*, in *State v. Hodgdon*, 41 Vt. 142-3. *State v. Palmer*, 18 Vt. 570, starts a *quære*, not decided.

216. An indictment for being a peddler without license under G. S. c. 81, s. 2.—That section defines who shall "be deemed a peddler"—provided, however, that the provisions of this section shall not be construed to extend to articles of provisions or produce," &c., &c. *Held*, that the exceptions were not descriptive of the offense nor defined it, and need not be negated in the indictment. *State v. Hodgdon*, 41 Vt. 139; and see *State v. Norton*, 45 Vt. 258.

217. **Supreme court.** After the supreme court has adjudged an indictment to be sufficient on demurrer, it is matter in their discretion to allow, or not, the prisoner to plead anew and to remand the case to the county court for trial. *State v. Wilkins*, 17 Vt. 151.

218. **Statute of limitations.** An indictment was quashed on motion where it appeared, on its face, that the prosecution was barred by the statute of limitations. *State v. J. P.*, 1 Tyl. 283.

219. **Note.** By Stat. 1870, No. 5, objections for formal defects apparent on the face of an indictment, &c., must be taken by demurrer, or motion to quash; and the indictment may be amended in these particulars.

### 3. Proceedings after indictment.

220. **Appearance—Misdemeanor.** One indicted for a misdemeanor had appeared and given bonds for his appearance from term to term. *Held*, that he might thereafter appear and plead by attorney. *State v. Dean*, Brayt. 26.

221. In trials for inferior misdemeanors, a verdict may be rendered in the absence of the respondent. If he do not appear after verdict, he and his bail may be called; or, the court may issue a warrant to apprehend and bring him before the court to receive sentence, or both. These principles apply as well to trials before justices, as elsewhere. The warrant, in such case, should be made returnable forthwith, and not to some future day by adjournment. *Sawyer v. Joiner*, 16 Vt. 497.

222. In that class of offenses where the ordinary judgment does not extend to the infliction of imprisonment by way of punishment primarily, the accused may appear by counsel, and, having made appearance, the trial may proceed without regard to the continued presence of either the accused, or his counsel. *Tracy ex parte*, 25 Vt. 98. See *State v. Wheeler*, 3 Vt. 344.

223. **Nolle prosequi.** While a criminal cause is on trial to the jury, the State's attorney cannot enter a *nolle prosequi* without leave of



the court. Such leave was refused, where the defense appeared to be ample. *State v. I. S.S.*, 1 Tyl. 178.

**224.** The right of the government attorney to enter a *nolle prosequi* is suspended when trial commences to the jury. After that, the power is to be exercised only by permission of the court. *State v. Roe*, 12 Vt. 93.

**225. Trial—Evidence.** The doctrine of *prima facie* proof obtains as much in criminal as in civil actions. *Forbes v. Davison*, 11 Vt. 660.

**226. Corpus delicti.** Where the *corpus delicti* is attempted to be shown by circumstantial evidence, it must be so established as to positively exclude all uncertainty or doubt, and all the circumstances combined must produce the same degree of certainty as positive proof. *State v. Davidson*, 30 Vt. 377.

**227.** Where the evidence of the *corpus delicti* was wholly circumstantial, and certain evidence tended to identify the party charged as connected with the transaction, but not to prove the *corpus delicti*;—*Held* erroneous, that the court declined on request to instruct the jury as to a separation and proper application of the evidence. *Id.*

**228.** It is said in some of the books, that the accused should not be convicted upon his confessions, without other proof of the *corpus delicti*. Whether this is an absolute rule of law, or merely a precautionary rule to be observed by the jury in weighing the evidence—*quære*. If it is a rule of law applicable to felonies and high crimes, there is no such absolute rule of law applicable to the lower grades of crime and misdemeanors—as, for selling liquor against the statute. *State v. Gilbert*, 36 Vt. 145.

**229. Confession.** A confession made under any threat, promise, or encouragement of favor, must never be received in a criminal prosecution. *State v. Phelps*, 11 Vt. 116. *State v. Walker*, 84 Vt. 296. See *State v. Carr*, 37 Vt. 191. *State v. Jenkins*, 2 Tyl. 377.

**230.** The owner of a factory, which the respondent, together with one Brierly, was charged with burning, visited the respondent in jail at his request, and said to him: "That he wanted him to tell the truth just as it was; that they had got Brierly and probably they would both be tried that day, and that it would be better to tell the truth just as it was, for if Brierly should get the start of you, it may go hard with you. You are a young man, and it would be better for you to tell it just as it is"—and thereupon the respondent confessed, &c. *Held*, that the confession made was not admissible. *State v. Walker*.

**231.** The prisoner, under the influence of improper inducements, made a confession to the officer making the arrest and his assistant.

Five hours later, the State's attorney told the prisoner if he wanted to make a confession he could do so, but must not expect any favor; that he was not obliged to make a confession unless he chose to, nor to tell anything to criminate himself; that if he was going to tell anything, to tell the truth—to tell it just as it was. The prisoner then made a confession. *Held*, that this communication of the State's attorney was sufficient to remove any reliance which the prisoner might have placed upon the previous inducements, and that the second confession was admissible. *State v. Carr*, 37 Vt. 191.

**232.** In a criminal prosecution, where the statement or admission of the respondent is put in evidence against him, the whole must be put in, and the whole is evidence. Such parts as are in his favor should be taken as true, unless disproved by the other circumstances or testimony in the case, or by their own innate improbability, or inconsistency, or absurdity. *State v. McDonnell*, 82 Vt. 491. *State v. Mahon*, 82 Vt. 241.

**233.** Where the confession of a respondent is put in evidence, his co-respondent cannot require that such part of it as implicates him shall be excluded, but the whole confession must be received as it was made; leaving the court to charge properly as to its effect, as to such co-respondent. *State v. Fuller*, 39 Vt. 74.

**234. Fabricated defense.** The introduction of false or fabricated evidence in defense is always regarded as an inferential admission of guilt, although not of a conclusive character;—as, a false and fictitious deposition obtained by the respondent personating the apparent deponent. *State v. Williams*, 27 Vt. 724.

**235. Alibi.** In a criminal prosecution one defense was an *alibi*. The court declined to charge that the jury must be satisfied beyond reasonable doubt that the respondent was *not* at the place of the *alibi* at the time in question; but did charge that if they found the *alibi* proved, they must acquit him, and that the prosecution, in order to warrant a conviction, must establish the whole case beyond a reasonable doubt. *Held* sufficient; and that the charge given embraced more than an answer to the specific request refused. *State v. Cameron*, 40 Vt. 555.

**236. Identification.** In a criminal trial, the State's witnesses had testified to the presence of the prisoner at the scene of the crime, and to his identity, and had further testified, without objection, that they immediately informed of him, and within an hour caused his arrest. The prisoner put in evidence that these witnesses, at the preliminary examination, did not testify so positively as now to his identity. The court charged that the fact that these witnesses so acted upon their belief and knowledge that the person they saw was the prisoner, and

that they so caused his arrest, tended to corroborate their testimony as to identifying him. *Held* correct. *State v. Dennin*, 32 Vt. 158.

**237. Testimony of an accomplice.** On trial of an indictment against two for a joint offense, the main testimony was that of an accomplice, which was corroborated as to the guilt of one of the respondents only. The court charged, in substance, that the jury might convict both prisoners on the testimony of the accomplice, if it was corroborated in important particulars as to one and commended itself to their credit as true, beyond a reasonable doubt, as to both; and declined to instruct, and did not advise nor caution the jury, not to convict the one as to whom such testimony was not corroborated. *Held* not erroneous—that the better practice is to advise the jury to convict no prisoner, unless there is some proof, other than the testimony of an accomplice, tending to show that prisoner to have had a guilty connection with the commission of the crime; but this is only a rule of practice, and not a rule of law. *State v. Potter*, 42 Vt. 495. See *State v. Howard*, 32 Vt. 380.

**238. Former acquittal.** A respondent acquitted in the county court on all the counts of an indictment except one, appealed to the supreme court, and on arraignment pleaded, generally, "not guilty." *Held*, nevertheless, that he was not compelled to go to trial on those counts on which he had been acquitted. *State v. Kittle*, 2 Tyl. 471.

**239. Former conviction.** The respondent wounded two persons in the same affray, at the same instant and by the same stroke. He was legally convicted of a breach of the peace by assaulting and wounding one of them. *Held*, that this was a bar to an indictment for assaulting and wounding the other—there being but one offense. *State v. Damon*, 2 Tyl. 887.

**240.** The theory that in criminal cases the jury are judges of the law as well as of the facts, does not require the submitting to them of the record of a former conviction, which affects the sentence only. This is purely a question of law bearing upon the duty of the court—no question of fact, such as the identity of parties, being raised. *State v. Haynes, et al.*, 36 Vt. 667.

**241. Irregular conduct of trial.** In a criminal prosecution the prosecuting attorney persisted, against the court's ruling, in arguing to the jury that the fact that the respondent did not take the stand as a witness and explain certain transactions involved in the case, was evidence of his guilt. Because the court did not actively interfere and prevent this by an enforcement of its own order;—*Held*, that it was such an irregularity suffered, and error, that the conviction should be set aside on exceptions. *State v. Cameron*, 40 Vt. 555.

**242.** In a criminal trial, the respondent requested a charge that the fact that he had not testified in his own behalf was not to be *even thought of*, or taken into consideration by the jury to his prejudice. The judge refused this, saying he could not prevent the jury's thoughts, but charged that such fact should not be taken against the respondent. *Held*, that although such remark of the judge as to the *thoughts* of the jury was unfortunate, the charge was correct, and he did right in refusing to charge as requested. *Ib.*

**243.** Where the court in a criminal case sent to the jury, while deliberating upon the case, a copy of the State statutes for their information as touching the case in hand;—*Held*, that this was error. *State v. Patterson*, 45 Vt. 308.

**244.** It is not the duty of the court, in a criminal case, to instruct the jury that they must not hold the law to be more unfavorable to the respondent than the court charged it to be. *State v. Clark*, 37 Vt. 471.

**245.** One judge of the county court may take a verdict in a criminal case, when the other judges are only temporarily absent, and subject to call. *State v. Bryant*, 21 Vt. 479.

**246.** A new trial will not be granted, after a verdict of guilty on an information for a misdemeanor, for the reason that a witness for the prosecution testified to material facts without being sworn, where it is not alleged in the petition that the respondent and his counsel were ignorant of that fact until after the verdict, and where it is not shown that the testimony given was not true, nor that the respondent had sustained some injury. *State v. Camp*, 23 Vt. 551.

**247.** Jurors in a capital case may not separate after being sworn. *State v. Godfrey*, Brayt. 170.

**248.** A verdict of guilty on a trial for perjury was set aside, because one of the jurors had separated from his fellows, unattended by an officer, after he was sworn and before verdict. *State v. Shippy*, Brayt. 169.

**249.** Where the jury, on inquiry by the court, disclosed their verdict in a criminal case before the verdict was actually taken;—*Held*, that this was no cause for setting it aside. *State v. Bryant*, 21 Vt. 479.

**250. Judgment on general verdict, one or more of the counts being bad.** Where an indictment apparently charged the respondent, in the same count, as an accessory both before and after the fact, and the count was insufficient as to the latter charge, the court treated that part as surplusage, and refused to arrest judgment after a general verdict of guilty. *State v. Butler*, 17 Vt. 145.

**251.** After a general verdict of guilty, judgment will not be arrested for the insufficiency

of the indictment, if it contains one good count. *State v. Davidson*, 13 Vt. 300. *State v. Bean*, 19 Vt. 580.

252. After a general verdict in a criminal cause, if one or more of the counts is sufficient, and others bad, the court will pronounce a judgment upon such as are good, and those only; if all are good, then judgment will be rendered upon the count charging the highest offense. *State v. Hooker*, 17 Vt. 668.

253. Under an indictment of four counts, the court instructed the jury that there was no evidence to support either the second or fourth count, and that the respondent could not be convicted on either of them; but the jury rendered a general verdict of guilty. *Held* to be no sufficient ground for a new trial, for that the conviction and sentence would be only upon the other counts. *State v. Wheeler*, 35 Vt. 261.

254. Where a respondent was charged with distinct offenses in two different counts of the indictment, and the evidence did not tend to sustain one of the counts, the county court erroneously charged the jury that they might find the respondent guilty on one or both of the counts, and the jury rendered a general verdict of guilty. On exceptions, the supreme court refused a new trial for the error, but rendered sentence upon the count to which the evidence applied. *State v. Bugbee*, 23 Vt. 82.

255. All the counts of an indictment should in some way be legally disposed of. Where the subject matter of two counts of an indictment was the same, and, through some inadvertence, a verdict was entered only upon one, the supreme court on exceptions allowed the prosecutor to enter a *nolle prosequi* on the other count. *State v. Roe*, 12 Vt. 98. 35 Vt. 266.

See CONSTITUTIONAL LAW; STATUTE, II.; JURY; EVIDENCE.

### CUSTOM.

1. Where goods are consigned to a commis-

sion merchant to be sold "for cash," he is liable therefor if he sells and delivers the goods upon a promise to pay therefor in future. A "custom" of the trade to treat a sale upon an actual credit of a few weeks, days, or other time, as a cash sale, is inconsistent with the terms of the contract ["for cash"], and is void. *Bliss v. Arnold*, 8 Vt. 252. *Catlin v. Smith*, 24 Vt. 85. 32 Vt. 622.

2. A custom of merchants in New York to consign consigned goods to others to sell, and then for each house to charge a commission of two and a half *per cent*—the usual commission—for selling, was *held* void, as against common reason and common justice. *Spear v. Newell*, 23 Vt. 159.

3. Custom, or usage, can never be given in evidence to vary or control an express contract. Its office is strictly one of exposition, being a means of arriving at the intention of the parties, and of ascertaining what the true contract was, and its nature and extent, which otherwise might be indeterminate and uncertain, arising from implications, presumptions, and acts more or less equivocal. *Linsley v. Lovely*, 26 Vt. 128.

4. Such custom, or usage, in order to its being admissible as an item in the testimony tending to show the true contract of parties, which is otherwise equivocal, must be the general usage of the whole trade or business, and so well established and uniformly acquiesced in, and for such length of time, that the jury may be fairly justified in inferring that it was known to the contracting parties, and that it entered into their minds, and made, by implication, a part of their contract. *Held*, that anything short of this—as, "the course of dealing in that branch of trade"—should be laid wholly out of the case. *Id.*

5. Where a contract is upon its face of doubtful construction, a custom may be proved in order to determine the construction, provided it be uniform and known, so as to be fairly presumed to have been in the mind of the parties while making the contract. *Copper Co. v. Copper Mining Co.*, 33 Vt. 92.

## D.

### DAMAGES.

1. **Right to damages.** As matter of strict right, whatever is the subject of exclusive legal ownership, and is lawfully possessed and claimed by any one as property, should be deemed to possess value sufficient, at least, to support a legal vindication of the party's right. *Fullam v. Cummings*, 16 Vt. 697.

2. **De minimis, &c.** The invasion of a legal right always imports some damage, though no pecuniary loss results therefrom. The maxim *de minimis, &c.*, does not apply in such case. *Cole v. Drew*, 44 Vt. 49. *Fullam v. Stearns*, 30 Vt. 443.

3. Where, in an action, an invasion of a right is established, though no actual damage be shown, the law gives nominal damages. This

applies to cases where the unlawful act might have an effect upon the right of the party, and be evidence in favor of the wrong-doer, if the right should ever come in question. So, too, nominal damages will be given, where one wantonly invades another's rights for the purpose of injury, though no actual damage be done. But no damages will be given where no unlawful intent, nor disturbance of a right, or possession, is shown, and where it is shown that no damage has been sustained. *Paul v. Slason*, 22 Vt. 231. *Graves v. Severens*, 40 Vt. 640. *Fairbanks v. Kittredge*, 24 Vt. 9.

4. This doctrine was applied where an officer, attaching hay, took and used the debtor's pitchfork in removing the hay, but returned it where it was found, so that the debtor had it again, and it was not damaged. In an action of trespass by the debtor therefor;—*Held*, that he could not recover, and that the maxim, *de minimis non curat lex*, well applied. *Paul v. Slason*.

5. In levying upon and removing certain machinery from a mill, the officer, in order to disengage it from the bands by which it was connected with the shafting, cut the thongs by which the bands were laced together, instead of untying them and taking them out without cutting, which could easily have been done. These bands did not belong to the owner of the machinery, but of the mill. The testimony was, that these thongs "were considerably worn and of small value." In trespass by the owner of the bands against the officer, the court charged that if the jury found that the thongs were "old, worn out and nearly worthless," the defendant would not be liable for cutting them, unless he did so wantonly; and further told the jury, that as the suit appeared to be brought to try the defendant's right to enter the mill and take the machinery, the court would not advise them to turn the case on some trifling damage in this particular, provided the defendant acted in good faith. *Held* erroneous, and that the rule *de minimis* does not apply in such case, which was an invasion of a legal right, and where also the damage could be estimated. *Fullam v. Stearns*, 30 Vt. 443. 44 Vt. 53.

6. **General—Special.** General damages, or such as is the common and ordinary consequence of the act complained of, need not be set forth specifically; and if some portion is enumerated, this will not preclude the party from proving other general damage; whereas special damage, required to be specially stated, is something unusual and extraordinary, and not the common consequence of the wrong complained of. *Hutchinson v. Granger*, 18 Vt. 386. 36 Vt. 592.

7. Where the primary cause of damage is occasioned by the fault of the defendant, the plaintiff may recover the full amount of his

ultimate damage, unless increased by his own negligence, or misconduct. *Bardwell v. Jamaica*, 15 Vt. 438.

8. In trespass *q. c. f.*, it was objected that the plaintiff could not recover for damage done by breaking down any fences, because none was declared for. The court charged, that so far as the breaking and entry declared for were effected by the act or means of breaking down the fence belonging to the close, the damages thereby done to the fence might properly be taken into consideration as a part of the damages occasioned by the breaking and entry. *Held* correct,—such damages being the natural and necessary consequence of the act charged. *Clark v. Boardman*, 42 Vt. 667.

9. **Loss of time.** The loss of time, in actions for personal injuries, is a proper element in computing actual damage; and the value of the plaintiff's time to him for the earning of wages in his trade, or profession, may be shown. *Nones v. Northouse*, 46 Vt. 587.

10. **Physician's bill.** In an action to recover for a personal injury, the declaration averred that the plaintiff "was thereby put to great loss, trouble, damage and expense in the needful employment of physicians, nurses, &c." *Held*, that this was a sufficient averment of special damages to allow a recovery for the physician's bills;—and, "in the case of a severe bodily injury, we regard the services of a physician as being so essentially necessary, that they may be recovered for as part of the general damages directly resulting from the injury." *Folsom v. Underhill*, 36 Vt. 580.

11. **Expenses of suit.** The expenses of a suit, beyond the taxable costs, cannot be recovered as damages in the same suit. *Park v. McDaniels*, 37 Vt. 594. *Rut. & Wash. R. Co. v. Bank of Middlebury*, 32 Vt. 651. *Harris v. Eldred*, 42 Vt. 42. *Post* 31.

12. The only remedy for recovering of the other party the expenses, beyond taxable costs, of defending a suit, is by an action for malicious prosecution. *Sampson v. Warner*, 48 Vt. 247.

13. The plaintiff's oxen had been stolen and taken to the defendant in the State of New York. The defendant having refused to surrender the oxen on demand, the plaintiff resorted to legal proceedings in New York to regain the possession and succeeded, but incurred expenses therein. In an action of trover afterwards brought, alleging such expense as special damage;—*Held*, that they were not recoverable. *Harris v. Eldred*, 42 Vt. 39.

14. —where there is an obligation to indemnify. Where judgment had been recovered against a town for the insufficiency of a highway occasioned by the acts of a railroad company, and the company were notified of the suit but declined interfering;—*Held*, in an

action against the company for indemnity, that the town was entitled to recover the amount of that judgment and their costs and expenses of that suit. *Duxbury v. Vt. Central R. Co.*, 26 Vt. 751.

15. **Interest.** Whether interest, *eo nomine*, is recoverable in an action of tort or not, the jury may take time into consideration in fixing upon reasonable damages. *Lindsey v. Danville*, 46 Vt. 144.

16. **Conversion of choses in action.** In trover to recover for notes, or other *choses in action*, executed by persons other than the defendant, and wrongfully detained, the rule of damages is the value of the property. This, *prima facie*, is the amount due on the instrument, but subject to proof of actual value. But where the notes were executed by the defendant himself, the rule is the amount due, without reference to the ability of the defendant to pay. *Robbins v. Packard*, 31 Vt. 570.

17. Where the plaintiff gave a promissory note to the defendant payable to the defendant's order, but solely for the accommodation of the defendant, which note the defendant got discounted for himself and afterwards paid, and then claimed that the plaintiff owed the note, and refused to deliver it to the plaintiff on demand, insisting upon the plaintiff's indebtedness thereon;—*Held*, that by reason of the defendant's claim to the note as a valid instrument, the plaintiff had a right to it, and could maintain trover for a conversion of it, as a piece of property; but was entitled in such action to recover only its value as property, being nominal damages. *Park v. McDaniel*, 37 Vt. 594.

18. But, under a special count in case, additional damages might be given, and were so given upon the report of a referee—the action admitting of an amendment of the declaration to conform to the report. *Id.*

19. **Ordinary consequences.** In an action by purchaser against seller for the false warranty of sheep as sound, and averring that they were affected with an infectious disease, and alleging as special damages that they communicated such disease to other sheep of the plaintiff;—*Held*, that the placing of these sheep with others was such a natural and ordinary act and mode of using them, that it was not necessary, in order to recover such damages, to aver or prove that the defendant knew or was informed of such intended use. *Packard v. Slack*, 32 Vt. 9. (*Mullett v. Mason*, 1 Law Rep. C. P., 559.)

20. **Question for jury.** Where the plaintiff's horse escaped upon the defendant's land, through a defect in that part of the division fence which the defendant was bound to maintain, and was there gored by the defendant's bull;—*Held*, that the liability for such damage

could not be declared as matter of law; that the defendant was liable for such damage, if it was the natural consequence of his neglect under the particular facts of the case which were known to him, and such a consequence as he might reasonably have anticipated, and that this was a question for the jury. *Saxton v. Bacon*, 31 Vt. 540. See *Holden v. Rutland & Burlington R. Co.*, 30 Vt. 297.

21. **Part of main trespass.** An injury done by the defendant's calf upon the plaintiff's land after a trespass by breaking in, though not such as cattle by nature are wont to commit—as breaking down a tree—and not of itself alone a trespass of the defendant, was *held* to be an aggravation of the trespass committed by the entry, and that such damage could be recovered with the damage done by the trespass of which it was a part. *Keenan v. Cavanaugh*, 44 Vt. 268.

22. **To what time computed.** The right of action being established, damages are to be computed to the time of trial, although accruing after the commencement of the action. *Lowry v. Walker*, 5 Vt. 181. *Spear v. Stacey*, 26 Vt. 61.

23. **Prospective.** Since a party injured can have but one action to recover the damage therefor, he is allowed in that action to recover not only the damages already accrued, but such as the jury find will accrue to him in future from the same cause. *Fulsome v. Concord*, 46 Vt. 135. *Whitney v. Clarendon*, 18 Vt. 252.

24. In an action for a personal injury, the court charged the jury, in respect to prospective damages, that they should reduce such losses to their present worth, or to such a sum as, being put at interest, would amount to the sum they found the plaintiff would lose in the future by the injury. *Held*, that as the effect of this suggestion, if it had any effect, would be to lessen the damages, the defendant could not complain, and it was not legal error. *Fulsome v. Concord*.

25. **Exemplary.** In actions of trespass, or case for a tort, damages beyond the amount of compensation for the actual loss suffered, whether called exemplary, punitive or vindictive damages, or smart-money, may be allowed, dependent on the evil motive of the defendant, as well as the circumstances of insult and indignity to the plaintiff. *Devine v. Rand*, 38 Vt. 621. *Ellsworth v. Potter*, 41 Vt. 685. *Edwards v. Leavitt*, 46 Vt. 126.

26. This doctrine applied to the case of a wilful cheat in the weighing of butter purchased. *Nye v. Merriam*, 35 Vt. 438.

27. It has long been settled in this State, and correctly settled upon sound reasons, that in actions of this character—assault and battery—the jury may give exemplary damages. It is not an innovation of the common law; it

is the common law. *Edwards v. Leavitt*, 46 Vt. 126.

28. Exemplary damages are given in enhancement, merely, of the ordinary damages, on account of the bad spirit and wrong intention, malice, or wantonness of the defendant manifested by the act, and are recoverable, with the ordinary damages, under the common allegation of damage to the plaintiff. *Hoadley v. Watson*, 45 Vt. 289. *Earl v. Tupper*, 45 Vt. 275. It would probably be error to charge that the plaintiff is entitled to exemplary damages. This is not matter of legal right. *Jerome v. Smith*, 48 Vt. 230. *Boardman v. Goldsmith*, 48 Vt. 408.

29. An administrator, in an action for injuries to his intestate, may recover exemplary damages in a case where his intestate might. *Earl v. Tupper*.

30. It is no bar to the recovery of exemplary damages in an action for an assault and battery, that a criminal prosecution is pending against the defendant for the same assault; nor (*Peck, J.*) would it be, if there had been a trial, conviction, sentence and judgment in the State prosecution. *Edwards v. Leavitt*, 46 Vt. 126;—nor is liability to the imposition of a fine in a criminal prosecution, a bar to any portion of the defendant's liability to exemplary damages in a civil suit for the same cause. *Hoadley v. Watson*, 45 Vt. 289.

31. In awarding exemplary damages, the jury are to be governed wholly by the malice or wantonness of the defendant, as shown by the conduct they find him liable for in the action. The plaintiff's expenses of the suit for counsel fees and trouble, not taxable as costs, are not to be considered as an element in such damages, and cannot be allowed. *Earl v. Tupper*, 45 Vt. 275. *Hoadley v. Watson*.

32. In actions for a tort where exemplary damages are allowable, the intent being material, evidence of acts and words before or after the principal transaction, not too remote in point of time but about the time, and which tend to show the defendant's intention and disposition in the principal act, is admissible. *Devine v. Rand*, 38 Vt. 621.

33. In case by husband and wife for injury to the wife by being bitten by the defendant's dog, the defendant was not allowed to show, as a reason why the suit was brought and as bearing on the question of exemplary damages, that a short time before the day of the injury the plaintiff set his dog and the defendant's dog to fighting, and that the defendant parted them and reproved the plaintiff. *Bates v. Cilley*, 47 Vt. 1.

34. **Mitigation.** In an action for assault and battery, the defendant offered to show, in mitigation of damages, a seisin in himself of the land and property in the crops thereon,

about which the dispute which caused the assault arose. Held not admissible. *Wright v. Page*, 2 Tyl. 80.

35. **Cases of conversion.** Where A drew logs to B's saw-mill to be sawed at the halves, or the sawing to be otherwise paid for by A at his election, and B sold all the boards sawed and received the pay;—Held, that he was liable to A in trover; but in assessing the damages the jury were allowed to deduct the price of the sawing. *Vickery v. Taft*, 1 D. Chip. 241. 21 Vt. 211. 27 Vt. 287.

36. In trover, the fact that the property, subsequent to the conversion, has gone back into the possession and control of the plaintiff and to his use, does not bar the action, but goes in mitigation of damages. *Yale v. Saunders*, 16 Vt. 243.

37. Where one's property was wrongfully taken and sold, and he procured it to be bid in for himself at the auction sale, and then appropriated it to himself;—Held, that the rule of damages was not the value of the property, but the price at which it was sold—there being no evidence of further damage. *Hurlburt v. Green*, 41 Vt. 490.

38. In trover for assisting the plaintiff's wife, who had separated from him, in removing the plaintiff's furniture;—Held, that the fact that the articles went to the use of the wife after such separation did not so go to the plaintiff's benefit, as to reduce the damages below the value of the property. *Crumb v. Oaks*, 38 Vt. 566.

39. Where the property wrongfully taken by the defendants was afterwards taken from their possession on an attachment against the plaintiff, and the same was sold on the attachment and the avails applied on the execution;—Held, that the defendants were liable for damages only to the time of the attachment, irrespective of whether or not the officer proceeded legally with the property after the attachment. *Montgomery v. Wilson*, 48 Vt. 616.

40. **In actions against constables, &c.** The defendant, a constable, took property out of his precinct, on *meane* process and brought it within his precinct, when he was sued in trespass therefor by the plaintiff, who claimed the property by virtue of a purchase from the debtor which was fraudulent as to his creditors. After the commencement of the trespass suit, the defendant, as constable, made a second return of attachment of the same property, within his precinct, upon the same process. At the time of the trial of the trespass suit, the suit in which the attachment was made was still pending. Held, that such second attachment went in mitigation of damages, and the plaintiff was allowed nominal damages only. *Stewart v. Martin*, 16 Vt. 397.

41. In an action of trespass against an of-

ficer and an attaching creditor who had taken the property of the plaintiff upon a writ against another person, the defendants offered to prove in mitigation of damages, that a third person had received the property to the officer, and that the plaintiff had afterwards, and after the commencement of this suit, assigned all his interest in the property and claim to such receiptor, and that the receiptor had the property in his possession; but, inasmuch as it appeared that the officer had demanded the property of the receiptor on the execution issued, and still held the receipt, and that the defendants had not relinquished their claim to the property;—*Held* (by a majority), that the evidence was not admissible. *Ellis v. Howard*, 17 Vt. 390.

42. A writ against the body, issued upon affidavit filed, was committed to a constable for service. The constable erroneously thinking he was not, under the circumstances, bound to serve the writ without indemnity, returned it to the creditor, stating his reasons for not serving it. In an action by the creditor against the town for such default;—*Held*, that it was proper to be taken into account, in mitigation of damages, that for several months after such return of the writ, the debtor continued publicly to reside in the same place without any change in his circumstances, and so that his body could have been arrested upon a new writ. *Blodgett v. Brattleboro*, 30 Vt. 579. *Woolcott v. Gray*, *Brayt*. 91.

43. In an action against a constable, or the town, for his neglect to keep the attached property so as to be taken in execution, it cannot be shown, in mitigation of damages, that the creditor might, by a new process or new execution, obtain satisfaction of his debt. He has a right to proceed against the specific property attached. *Bowman v. Barnard*, 24 Vt. 855.

44. *Orim. con.* In an action for criminal conversation, the defendant may, in mitigation of damages, prove the plaintiff's criminal connection with other women at any time after his marriage and before trial. *Shattuck v. Hammond*, 46 Vt. 466.

45. **General rule—Goods converted or lost.** The rule of damages, in an action for a conversion, is the value of the property at the time of the conversion, and interest thereafter; and not an increased value which the property may thereafter have acquired,—as by the growth of a calf. *Thrall v. Lathrop*. 30 Vt. 307.

46. Where goods forwarded from New York to St. Albans by a common carrier were lost at St. Albans;—*Held*, in an action for the loss, that the rule of damages was the value of the goods at St. Albans at the time of the loss, deducting the freight unpaid, and adding interest; but there being no evidence of value except the prices stated in the bill of pur-

chase, the jury should have been limited to such prices as the value. *Blumenthal v. Brainard*, 38 Vt. 402.

47. **Assessment.** In an action on the case, the declaration averred that the defendant had conveyed certain lands to the plaintiff by deed of warranty, and received the deed from the plaintiff under a promise to procure it to be recorded in the proper office, but that he fraudulently neglected to get the deed recorded, but kept it and refused to deliver it to the plaintiff, whereby he "had deprived the plaintiff of any title to the land and all benefit from the deed." After judgment for the plaintiff on demurrer;—*Held*, that the plaintiff was entitled to have the damages assessed at the full value of the land, by reason of the admission implied by the demurrer that he had been deprived of all title to the land, &c. *Hyde v. Moffat*, 16 Vt. 271. *Redfield, J.*, dissenting.

48. In cases of judgment on demurrer, by default, or *nil dicit*, the plaintiff is entitled to only nominal damages, except where the assessment is mere matter of computation,—as in case of a bond, bill, note, or other contract. In all open actions, if the plaintiff claims damages beyond nominal, they must be ascertained on inquiry; as, by the court, or by some person appointed, or by a jury. *Webb v. Webb*, 16 Vt. 636. 37 Vt. 154.

49. In debt upon bond conditioned to indemnify the plaintiff against certain debts, the declaration assigned as breaches, in general terms and round numbers, that the plaintiff had been compelled to pay said debts and that the defendant had not indemnified him. The defendant pleaded in bar an accord and satisfaction, and a set-off, but introduced no evidence in support of his plea in bar. *Held*, that without proof of damages the plaintiff was entitled to nominal damages only;—that the case stood as on a judgment by default, *nil dicit*, or on demurrer. *Id.*

50. On the assessment of damages after a default, in an action of trover;—*Held*, that matter which might have been given in evidence, under the general issue, to defeat the action altogether, may be received in mitigation of the damages to a nominal sum. *Collins v. Smith*, 16 Vt. 9.

51. Where a suit is brought upon an instrument which, as a contract, shows both the cause of action and the measure of the plaintiff's right specifically, the production of the instrument entitles the plaintiff to damages according to that measure, and they are to be ascertained by mere computation; and the defendant cannot, in such case, on the assessment of damages after judgment by default, *nil dicit*, or demurrer, or on setting his case down as "not for the jury," prove matters affecting the validity of the contract, nor show a superven-

ing matter of defense. *Sweet v. McDaniels*, 39 Vt. 272. *Bradley v. Chamberlain*, 31 Vt. 468. See *Webb v. Webb*, 16 Vt. 636. *Redfield, J.*, in *Hyde v. Moffat*, 16 Vt. 284.

52. Whenever the cause of action must be proved precisely as alleged, and, when proved, furnishes of itself a rule of damages, the plaintiff after judgment is entitled to the amount of damages indicated by that rule, in the absence of all proof to vary it; and the form of action can make no difference in this respect. *Bradley v. Chamberlain*.

53. In an action of trespass against some of several co-trespassers, on the assessment of damages after a preliminary judgment without trial;—*Held*, that payments made by others of such co-trespassers are applicable *pro tanto* towards the damages, and may be proved although not pleaded in the action. By *Steele, J.*: “We do not understand, that upon the assessment of damages after a judgment passed without trial after a failure to procure a continuance, the court look into the pleadings to determine what evidence shall be received.” By *Peck, J.*: “It seems to me, that the partial payment should have been pleaded.” *Chamberlain v. Murphy*, 41 Vt. 119, 120. 48 Vt. 155.

54. Treble damages under statute. A count in trover cannot, under G. S. c. 33, s. 14, be joined to a count in trespass declaring upon a statute, and for treble damages, for the cutting down of a tree, &c. *Keyes v. Prescott*, 32 Vt. 86.

55. G. S. c. 113, s. 51, which gives treble damages in certain cases of trespass on land, does not create the right of action, but only gives cumulative damages for what was, and still is actionable at common law. *Montgomery v. Edwards*, 45 Vt. 75.

56. The right to recover treble damages is “by action founded on this statute,” and hence the declaration must count upon the statute. Where the only reference to the statute was, in the conclusion,—“contrary to the form and force of the statute in such case made and provided;”—*Held*, that the declaration was insufficient for the recovery of any thing beyond single damages. *Ib.*

57. Stipulated damages. Where parties submitted to arbitration and agreed in the submission, each to perform the award or pay to the other \$500, and the award was to pay a less sum in money;—*Held*, that the \$500 could not be considered as stipulated damages, and that the sum awarded was the measure of damages. *Whitcomb v. Preston*, 13 Vt. 53.

For damages in particular actions and transactions, see ASSUMPSIT; COVENANT; TRESPASS, &c.;—CONTRACT; FRAUD; SALE, &c.

## DEDICATION.

1. What constitutes—and evidence of dedication. The enjoyment of a public highway, square, common, or any other common privilege or immunity, though for a period short of fifteen years, may afford conclusive evidence of a right so to enjoy. The dedication need not be by deed, but it is sufficient if the owner of the soil by some unequivocal act manifests his intention to dedicate the land to public use, and, in consequence thereof, individuals have embarked in any undertakings, or invested property which will be materially affected, if such intention should be altered or changed. In such case, the donor cannot reclaim the dedication, but he retains the fee subject to the public use. *Abbott v. Mills*, 3 Vt. 521. *State v. Wilkinson*, 2 Vt. 480.

2. Where a piece of land is thrown or left open by the owner for public use as a common thoroughfare, without any intent manifested to resume possession, and the land is so used by the public without restriction, it may become a public square or highway by dedication, without deed or other act of the owner; and if so suffered to continue, until individuals have become interested by purchases under the expectation that it would not be reclaimed by the owner, the dedication becomes irrevocable, though it may not have existed fifteen years. *State v. Catlin*, 3 Vt. 530.

3. The declarations of the owner are admissible evidence to prove the dedication of lands to public use, particularly in connection with his acts. *Ib.*

4. Where the proprietors of a town passed a vote setting apart a piece of undivided land as a public square, the vote, though irregular and not originally binding, was *held* to have become so as a dedication, where the proprietors had derived a benefit from it, and had recognized it by allotting their lands and village lots as bordering upon the square, and individuals had bought and built accordingly, without objection. *Abbott v. Mills*, 3 Vt. 521.

5. A right by dedication may be established by a possession by the public for less than fifteen years, when accompanied by such acts and circumstances as show an intent on the part of a donor to make the dedication. *Morse v. Ranno*, 32 Vt. 600. *Prouty v. Bell*, 44 Vt. 73.

6. A deed conveying lands to a town in fee will not be construed as a dedication of the land to public use, although expressed to be “for the use of the town as a meeting house green,” “or common”;—the words not amounting to a condition, or a limitation. *State v. Woodard*, 23 Vt. 92. *Beach v. Haynes*, 12 Vt. 15.

7. But where the town, in such case, after



purchasing and taking a title in fee to the land, suffered the public to use it as a public common, and afterwards made a survey of the land, and placed it upon record, describing the land as the "town common," and thereafter, for more than 15 years, it was used by the public as a public common;—*Held*, that the land had thereby become irrevocably dedicated to the use of the public, so that a party to whom the town sold and conveyed a part of the land was indictable for a nuisance by inclosing it. *State v. Woodard*.

8. **Extent of use.** Where the public rely upon usage as evidence of their right, the right cannot be more extensive than the usage; and evidence of private occupancy may qualify or disprove the usage claimed. *State v. Trask*, 6 355.

9. **Acceptance.** A dedication of land to public use, whether by deed or otherwise, requires, in order to be binding, an acceptance by the public, and this may be of the whole or of a part only; if appropriated by the public only in part, and the rest has for many years been occupied by the owner for private uses, this is evidence that the public claim has been waived or relinquished. *Id.*

10. To render a dedication of land to public use binding, there must be not only some act of dedication on the part of the owner, but there must be something equivalent to an acceptance on the part of the public. *Id. Morse v. Ranno*, 32 Vt. 600. *Dodge v. Stacy*, 39 Vt. 558.

11. Where land has been dedicated by the proprietor to public use—as for a common—and the dedication has been accepted—as by use for such purpose—the public has acquired an easement therein, and the town, or its authorities, have no power to convey a right inconsistent therewith;—as, a right to an exclusive occupation. *Pomeroy v. Mills*, 3 Vt. 279. *S. C.*, 3 Vt. 410.

12. **Indictment.** Though the fee of land be vested in a town, or be private property, even, yet if the use and occupancy be in the public as a highway, public square or common,—common to all the people for passing and re-passing,—any obstruction thereof, or nuisance erected thereon, may be prosecuted for by indictment, and may be described in the indictment as a public highway. *State v. Atkinson*, 24 Vt. 448. *State v. Wilkinson*, 2 Vt. 480. *State v. Catlin*, 3 Vt. 530.

13. **Owner of the fee.** The owner of the fee of land, dedicated to the public as a common or highway, may maintain trespass, or ejectment, for a private occupation thereof; but he could hold only in a way consistent with the rights of the public. *Pomeroy v. Mills*, 3 Vt. 410.

14. **Public square, &c., as distinguished**

**from a highway.** Public squares, or commons, are not strictly highways. They are public dedications for ornament and for use, and not for traveling with horses or teams. They are like highways in some particulars, but it by no means follows that they may not be inclosed with a fence, or that trees may not be set out thereon. They frequently require to be so enclosed for the convenience of people on foot, and to exclude horses, carriages and teams. *Hutchinson v. Pratt*, 11 Vt. 402.

#### HIGHWAYS, I., 1.

### DEED OF LANDS.

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#### I. THE INSTRUMENT AND ITS REQUISITES.

##### 1. *Consideration.*

1. A consideration is necessary to sustain a deed of bargain and sale, or other conveyance of land; but it is not essential that the consideration should be expressed in the deed. It may be proved otherwise—as by parol, and from circumstances. *Stevens v. Griffith*, 3 Vt. 448. *Wood v. Beach*, 7 Vt. 522. 19 Vt. 216.

2. The fact that the true consideration of a deed is different from that expressed in it,—as where it was for love and affection, but expressed to be for a money consideration,—does not avoid the deed, though it may be evidence of fraud as to third persons. *Brckett v. Wait*, 6 Vt. 411.

3. The purpose, as expressed in a conveyance of land to a town, of having a school house built thereon and a school taught for the benefit of the youth of the town, imports a sufficient consideration to support the deed, although

not expressed in the deed as the consideration. *Castleton v. Langdon*, 19 Vt. 210.

### 2. Statute System.

4. Our statute system of conveyancing was designed to be entire in itself; and the common law modes of conveyancing have not been regarded as in force here,—as, a fine, common recovery, &c. *Redfield, J.*, in *Gorham v. Daniels*, 23 Vt. 600.

### 3. Signing.

5. Under the statute requiring a deed of land to be signed and sealed by the grantor, the name of the grantor must be subscribed to the deed. A deed, purporting to be the deed of a private corporation named therein as “The Bennington Iron Company,” was signed “Charles H. Hammond, chairman Bennington Iron Co.”—*Held*, that it was not signed by the corporation so as to become its deed. *Isham v. Bennington Iron Co.*, 19 Vt. 230. 23 Vt. 285. [The authority of Hammond was not recited, nor appeared.] *Miller v. Rut. & Wash. R. Co.*, 36 Vt. 452.

### 4. Sealing.

6. A signed writing, not sealed nor acknowledged, is inoperative at law as a conveyance of land, though so intended. *Arms v. Burt*, 1 Vt. 303.

7. An interest in land created by a perpetual lease can be conveyed or surrendered only by a deed properly executed;—the instrument must be sealed. *Stevens v. Denning*, 2 Vt. 411.

8. **Scroll.** A scroll or circle made with a pen, and the word “seal” written within it, was *held* not to be a seal when attached to an instrument conveying land, nor to constitute it a deed. A seal, in such case, must be of wax or wafer, something which may be impressed with an instrument used as and for a seal. *Beardsley v. Knight*, 4 Vt. 471.

### 5. Witnessing.

9. Under our statutes, two subscribing witnesses are necessary to the validity of a deed of lands, or of any estate or interest therein. *Day v. Adams*, 43 Vt. 510.

10. Where a deed has but a single subscribing witness, the recording of it is not constructive notice to subsequent purchasers. *Peck, J.*, *Id.* 515.

11. Nor can such deed be treated as valid, on the ground that it is good in equity and would be enforced in a court of chancery; for though such a deed is treated as evidence of an agreement to execute a valid deed, it is not

conclusive, and it cannot be assumed that a court of equity would enforce it on application for that purpose. *Id.*

12. A defective deed—as where it has but one attesting witness—is evidence of an agreement to execute a valid deed, which may be enforced in equity; and notice of such deed—as by seeing the record of it in the town clerk’s office—is notice to an attaching creditor of the grantee’s right, and such creditor will stand in no better condition in respect to title than the grantor. *Vt. Mining Co. v. Windham Co. Bank*, 44 Vt. 489. •

### 6. Delivery and acceptance.

13. **Delivery.** The delivery of a deed, either as an escrow or absolutely, is an act including intent, and is always a question of fact resting *in pais*, and to be found by the jury. *Lindsay v. Lindsay*, 11 Vt. 621.

14. —**in trust.** Where a deed is delivered to one in trust for the grantee, to take effect at the grantor’s death unless he shall otherwise direct in his lifetime, and he dies without giving any further direction, the deed takes effect at the death of the grantor as his deed from the first delivery; and *held*, that by such deed of a person insolvent, creditors might be preferred. *Morse v. Slason*, 13 Vt. 296.

15. Where one member of a firm was trustee and had sole control of the estate of a third person, and he loaned the trust funds to his firm, and received their note and mortgage therefor running to the *cestui que trust*, and caused the mortgage to be recorded, and retained the papers in his possession, though without any knowledge of the transaction by the *cestui que trust*;—*Held*, that here was a sufficient legal delivery to give validity to the note and mortgage. *Tucker v. Bradley*, 33 Vt. 324.

16. —**to agent of grantee.** The delivery of a deed to the agent of a grantee is, in legal effect, a delivery to the grantee; and is effective to pass the title, although delivered upon a condition not performed. *Pratt v. Holman*, 16 Vt. 530. 32 Vt. 350.

17. —**in escrow.** Where a deed, or other writing, is deposited with a third person to be delivered to the grantee only upon the performance of certain conditions precedent, and he delivers it without the performance of such conditions, this is no delivery in law, and the instrument takes no effect, though executed, acknowledged and recorded. *Stiles v. Brown*, 16 Vt. 563.

18. To defeat the operation of a deed in the hands of the grantee named, it may be shown that it was delivered to a third person, as an escrow, and was by him wrongfully delivered to the grantee. *Nichols v. Nichols*, 28 Vt. 228.

19. A deed deposited by the grantor with a

third person, to be held by him and not to be delivered until some other thing is done, is an *escrow*, and has no validity without the performance of such condition, even though the depository fraudulently delivers it to the grantee, who takes it in good faith and without knowledge of the condition, and advances a valuable consideration for it; and even if the grantor, for the purpose of expediting the business, consents to the recording of the deed and it is so recorded, but with the express understanding that the depository shall retain the deed thereafter until the performance of the condition, there is no effectual delivery without performance of the condition. *Smith v. S. Royalton Bank*, 32 Vt. 341. Distinguished from *Pratt v. Holman*, 16 Vt. 530.

20. To constitute the delivery of a deed of lands, the grantor must part with the custody and control of the instrument, permanently, with the intention of having it take effect as a transfer of the title, and must part with his right to the instrument, as well as with the possession of it. So long as he retains the control of the deed, he retains the title. *Elmore v. Marks*, 39 Vt. 538.

21. **Acceptance.** D being indebted to M Bank, without their knowledge made to them a mortgage, May 27th, and sent it by a messenger to the town clerk's office for record, intending thereby to part with all control over it and that it should take immediate effect, and sent another messenger to inform the bank of the facts. This messenger gave such information on the 29th to the cashier, who replied that he was glad of it. *Held*, that this was a good delivery and acceptance, and that the mortgage, being recorded, took precedence of another mortgage of the same estate afterwards, on the 29th, executed and delivered by D directly to F bank and recorded, although the first mortgage was not received by M Bank from the town clerk until after the recording of the second mortgage. *Farm. & Mech. Bank v. Drury*, 38 Vt. 426.

22. **Date not controlling.** An attachment was *held* to prevail over a deed of earlier date and recorded, but not then accepted by the grantee. *Denton v. Perry*, 5 Vt. 383.

23. A executed to B a deed of land, and soon after executed to him another deed of the same land, for the same consideration and of the same tenor, but bearing, by antedating it, an earlier date than the first, and, before either deed was recorded or any further conveyance was made or lien created, A came in possession of the deed last executed, but of earliest date, and destroyed it. *Held*, that if B gave up that deed to A to be cancelled, the other deed was inoperative without some new agreement to give it effect—something tantamount to a new delivery; but if A took away and destroyed that deed without the consent of B, then the

other deed would take effect, and might be recorded. *Corliss v. Corliss*, 8 Vt. 373.

24. The orator conveyed to H land with warranty, and at the same time took back a mortgage to secure the purchase money, but the mortgage bore an earlier date. Both instruments were recorded. Afterwards H quit-claimed generally to G. On a bill against H and G to foreclose;—*Held*, that the deed and mortgage took effect from the delivery, respectively, and that the date was unimportant; that as mere assignee of the equity of redemption, G stood on no higher ground than H; and that to entitle G to the superior equity, it must appear that he was a *bona fide* purchaser, deceived by the record, and that he paid a valuable consideration. *Fish v. Gordon*, 10 Vt. 288.

#### 7. Acknowledgment and proof.

25. **Acknowledgment.** The deed of a *feme covert* of land held in her own right must be executed and acknowledged conformably to the law of the place where the land lies. *Harmon v. Taft*, 1 Tyl. 6.

26. As to a deed of lands situate in this State, which was executed in New York, April 10, 1773, and there proved according to the laws of that province;—*Held*, that it was not entitled to registry, because not acknowledged according to the laws of New Hampshire, which maintained jurisdiction *de facto*, though the government *de jure* may have been in New York. *Townsend v. Downer*, 27 Vt. 119. *S.C.* 32 Vt. 183.

27. A judge of the supreme court being *ex officio* a justice of the peace throughout the State, his certifying the acknowledgment of a deed before him, as such judge, satisfies the statute requiring the acknowledgment to be before a justice of the peace. *Middlebury College v. Cheney*, 1 Vt. 366.

28. A recorded deed is not defeated by an omission of date in the acknowledgement. *Galusha v. Sinclear*, 3 Vt. 894.

29. It is not indispensable, that the place of taking the acknowledgment of a deed should fully appear from the certificate of acknowledgment itself, provided it can be discovered with sufficient certainty by inspection of the whole instrument. *Brooks v. Chaplin*, 3 Vt. 281. *Ives v. Allyn*, 12 Vt. 589.

30. In the body of a deed, one of the grantors was described as *Richard G. Bailey*, and the deed was signed *R. G. Bailey*. The certificate of acknowledgment was, that "Oliver Hale and Daniel Brown, *Richard G.* personally appeared and acknowledged this instrument, by them *sealed and subscribed*," &c. *Held*, that it sufficiently appeared that the deed was acknowledged by *Richard G. Bailey*, the grantor. *Chandler v. Spear*, 22 Vt. 368.

31. Where the name of the grantee, instead of that of the grantor, in a deed, appeared in the certificate of acknowledgment, and there was nothing apparent on the face of the certificate, or of the deed, to determine whether an error was committed in writing the name of the man who acknowledged, or in taking the acknowledgment of the wrong man, by mistake;—*Held*, that no correction could be made by construction, and that this was of no effect as an acknowledgment. *Wood v. Cochrane*, 39 Vt. 544.

32. A deed of lands must show upon its face, as spread upon the record, a compliance with the requirements of the statute, in order to take effect as constructive notice; and parol evidence cannot be brought in aid of any defect. Thus, where there appeared upon the deed, as recorded, no proper acknowledgment;—*Held*, that the record was no notice to a subsequent purchaser. *Ib.*

33. All that is essential to the certificate of acknowledgment of a deed executed by an agent, is, that it be intelligible, and clearly appear to be intended to be the deed of or on behalf of the constituent. *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

34. **Proof instead of acknowledgment.** A deed not acknowledged, executed before any statute requiring acknowledgment, may be proved like other writings not acknowledged. *Stevens v. Griffith*, 8 Vt. 448.

35. The cases where, by statute, proof of the execution of a deed may be taken instead of an acknowledgment, being special and exceptional, in order that such proof may be omitted, it must appear, in the certificate or document of proof, to be a case within some of the exceptions. *Pearl v. Howard*, 1 D. Chip. 173. 8 Vt. 37.

36. Where the execution of a deed is proved before a justice by the subscribing witnesses, under s. 7 of the conveyance act of 1797 (G. S. c. 65, ss. 11 and *seq.*), it need not appear from the certificate that the grantor refused to acknowledge the deed. *Catlin v. Washburn*, 3 Vt. 25.

37. In every case of a joint deed, the reasonable presumption is that the interest of the grantors was joined. If so, it would seem that each owner was interested in the entirety, and so not competent to make the statute proof of the execution of the deed by his co-grantors, any more than by himself. *Redfield, C. J.*, in *Townsend v. Downer*, 27 Vt. 119.

#### 8. Recording and notice.

38. **Recording.** To entitle a deed to registration, it must be executed according to the statute requisites by which the registry of deeds is established. This statute mode of con-

veyance is exclusive of all modes of conveyance at common law, and of all previous statute modes, so far as the later statute provides a new mode of conveyance. *Isham v. Bennington Iron Co.*, 19 Vt. 230. 23 Vt. 611.

39. A deed not executed according to the statute requirements is not entitled to registry, and consequently the record of it is not constructive notice to any one. *Ib. Pope v. Henry*, 24 Vt. 560.

40. The record of a deed can have no further effect, as implied notice of its existence and contents, than the statute attaches to it. The recording of an unacknowledged deed has therefore no other effect, as notice, than the temporary effect given to it by the statute. (G. S. c. 65, s. 16.) *Hoisington v. Hoisington*, 2 Aik. 235.

41. The copy of a deed is not entitled to record, and a record of such copy is not in law a record of the original, and does not operate as notice to subsequent purchasers or creditors, but is a nullity. *Stevens v. Brown*, 3 Vt. 420.

42. Previous to the Act of 1797, there was no law in this State authorizing the record of a deed of lands in this State, which was executed out of the State before 1787, and was acknowledged or proved only according to the laws of the State or country where executed. *Townsend v. Downer*, 27 Vt. 119. *S. O.*, 32 Vt. 188. And the Act of 1797 did not legalize a record made before its passage. *Ib.*

43. The registry of a deed in Cheshire county, New Hampshire, in 1781, of lands situate in Vermont was held ineffectual, inasmuch as this State was fully organized in 1777, and as early as 1779 two counties were fully organized, viz: Cumberland and Bennington, with clerks and books of registry;—in the first of which counties the land lay. *Brown v. Edson*, 23 Vt. 435.

44. Whether the registry of a deed at Exeter, New Hampshire, conveying lands within what is now the State of Vermont, executed and recorded before the organization of this State, is a sufficient registry—*quære*. *Ib.*

45. A deed of machinery in a mill would be void as against the creditors of the grantor, without an actual change of possession, before the passage of the Act of Nov. 5, 1838, authorizing the record of such conveyances, and making the record equivalent to such possession. *Quære*, whether such deed, recorded before the Act, is not brought within its protection prospectively, from and after the passage of the Act. *Walworth v. Readsboro*, 24 Vt. 252. 9 Vt. 351.

46. A deed of land to be admitted as evidence, even in a suit between the parties, if proved only by the acknowledgment of the grantor, must be first recorded. But when the clerk of the proper office has duly certified upon the deed that it has been properly recorded, the

effect of the evidence cannot be defeated by showing a mistake in the record,—certainly not where such mistake does not affect the interest of the person against whom the deed is offered. *Manwell v. Manwell*, 14 Vt. 14.

**47. Effect of record by relation.** A deed, required to be acknowledged and recorded, may be read in evidence if acknowledged and recorded at any time before trial,—such acknowledgment and record, though subsequent to the date of the deed, taking effect, by relation, from such date, as against all persons except subsequent *bona fide* purchasers, or attaching creditors without notice. *Pierce v. Brown*, 24 Vt. 165. *Douglass v. Spooner*, N. Chip. 74. *Harrington v. Gage*, 6 Vt. 532. *Pitkin v. Leavitt*, 13 Vt. 379.

**48. Filing for record.** It has been often decided that where a deed is left with the town clerk in the usual way for record, but is not spread upon the record until some time afterwards, yet when recorded the record has relation back to the time when it was filed for record; and, in such case, it will have priority over a deed of later date though earlier spread upon the record. *Jarvis v. Aikens*, 25 Vt. 635.

**49. Deeds take precedence, not according to priority of time in the fact of recording, but according to priority of filing and deposit for record in the proper office.** But if the grantee withdraws the deed, after being so filed and deposited, and carries it away before it is in fact copied upon the book of records, its operation as a recorded instrument is postponed until it is returned, and takes effect from its return, and from that time only. *Johnson v. Burden*, 40 Vt. 567. *Williams, C. J.*, in *Sawyer v. Adams*, 8 Vt. 175-6, citing *Brush v. Cook*, decided in 1824.

**50. Where a record is made essential in working a transmission of title, or in creating or defeating a right, nothing is effectually accomplished until the necessary records are completed.** But where the object of the record is notice merely, as where the title is passed or the right acquired by act of the parties, as in case of the conveyance of real estate by deed, the lodging of the instrument in the proper office for immediate record, and the reception of it by the recording officer for the same purpose, are held to operate, like the record itself, as notice to third persons. In other words, the deed or instrument, thus deposited and received, is deemed to be of record, or recorded. *Ferris v. Smith*, 24 Vt. 27, 32. *Bigelow v. Topliff*, 25 Vt. 273. *Morton v. Edwin*, 19 Vt. 77.

**51. Index.** A deed left for record in the town clerk's office and copied by him into the proper book, in the proper place, and duly certified as recorded, is recorded, and takes effect as a recorded deed, although not entered upon the index or alphabet—which constitutes no

part of the record. *Curtis v. Lyman*, 24 Vt. 338. 29 Vt. 324.

**52. Misplaced record.** Where a town clerk copied a deed left with him for record on the back leaf, not paged, of a volume of the records which had not been used for the recording of deeds for more than twelve years, and the names of the parties were not entered in the alphabet, and this was done for the purpose of concealment, and fraudulently, on the part of the town clerk, though the grantee in the deed was innocent thereof;—*Held*, that such deed was not recorded within the meaning of the statute, and was not notice to a subsequent attaching creditor, or purchaser. *Sawyer v. Adams*, 8 Vt. 172. *Phelps and Royce, J. J.*, dissenting. 24 Vt. 342.

[*Note.*—In *Spear*, assignee of *Alexander*, in bankruptcy, v. *Birchard et al.*, in U. S. District Court for Vt., at February term, 1875, before N. Shipman, District Judge, it was held, that successive mortgages so fraudulently transcribed out of place and not entered on the alphabet, took effect as recorded deeds, both as to the assignee and the several mortgagees, from the respective dates that they were left for record and were indorsed as received for record, according to G. S. c. 15, s. 44, enacted since *Sawyer v. Adams*; and that from the reasoning and language of the court in *Bigelow v. Topliff*, 25 Vt. 284, and *Jarvis v. Aikens*, Id. 637, it appeared that the doctrine of *Sawyer v. Adams*, was not the settled law of Vermont.]

**53. Recording power of attorney.** Where lands are conveyed under a power of attorney, the power must be recorded and accompany the grant upon the records, in order to connect the grant with the grantor; without such record it is not "admissible in evidence." G. S. c. 65, s. 24. *Oatman v. Fowler*, 43 Vt. 462.

**54. Where land is in two or more towns.** A power of attorney for the conveyance of all the principal's land in a certain county was recorded in one town of that county, in which town the principal owned lands. A copy of that record was recorded in another town of that county. *Held*, that the record of such copy was of no avail as to lands in the last named town. *Id.*

**55. Where the same deed conveys lands situate in two different towns, the recording of it in one town only is not constructive notice of the conveyance of the land situate in the other town.** *Perrin v. Reed*, 85 Vt. 2. *Danby Bank v. Lapham*. *Id.* 8.

**56. Where a deed conveyed lands situate in two towns and was recorded in but one;—*Held*, that although the record was not constructive notice as to the lands in the other town, yet that a party who examined such record, and had such knowledge of the lands as to know from the description given that the deed, as**

recorded, conveyed the land in such other town, was chargeable with actual notice. *Ib.*

**57. Notice of unrecorded deed.** A later deed, though first recorded, must yield to an earlier deed, though not recorded, of which the grantee in the later deed has knowledge when he takes it. *Stewart v. Thompson*, 8 Vt. 255. *Ludlow v. Gill*, 1 D. Chip. 49. N. Chip. 63. *Corliss v. Corliss*, 8 Vt. 373.

**58. Judgment in ejectment against the grantee in an unrecorded deed.** A third person afterwards, without knowledge of such deed, purchased and took conveyance of the land from the grantor in that first deed. *Held*, that his rights were not concluded by that judgment. *Barlow v. Boune*, Brayt. 185.

**59.** To give effect to a deed of prior date, unrecorded, against a deed of later date, recorded, the second grantee, at the time of taking his deed, must have had notice of the execution, contents and existence of the prior deed. *Brackett v. Wait*, 6 Vt. 411.

**60.** The recording of a deed operates as notice only to those who take conveyance of the same land, or make claim thereto by act subsequent to such recording, and does not affect those who already have title. *Leach v. Beatties*, 33 Vt. 195. *Holley v. Hawley*, 39 Vt. 532.

**61. Simultaneous records.** Where two separate deeds of the same parcel of land were executed and delivered by the same party, at the same time, one to each of two several grantees, neither grantee knowing that the land was conveyed to the other, and both deeds were left for record at the same time;—*Held*, that each grantee, as against the other, took a moiety of the land. *Ferris v. Mosher*, 27 Vt. 218.

**62. Who is not affected by notice.** A purchaser in good faith, without knowledge of a previous unregistered deed, is not affected by notice thereof to his grantor. *Morrison v. Shattuck*, 1 D. Chip. 42. S. C., N. Chip. 34.

**63.** Although the grantee of lands is affected by notice, at the time of his purchase, of an outstanding unrecorded deed, his grantee will not be affected by such notice, unless he knew that his grantor had such notice, but may rely upon the record title; and a subsequent grantee may, in such case, stand upon the title of the second. *Day v. Clark*, 25 Vt. 397.

**64. Purchase according to the record.** A deed of the east half of a lot was, by mistake of the town clerk, recorded as a deed of the west half. *Held*, that a later deed to a subsequent purchaser of the east half, who had no notice of the first deed except what was contained in the record, should prevail over the first deed. *Sanger v. Craigie*, 10 Vt. 555.

**65. Want of record as evidence of fraud.** The fact that a deed remained unrecorded for two months and that possession of the land

remained in the tenant of the grantor under an unexpired lease, was *held* to afford no presumption of fraud in the grant, or of a reconveyance. *Brackett v. Wait*, 6 Vt. 411.

**66. Remedy against grantor.** The grantee of land who neglected to record his deed, by reason of which a creditor of the grantor took the land by levy of execution, was *held* entitled, on bill against his grantor, to recover the amount of the debt thus paid by the levy. *Anon. Addison Co.*, 20 Vt. 392.

## II. WHAT PASSES.

**67. Deed alone is not title.** A deed on record, though ancient, shows no title, of itself, in the grantee. To make it proof of ownership, it must be accompanied either with proof of possession corresponding to the deed, or of title in the grantor. *Bank of Middlebury v. Rutland*, 33 Vt. 414. *Potter v. Washburn*, 13 Vt. 558.

**68. Quit-claim deed.** A deed of release and quit-claim, in common form, of all the grantor's "right, title, interest, property, estate and demand in and to" certain lands, &c., passes every estate and interest which the grantor had in the lands described,—as, both a reversionary estate in fee, and a particular estate for life, or years. *Pingrey v. Watkins*, 15 Vt. 479. S. C., 17 Vt. 379.

**69.** A quit-claim deed conveys only the title which the grantor then has, and does not prevent him from subsequently acquiring by purchase or descent, and holding, an outstanding title. *Henry v. Bell*, 5 Vt. 393.

**70.** The *habendum* of a quit-claim deed in common form was: "To have and to hold the premises so that neither the said A (the grantor) nor any one claiming under him should thereafter have claim, or right to the premises aforesaid." *Held*, that the word *premises* did not mean the land, but referred to such title and interest as the grantor then had in the land, and did not exclude him from subsequently acquiring and holding a superior right and title from some other source. *Smith v. Pollard*, 19 Vt. 272.

**71. Warranty deed.** Where one conveys land with covenants of warranty of title, all title subsequently acquired by the grantor will enure for the benefit of the grantee, and in discharge of the grantor's covenants. *Middlebury College v. Cheney*, 1 Vt. 336. *Blake v. Tucker*, 12 Vt. 39. See *Brown v. Edson*, 28 Vt. 435. *Jarvis v. Aikens*, 25 Vt. 635. *Carbee v. Hopkins*, 41 Vt. 250. ESTOPPEL, II.

**72. Freehold in futuro.** Under the statutes of conveyancing in Vermont, there is no objection whatever to the creating of a freehold estate, in terms, to take effect in future. *Gerham v. Daniels*, 23 Vt. 600.

73. Where, in the conveyance of land, it was expressed that the grantee was not to come into possession of it until after the death of the grantor and his wife—"meaning to convey the whole of the above described land after the death of myself and wife"—this was *held* to be a reservation of an estate during the life of the grantor and his wife: and—the grantor dying before his wife,—*held*, that he died seized of an estate in which the widow was entitled to dower. *Ib.* And see *Adams v. Dunklee*, 19 Vt. 382. *Sherman v. Dodge*, 28 Vt. 26.

74. **Appurtenances.** The manure of animals, made upon a farm, whether scattered upon the land, spread about the barn-yard, lying in piles at the stable windows, or lying in the stables where it has been suffered to accumulate, passes by a deed of the freehold, as appurtenant to it. *Stone v. Proctor*, 2 D. Chip. 108. *Wetherbee v. Ellison*, 19 Vt. 379. 43 Vt. 93.

75. Fencing materials, as posts and rails, where it is evident from the manner of their distribution upon the land, and other appearances, that they are designed for immediate use in fencing the land, will, like fences already built, pass with a deed of the land. Where the question was whether certain posts and rails were embraced in a written contract for the sale and conveyance of "*a farm*;"—*Held*, that parol evidence was admissible to prove the situation of the posts and rails in these respects. *Ripley v. Paige*, 12 Vt. 353.

76. A stone split out, raised and propped up a little from the ground, and intended to be removed from the farm and used elsewhere, does not necessarily pass with a deed of the farm; and it is competent to show by parol that the purchaser of the farm, at the time the deed was executed, was informed of the facts, thus showing that the stone did not pass with the deed. This is not properly an exception of what would otherwise pass by the deed. *Noble v. Sylvester*, 42 Vt. 146.

77. A conveyed to B a house and lot by deed in common form. There was at the time an aqueduct laid from a spring upon other lands of A to the house conveyed, in which the water was then running to the house. *Held*, that, although the deed made no allusion to the spring or aqueduct, it conveyed the water as it "was then running, with a right to the spring and aqueduct sufficient for its continuance, as an appurtenance to the house and land. A, having afterwards cut off the aqueduct upon his own land and stopped the flow of the water, was held liable to B in an action. *Cookidge v. Hager*, 43 Vt. 9.

78. The fee of one parcel of land—as, a highway—does not pass as appurtenant to the grant of another parcel,—as, of the land adjoining. *Buck v. Squiers*, 22 Vt. 484. *Cole v. Haynes*, 22 Vt. 588.

79. The defendant, owning a grist-mill and the lands around it, sold the mill with the appurtenances, and conveyed the mill with the land on which it stood, and land north of it to the highway, and as far west as the west side of the mill. There was an open space on the north and on the west of the mill, which for more than 60 years had remained uninclosed, and persons going to the mill passed over this open space, in any direction they pleased, to and from the mill door. The defendant afterwards inclosed and occupied the space west of the mill. In an action by the grantee for an obstruction to his right of way to the mill, claiming that by reason of such obstruction the passage to and from the mill was rendered less convenient than before;—*Held*, 1st, that the use by the defendant of his own land in connection with the mill did not necessarily make it an appurtenance to the mill; 2nd, that as the right claimed was one of convenience only and not of necessity, the conveyance must be construed as limiting the grant to the boundaries specified in it. *Plimpton v. Converse*, 42 Vt. 712.

80. The word *appurtenances* in the *habendum* of a deed, is confined to existing rights legally appurtenant to the land in the hands of the grantor, and does not carry an easement in the land of another which, by reason of not having ripened into a legal right, has not become legally attached to the premises conveyed. *Swasey v. Brooks*, 34 Vt. 451, questioning *dictum* in *Vt. Central R. Co. v. Hills*, 23 Vt. 681,

### III. CONSTRUCTION.

#### 1. *Office of the habendum.*

81. The office of the *habendum* in a conveyance is to define the estate conveyed; but in an assignment merely of a leasehold estate, which is limited and defined by the original deed, no such definition is required, and the *habendum* is not necessary. *Strong v. Garfield*, 10 Vt. 497.

82. Selectmen by one instrument leased certain lots, *habendum* "as long as wood grows and water runs, or as we the selectmen have a right to lease the same." As selectmen they had a right to lease some of these lots perpetually, and some for only five years. *Held*, that this alternative in the *habendum* had reference to the statute limitation as to this last class of lands, and that the lease was valid. *Lemington v. Stevens*, 48 Vt. 38.

83. No one can take an immediate or present estate under a deed, who is not named as a grantee in the premises, provided any one is named therein; if no one is therein named, the grantee may be ascertained from other parts of the deed. *Adams v. Dunklee*, 19 Vt. 382.

84. Where the grantee is named in the

premises and the quantity of the estate granted is stated, he takes the entire estate described; and any limitation in the *habendum* designed to abridge or lessen such estate of the immediate grantee, in favor of a party not named in the premises, is repugnant and inoperative. *Ib.*

85. Thus, where the grant was "to T O, for and during his natural life and the life of H O, his wife, &c.,"—"to have and to hold, &c., to him the said T O and H O, for and during their and each of their natural life, to their use and benefit during said term";—*Held*, that T O took the entire estate for both lives, and no remainder vested in the wife on the death of H O, but passed to the administrator of H O. *Ib.*

86. Where the *habendum* in a deed is contradictory to the premises, it is void, and the words in the premises stand. But where it only limits, explains or qualifies the words there used, it performs its proper office. It may lessen, enlarge, limit and qualify the use of the land so long as it does not defeat the estate granted. *Cong. Soc. Halifax v. Stark*, 34 Vt. 243.

87. Thus, where the grant was to a corporation, by its name simply, of land by its name and boundaries, without other description in the premises of the estate or interest conveyed;—*Held*, that the use which the grantee was to have of the land, and the extent and duration of the estate, were properly explained and limited in the *habendum*. *Ib.*

88. Where the purpose of the grant is clearly ascertained from the premises of a deed, and the premises contain proper words of limitation, an *habendum* which is repugnant to the grant yields to the manifest intent and terms of the grant; if clearly repugnant to the grant, it is treated as of no validity or effect. *Ib. Flagg v. Eames*, 40 Vt. 16. *Adams v. Dunklee*, 19 Vt. 882.

## 2. Rules of interpretation.

89. **Office of court.** Where there is no question as to the facts, it is a mere question of law as to what land was intended to be conveyed by a deed. *Stevens v. Hollister*, 18 Vt. 294.

90. It is error to leave to a jury the construction of a deed as to the boundaries intended, where there is no latent ambiguity in the description. But a new trial will not be granted for such error, if the jury gave the right construction. *Morse v. Weymouth*, 28 Vt. 824.

91. —of jury. Whether or not particular premises are included in the description in a deed, where this cannot be determined from an inspection of the deed, is a question for the jury; but the construction of deeds, and their legal effect, are always questions of law. *Lippett*

*v. Kelley*, 46 Vt. 516. *Mitchell v. Stevens*, 1 Aik. 16. *Hodges v. Strong*, 10 Vt. 247.

92. **Intent.** It is a cardinal principle in the interpretation of deeds that the intention of the grantor, where it is plainly and clearly expressed, or can be collected or ascertained from the deed, is to be observed and carried into effect, unless it is in conflict with some rule of law; and that whatever is repugnant to the general intention of the deed, or the obvious particular intention of the grantor, is to be rejected, if such intention is consistent with the rules of law. *Kellogg, J., in Flagg v. Eames*, 40 Vt. 22.

93. The intent when apparent and not repugnant to any rule of law, will control technical terms; for the intent, and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with a view to give every part of it meaning and effect.—Applied in *Collins v. Lovelle*, 44 Vt. 230. *Colby v. Colby*, 28 Vt. 10. *Flagg v. Eames*, 40 Vt. 16.

94. As to rules of interpretation of deeds and other contracts, and how far technical rules and terms yield to the intent as manifested by a view and comparison of the whole instrument—See *State v. Trask*, 6 Vt. 355. *Wheelock v. Moulton*, 15 Vt. 519. *Mills v. Catlin*, 22 Vt. 98. *Blake v. Stone*, 27 Vt. 475. *Noyes v. Nichols*, 28 Vt. 159. *Smith v. Hastings*, 39 Vt. 240. *Flagg v. Eames*, *Collins v. Lovelle*.

95. Construction of a deed containing repugnant provisions, and claimed as limiting a use upon a use;—*Held* to create contingent or alternative uses;—also, the intent being clear, that the repugnancy will be rejected, and the deed take effect according to the intent. *State v. Trask, Supra.* 40 Vt. 22.

96. **Different instruments.** Two deeds between the same parties about the same subject matter and bearing the same date, the one containing an implied and the other an express grant;—*Held*, to be taken as contemporaneous, nothing appearing to the contrary, and to be construed together. Instance of such construction and qualification of one by the other, in relation to an aqueduct and spring of water. *Coolidge v. Hager*, 43 Vt. 9.

97. **Repugnancy.** In determining what parts of a repugnant description in a deed shall be rejected, the prevailing intention of the grantor, as manifested on the face of the deed, must be followed. Instance, *Gates v. Lewis*, 7 Vt. 511.

98. **Covenants.** Although the covenants in a deed do not enlarge the estate granted in the premises, yet where it becomes a question of construction as to what is granted, they may well be resorted to, to help out the construction,—and this, upon the principle that refer-



ence is to be had to the whole deed, and that every part is to have an operation, if possible. *Mills v. Catlin*, 22 Vt. 98.

**99. Equivocation.** The rule that the construction of a grant shall be most favorable for a grantee, is not properly applicable to any case but one of strict *equivocation*, where the words used will bear either one of two or more interpretations, equally well. *Redfield, J., Adams v. Warner*, 23 Vt. 395, 411; and see *Mills v. Catlin*, 22 Vt. 98, 105.

**100.** The rule that a deed shall be construed most strongly against the grantor and favorably to the grantee, in respect to the thing granted and the estate conveyed, is the last which courts apply, and is never resorted to so long as a satisfactory result can be reached by other rules of analysis and construction. *Kellogg, J., in Flagg v. Eames*, 40 Vt. 24.

**101.** Where the terms of a deed are equivocal, the subsequent conduct of the parties, or their grantees, may be considered for fixing the signification; but where the terms used are explicit and unequivocal, no such ground of construction can ever be resorted to, at least in a court of law. *Redfield, J., in Keith v. Day*, 15 Vt. 660.

**102. Indefiniteness.** A devise, or grant, is never declared void for uncertainty, upon the mere ground of the indefiniteness of the description of the subject matter of the devise, or grant; but only where, after the resort to oral proof, it still remains mere matter of conjecture what was intended by the instrument. *Townsend v. Downer*, 23 Vt. 225. [The devise was by a resident of Long Island, N. Y., made in 1792, of "a certain right of land which I purchased, lying on the main, supposed to be in the State of Vermont." *Held*, that the subject of the devise could be determined by evidence *extra*.]

**103.** It is not necessary to the validity of a grant, that every part of the description of the subject matter should be literally true. *Day v. Adams*, 42 Vt. 510.

**104. Void exception.** It is only where an exception is wholly inconsistent with a grant, and where, if the exception be allowed, the grant would become inoperative, that the exception is held void,—and this as a matter of strict necessity. *Adams v. Warner*, 23 Vt. 395.

3. *Instances—as to description, boundaries, &c.*

**105. Severalty.** Where the owner of a lot conveys a certain number of acres of it, though by an imperfect description, but the parcel can be ascertained, the grantee takes in severalty, and not as tenant in common with the grantor in the whole lot. *Clapp v. Beardsley*, 1 Vt. 151. 24 Vt. 539.

**106. Mill-dam.** Construction of a grant

to erect a dam of a certain height above low water mark, where the precise location was not designated, but was along an inclined plane of rocks, descending with the stream. *Rogers v. Judd*, 6 Vt. 191.

**107. Spring.** The orator conveyed certain premises on which was a spring of water, which was carried by an aqueduct to a tub on the premises, and, in his deed, reserved "the right of taking all the waste water as it now runs into the tub on said premises by aqueduct to my Prescott lot, with the right and privilege of digging up and repairing the same, at any time, by paying all damage which it may be to the premises." Immediately after the execution of the deed, the orator laid down a lead aqueduct from said tub to his Prescott lot. On a bill brought to enjoin the grantees from molesting the orator in the exercise of his right of taking and using such waste water;—*Held*, (1), that this reservation was of an interest and right in the spring itself to the extent named; that "all the waste water as it now runs, &c.," means all the water carried or that would run from the spring to the tub by the aqueduct then existing, or a like one, except such portion passing into the tub, as might be necessary for the use of the grantee to be taken from said tub, as it was then situated;—*Held*, (2), that the grantee had no right to remove the tub to the prejudice of the orator, nor to tap the spring, aqueduct, or tub, so as to diminish the quantity of water;—*Held*, (3), that the orator, on the grantee's neglect, might enter upon the premises conveyed, and repair or lay a new aqueduct from the spring to the tub, whenever, for want of repairs or want of a new aqueduct, the water did not run from the spring to the tub, or did not run in the quantity contemplated by the reservation,—and this, without payment of damages. Decree for orator for damages sustained for an obstruction to the orator's rights as above declared, and an injunction granted against further molestation. *Hill v. Shorey*, 42 Vt. 614.

**108.** A reservation, in a deed of lands, of a spring and the right of relaying and repairing at all times the logs or pipes conveying the water from such spring, does not authorize the relaying of the logs or pipes at a different place, though in the same general direction. *Woodcock v. Estey*, 43 Vt. 515.

**109.** Where a spring of water had been set out and separated from other lands by the owner, so as to extend three rods each way from the centre of the spring;—*Held*, that under the conveyance of "the spring," by that name, the whole land so set out passed. *Id.* See *Mixer v. Reed*, 25 Vt. 254.

**110. Other instances—What conveyed.** The thing granted in a deed was described as follows: "The following described land in

Colchester; all the land which I own by virtue of a deed dated January 18, 1848, from Asa S. Mills, recorded," &c.,—"being all my right and title to the land comprising 50 acres off of the east end of lot No. 75 in said town"—*habendum*, "the above granted and bargained premises," &c. The covenants were, that the grantor was seized of the "premises" in fee simple; had good right to bargain and sell the same; that they were free of all incumbrances, and that he would warrant and defend, &c. *Held*, that the thing granted was the land itself, and not such quantity of interest, less than a fee simple, which the grantor might happen to have. *Mills v. Catlin*, 22 Vt. 98.

111. The owner of the land upon both the north and south sides of a stream, conveyed to D R a parcel on the north side, described as including "the blacksmith shop and works," and also the right to draw water from a flume above to carry the works; "also the privilege to remove said blacksmith shop works to the opposite bank of the river below the grist-mill, when he thinks proper." Afterwards the shop was removed to the south side of the stream, and after such removal, and while it was standing and occupied, the same grantor conveyed to the defendant's grantor the land upon the south side of the stream "except a blacksmith's shop and such privileges of drawing water, as I have heretofore deeded to D R." Several years after this, the shop was destroyed. In ejectment by the plaintiff, claiming under D R, to recover the piece of ground on the south side of the stream where the shop formerly stood;—*Held*, that the deed to D R was not a mere license to occupy such parcel, but conveyed the fee. Judgment for the plaintiff. *Hale v. Barrows*, 22 Vt. 240.

112. The description of premises in a mortgage was: "Water lots number one, two, three, four, five, six, seven, eight, nine, the westerly half of ten, eleven, twelve, thirteen and fourteen," and then bounding them in a body, and specifying that on lots number one, six, seven and the westerly half of ten, and on numbers eleven, twelve, thirteen and fourteen, were certain described buildings. The question was, whether the deed conveyed the whole, or only the westerly half of lots eleven, twelve, thirteen and fourteen. *Held*, that the mere words were consistent with either view; but it being shown that the mortgagor owned only the westerly half of lot ten, and owned the whole of all the other lots, and that the buildings referred to as upon lots eleven, twelve, thirteen and fourteen were situate upon the east end of those lots, *held* that the deed conveyed the whole of those lots. *Edmunds v. Follett*, 29 Vt. 116.

113. Where land had been set out to a widow as her dower;—*Held*, that such dower

right was conveyed by a deed of "the reversion of the widow R H,"—this being the subject matter which the parties apparently had in view, and the deed being otherwise senseless and inoperative. *Pingrey v. Watkins*, 15 Vt. 479.

114. A deed contained the following words, after the description of the lands conveyed: "Reserving from the premises above described three west rows of apple trees in the orchard, two stalls in the southwest corner of the barn, and twelve feet square over said stalls for hay, which is reserved for the use of our mother, Mary Wood." *Held*, that these last words were not merely an additional description of the land, but described the nature and character of the estate reserved in the land, viz., an estate for life in Mary Wood. *Keeler v. Wood*, 30 Vt. 242.

115. The administrator of an insolvent estate conveyed the lands as follows: "I do in my said capacity give, grant," &c., "all the right, title, interest and estate which of right belonged to Elisha Davis, deceased (excepting the widow's thirds hereinafter to be described), to the following tract," &c. Then follows a description by metes and bounds embracing the whole territory of the tract, concluding, as follows: "Excepting the widow's thirds which is set off by the judge of probate, on the west line of the above described land, containing eleven acres and forty rods, reference being had to the survey bill," &c. *Held*, that the words, "widow's thirds," meant here the interest of the widow in the land, and not the particular piece of land in which she had a dower interest; and that the deed conveyed the whole interest of the intestate in all the described premises, except the life estate of the widow in the eleven acre piece. *Crosby v. Montgomery*, 38 Vt. 238.

116. Nov. 18, 1847, A and B executed to M a deed conveying "one undivided half of the following described tracts and parcels of land," and then particularly described the several parcels. Jan'y. 8, 1849, A and B executed to M a deed of their remaining undivided half "of all and singular the lots, tracts, pieces and parcels of land described in our deed to the said M, dated Nov. 18, 1847"—"being all our interest in said lands." They took back from M a mortgage, of the same date, of "the following real estate," &c., "viz., the same and all the real estate described in the deed of the said A and B to me the said M, dated Nov. 18, 1847." *Held*, that the words "real estate," as here used, were synonymous with the word *lands*, and that the purpose of the reference to the deed of 1847 was to identify the land, and define its boundaries as therein described, and not to limit the quantity or extent of interest in it to be conveyed; and that the mortgage conveyed not merely a moiety, but the whole—

interest which M, the mortgagor, acquired by the two deeds from A and B. *Carpenter v. Millard*, 88 Vt. 9.

117. A warranty deed from a father to his son contained this condition: "provided, nevertheless, and it is the express condition of this deed, that I am to have the use and improvement of the premises during my life, if I have occasion therefor, and shall choose to do so." *Held*, that the grantor retained a life estate in the premises which could be surrendered only by deed; and that a surrender, by parol, of the control and possession, was not such a surrender of the estate of the grantor as to take away his legal right to resume possession. *Colby v. Colby*, 28 Vt. 10.

118. A deed in its granting part conveyed to A B "and her heirs and assigns forever, a certain piece or parcel of land" [describing it] "that is to say, one undivided half of the same, with the privileges and appurtenances thereto belonging, bounded," &c. [giving the boundaries] "always provided that in the event of her decease, the same shall revert to me, if living, if not, to my heirs"—*habendum* "to the said A B and her heirs and assigns, to her and their own proper use, benefit and behoof forever." Then followed the usual covenants, and this clause, viz: "always reserving the reversion to myself and heirs as stipulated in the deed." *Held*, that the plain intent and effect of the deed were to convey an estate for life only, and in one-half of the lands. *Flagg v. Eames*, 40 Vt. 16.

119. A deed contained this reservation: "Reserving to ourselves the right to use and occupy the said granted premises for five years, if we choose to do so for that length of time; but if we leave the possession and occupancy of said premises before the expiration of said five years, then this reservation shall be at an end and determine, and the grantee above-named shall have full possession thereof." The grantor leased a part of the premises for four years at an annual rent, and the lessee went into possession, the grantor retaining the personal possession and occupation of the rest of the premises. The grantee brought ejectment against the grantor and his lessee. *Held*, 1st, that the right reserved "to use and occupy" was equivalent to the right to the use and occupancy; that it was general, and not personal, and was the right to occupy by himself, his agent, tenant or assignee, though the word *assignee* was not used; 2d, that the contingency on which the plaintiff's right to enter was conditioned had not arisen; that the grantor had not left the possession and occupancy of the premises so long as he resided on and personally occupied that part of the premises not leased; and that the plaintiff could not recover any part of the premises. *Cooney v. Hayes*, 40 Vt. 478.

120. A description of land in a deed as "certain tracts and pieces of land, numbered 42, 44," [in figures] is sufficient. *Middlebury College v. Cheney*, 1 Vt. 336.

121. An exception in the grant of a lot of a certain number of acres "off the west end of said lot," where the lot was in rectangular form, having its sides towards the cardinal points, was *held* to require the land to be separated by a line parallel with the lot line. *Rich v. Elliot*, 10 Vt. 211. 27 Vt. 256. *Id.* 743; and see *Sawyer v. Coolidge*, 34 Vt. 303.

122. Where a lot is of rectangular form, its side lines corresponding nearly with the cardinal points, a deed of "the north half" imports one half of the lot in quantity, and in rectangular form, and is that part of the lot which lies north of a line running through it, which bisects the east and the west line of the lot; and such description cannot be controlled by parol evidence. *Butler v. Gale*, 27 Vt. 739; and see *Beecher v. Parmele*, 9 Vt. 352.

123. **Falsa demonstratio.** Where there is an incongruity or inconsistency in the description in a deed, a part may be rejected if a sufficient description remains, and that part should be rejected which goes to defeat the intention of the parties, as apparent on the face of the deed, or as would defeat the deed altogether;—as where an inaccuracy occurs in a particular erroneously added, for greater certainty. *Hull v. Fuller*, 7 Vt. 100.

124. If the words employed in the description in a deed sufficiently ascertain the premises intended to be conveyed, the addition of things false or mistaken will not frustrate the grant. *Lippett v. Kelley*, 46 Vt. 516.

125. Where land conveyed is described in the deed by clear and well defined metes and bounds, such description will prevail over any general words of description tending to enlarge or diminish the boundaries. *Pierpoint, J.*, in *Spiller v. Scribner*, 36 Vt. 246.

126. The place of beginning being given, and all the courses and distances;—*Held*, that the boundaries were not enlarged by the additional words "meaning to take three-fourths of lots Nos. 28 and 29." *Gilman v. Smith*, 12 Vt. 150.

127. The grant was of "all the tracts, pieces and parcels of land lying and being in the towns G and N, which were left to me by my late husband." *Held*, that the grant was not restricted by the added words, "and being the farm on which I now live and occupy." *Hibbard v. Hulbert*, 10 Vt. 173.

128. Where the deed bounded the land "south on the highway";—*Held*, that by legal intentment this was the center of the highway, and that the grant was not carried to the south line of the highway by the additional words "meaning to convey a piece of land I hold

by a deed from A B." *Morrow v. Willard*, 30 Vt. 118.

129. The grant was of lots Nos. 22 and 23 in the second division of lots in Chelsea. *Held*, that this was in legal effect a description according to the lines of said lots, as surveyed and established in the original division of the town, and was not enlarged by the additional words "and is all and the same land which we now occupy and improve as our home farm." *Spiller v. Soribner*, 36 Vt. 245.

130. **Monuments, courses, &c.** Where the original monuments are found, no testimony can be received to show that the surveyor intended to locate the boundaries elsewhere. *Hull v. Fuller*, 7 Vt. 100.

131. Where courses and distances and known monuments are given in the deed, or levy of execution, the monuments will control, even to the rejection of the courses. That the opposite course is given, in such case, is of no more importance than if varied only one degree. *Barnard v. Russell*, 19 Vt. 334.

132. But where courses and distances are alone given in a survey, the needle must govern the one, and the chain the other; and the intention of those who made the survey cannot be let in to vary the result. *Owen v. Foster*, 13 Vt. 263; and see *Brooks v. Taylor*, 2 Vt. 348.

133. Boundaries and monuments established about the time of a conveyance, and a line so ascertained and afterwards assented to by all parties interested, were held to prevail over courses and distances named in a subsequent deed. *Keenan v. Cavanaugh*, 44 Vt. 268; and see *Patch v. Keeler*, 28 Vt. 332.

134. In order for an application of the rule that courses and distances yield to monuments, the existence and location of the monuments must be proved; and to prove this, parol evidence is admissible. If no monuments are mentioned in the deed, or, if mentioned, their existence and location are not shown, the courses and distances govern. *Bagley v. Morrill*, 46 Vt. 94.

135. In order to warrant the court in assuming a mistake in a deed in the course of a line and substituting another, the deed itself, or the deed with proof of such facts as are competent to be shown in aid of the construction of a written instrument, must contain the necessary elements to make such assumption a matter of legal construction, as contra-distinguished from matter of extrinsic proof. *Ib.*

136. Where a deed described the line in dispute as running from a corner, on a given course a given number of rods, to a corner, but did not state whether, or not, those corners were marked on the land;—*Held*, that parol evidence was admissible to prove that those corners were in fact marked by monuments; that, the corners being thus established, the

authentic boundary would be a straight line from one corner to the other, notwithstanding it did not conform to the course and distance named in the deed; and that the existence of a straight line of marked trees from one corner to the other tended to show the marked corners called for by the deed, and that the line between the two was a straight line. *Clary v. McGlynn*, 46 Vt. 347.

137. Where a line was described in a deed as "beginning" on the south line of A's land, thence running "east 15 degrees south on said A's line," and A's line in fact ran east 13½ degrees south, and the grantor owned to A's line;—*Held*, that the words "on said A's line" were the controlling description, and the course "east 15 degrees south," was to be regarded as the false description, and that A's land, that is, the border or extreme limit of it, was made an abuttal, or boundary, the same as if the deed had bounded the lands granted north by A's land. *Park v. Pratt*, 88 Vt. 545.

138. A deed of a house lot described the land as beginning at a point in the centre of a highway; thence northerly eleven rods to a corner, &c.; thence easterly, &c., to a corner; thence southerly eleven rods to the centre of the highway; thence westerly in the centre of the highway to the place of beginning. The court charged, that unless there was some object or mark in the corner of the eleven-rod lines intended by the parties to mark the northern termini, the distance named in the deed must govern. *Held* correct,—and that neither an accommodation fence across the lot, not intended to mark the true line, nor the corners of adjoining lots, not shown to have any connection with or reference to the corners in question, could fix said corners, by legal intentment. *Day v. Wilder*, 47 Vt. 583.

139. A deed conveyed a tract of land, "except eight acres on the south-west corner of said tract, being the land where J C now lives." These eight acres, as occupied by J C, had definite limits and boundaries, not extending to the true west line of the tract. *Held*, that the exception was limited to the west line, as occupied and claimed by J C. *Sawyer v. Coolidge*, 34 Vt. 308.

140. Where the dispute is one of boundary merely, and one has occupied to a boundary beyond the true limits of his deed, and he conveys according to his deed, such deed conveys to the purchaser according to the boundary the grantor has claimed and occupied to. *Takeaway v. Barrett*, 88 Vt. 316.

141. A deed to M described one line of the land conveyed, as running "north 34 degrees west on said M's line and C's north line, 45 rods and 16 links, to the bound begun." This land of M referred to, extended northerly only to a brook which intersected the line above

given. C's land was on the opposite side of the brook and extended along the brook several rods further north-easterly than the termination of "said M's line" on the brook, so that, by extending the line across the brook on the course given to the place of beginning, the deed would include a part of C's land which was referred to as bounding the land conveyed. On the other hand, in order for the line in question to reach and run on C's north line, it would, at the point where it reached C's land at the brook, have to turn nearly at a right angle and run north-easterly on his line a few rods to a corner of his land, then turn at a still greater angle running on his north line in a course north  $67\frac{1}{2}$  degrees west. C's north line was at that time marked by a log and slash fence, as nearly on the line as such fences usually are. The court adopted the latter construction, giving control to the monuments and abutments over the courses;—that is, by following M's land as far as that extended, and then by C's land as then owned and occupied by him. *Bundy v. Morgan*, 45 Vt. 46.

**142. Quantity.** In a deed conveying land by metes and bounds, the words "containing thirty-four acres and nineteen rods of ground," do not import an agreement that the tract described contains that quantity, but are to be taken as part of the description. *Beach v. Stearns*, 1 Aik. 325.

**143.** So, where the lands were described as bounded on certain other lands, without giving courses or distances, "the same containing about five and three-fourths acres, be the same more or less;"—*Held*, that these words were part of the description only, and were not conclusive that the grantee had not purchased and agreed to pay for the land at a certain price per acre, as he claimed. *White v. Miller*, 22 Vt. 380.

**144.** Where a deed described the land conveyed by reference to the lines and lands of adjoining proprietors, and the calls of the deed could be answered either by including or excluding a particular parcel, the quantity named, as "about forty acres," was *held* to determine the construction. *Pierce v. Brown*, 24 Vt. 165.

**145. Reference to other instruments.** In trespass *qua. clau.* the plaintiff made title from an original proprietor and survey bill, recorded, of fifty acres. The first two deeds following described the lot as forty acres and omitted one line given in the survey bill, but referred to the survey on record. The remaining deeds down to the plaintiff continued the same error in the description, and omitted the reference to the survey. The plaintiff proved possession of the entire lot in himself and his predecessors from the date of the survey, more than 30 years, down to the time when the defendant entered upon ten acres of it. The county court construed the deeds as conveying all the land embraced in the

survey, without referring that question to the jury. *Held* correct. *Stevens v. Hollister*, 18 Vt. 294.

**146.** In construing a deed, where another deed is referred to for a description of the premises conveyed, the deed referred to is regarded as of the same effect as if copied into the deed which refers to it, and whatever is described in it will pass. The two descriptions should be considered together. *Lippett v. Kelley*, 46 Vt. 516.

**147. Bounding by a stream.** A deed describing a boundary as running up a river upon the south bank to certain falls, "thence continuing to run in such a direction as to include a mill-yard, and the whole of a mill-pond which may be raised by a dam on said falls, to a road that leads to E, thence easterly on said road," &c., was *held* to indicate the road as the boundary of the land, and not as a limit of the pond. *Hull v. Fuller*, 4 Vt. 199.

**148.** The description in a deed was as follows: "Beginning at the intersection of the road from Chelsea to Allen's saw-mill and the branch on which the saw-mill stands on the northerly side of said branch and nearly opposite my now dwelling house; thence on the easterly side of said road until said road strikes the bank of said branch; thence down said branch in the middle of the channel, to the first mentioned bounds." *Held*, that the point of commencement was at the intersection of the northerly bank of the stream with the eastern side, or edge, of the road, and that no land lying south of that point, and no part of the highway was conveyed. *Buck v. Squiers*, 22 Vt. 484. *Redfield, J.*, dissenting.

**149. —by a highway.** Where one conveys land adjoining to or bounded upon a highway, of which the grantor owns the fee, the law presumes the party intended to convey to the middle of the highway, and will give the deed such an effect, unless the language used by the grantor is such as to show a clear and explicit intent to limit the operation of the grant to the side or outer edge of the highway. And in all cases, where general terms are used in a deed, such as "to," or "upon," or "along a highway," the law presumes the parties intended the conveyance to be to the middle or centre line. *Poland, J.*, in *Buck v. Squiers*, 22 Vt. 489; approved, *Marsh v. Burt*, 34 Vt. 289; *Morrow v. Willard*, 30 Vt. 118; and applied to a railroad, in *Maynard v. Weeks*, 41 Vt. 619.

**150.** This doctrine recognized, but qualified in its application to a levy and set-off upon execution. *Cole v. Haynes*, 22 Vt. 588.

**151.** The owner of Lot No. 17 conveyed to the plaintiff all "except that part of said lot which lies on the north side of the road, at the north-east corner of said lot, being about three-fourths of an acre," and at the same date he

conveyed to the defendant that part of the lot "lying in the north-east corner of the lot, being that part which lies on the north side of the road, three-fourths of an acre, more or less." *Held*, that the exception in the plaintiff's deed included all the land lying on the north-easterly side of the road which ran from south-east to north-west over said lot, and included not only the parcel which lay strictly in the north-east corner of the lot, but also a small strip, not strictly in the north-east corner, but further south and a little separated from the main parcel by a curve in the road, which for a short distance ran along the east line of the lot—thus making the road the dividing line between the parties throughout. *Morse v. Weymouth*, 28 Vt. 824.

152. Three parcels of land, constituting originally but a single piece, and separated from each other only by a highway, were conveyed in one deed by separate descriptions. The *first*, "Beginning on the west side of the road at the end of a wall, running westerly on said wall," &c.; thence (around) "to the road, thence on said road to the place of beginning." The *second* piece was described as "on the south side of the road opposite to the last mentioned piece, fenced on two sides, being a ridge of land lying between said road and the centre line of lot No. 3 to extend so far east as to make just five acres." The *third* piece was described as "opposite to the last mentioned piece on the east side of said road within the fences or wall." *Held*, that as to each of said parcels, the grant extended to the centre line of the highway; that, as to the *first*, the end of the wall is referred to, not as excluding the road, but as a tangible and permanent boundary, such as could not be had in the centre of the road, and is controlled by the other two references to the road, which apply to the centre line; that, as to the *second*, the references to the road mean the centre line, there being nothing to indicate the contrary; that, as to the *third*, as it in fact was bounded on two sides by the highway, and opposite the others, applying the language of the description to the peculiar case and circumstances, it should not be limited to the fences inclosing it. *Marsh v. Burt*, 34 Vt. 289.

153. —**by a railroad.** The description in a deed was as follows: "Beginning on the west line of the V. & C. railroad and south-east corner of land west of said railroad, owned by," &c.; "thence south on the west line of said railroad," &c. *Held*, that the west line or side of the land owned by the railroad company, was intended, and that was the boundary. *Maynard v. Weeks*, 41 Vt. 617.

154. **Lease.** Construction of lease. *Brigham v. Avery*, 48 Vt. 602.

## DEFINITIONS.

(Words—Phrases.)

ABLE-BODIED. (Militia acts.) 10 Vt. 152. (Pauper acts.) 15 Vt. 200.

ABSENT PERSON. (G. S. c. 19, s. 1, 9th clause.) 85 Vt. 232.

ABUTMENT. Part of a bridge. 15 Vt. 438.

ACCEPT AND RECEIVE. (Stat. of Frauds.) 28 Vt. 801. 47 Vt. 848.

AFFIRMANCE, on appeal. 1 D. Chip. 338.

AGGRAVATION, matter of. 19 Vt. 102.

AGREEMENT. (Stat. Frauds.) 3 Vt. 290. 15 Vt. 691. 41 Vt. 541.

APPEAL. (Listing Act.) 34 Vt. 184.

APPEAR, as used in a recognizance. 7 Vt. 529. 15 Vt. 9.

APPROVED NOTE. 48 Vt. 227.

ASSAULT. 44 Vt. 476.

BAGGAGE. 85 Vt. 605.

BANK NOTE, BILL, PROMISSORY NOTE. (R. S. c. 96, s. 4.) 17 Vt. 151.

BARGAIN. (Stat. Frauds.) 15 Vt. 691.

BELONGING to a town. (Pauper Act.) 8 Vt. 45.

BEREFT OF REASON. 48 Vt. 172.

BOND, of railroad company. 32 Vt. 297.

BRIDGE. Includes abutments. 15 Vt. 438. See 38 Vt. 44.

BRINGING A PETITION for divorce. 45 Vt. 538.

BUSHEL. 13 Vt. 245.

CASH SALE—SALE FOR CASH. 8 Vt. 252. 24 Vt. 85. 32 Vt. 632.

CATHOLIC CHAPEL. 33 Vt. 593.

CHALLENGING. (Breach of Peace Act.) 1 Tyl. 180.

CHARACTER—REPUTATION. 26 Vt. 270.

CLAIM AND DEMAND. (Corporate Stock.) 30 Vt. 246.

CIVIL ACTION. (Penalty—Qui Tam.) 8 Vt. 272. 10 Vt. 487. (Bastardy.) 7 Vt. 419. 11 Vt. 543. 8 Vt. 141.

CLOSE—INCLOSURE. 39 Vt. 326.

COASTING in highway. 41 Vt. 271.

COLOR OF TITLE. The term *color of title*, means a deed or survey of the land, placed upon the public record of land titles, whereby notice is given to the true owner and all the world that the occupant claims the title; and, because of such notice, occasional entries, cutting timber, &c., which would ordinarily be mere acts of trespass in a stranger, are considered as acts of possession when done by one having color of title. *Poland, C. J.*, in *Hodges v. Eddy*, 38 Vt. 845. See *Buck v. Squiers*, 23 Vt. 498.

COMING AND RESIDING—COME TO RESIDE. (Pauper Acts.) 1 Vt. 385. 6 Vt. 200. 10 Vt. 22. 13 Vt. 215. 19 Vt. 267. *Id.* 392. 29 Vt. 396. 33 Vt. 159. 44 Vt. 382. 46 Vt. 606.

COMPANY.—As *railroad company*; not necessarily importing a corporation. 27 Vt. 723.  
 COMPROMISE. 8 Vt. 472.  
 CONSIDERED SOUND. 16 Vt. 525.  
 CONTINGENCY. (Trustee Acts.) 19 Vt. 899. 25 Vt. 650.  
 CONVEY—DEED OF CONVEYANCE. 11 Vt. 47. *Ib.* 549. 13 Vt. 53. 33 Vt. 470.  
 COUNTERFEIT—COUNTERFEITED. 2 Aik. 89. 18 Vt. 198.  
 COURSE OF BUSINESS. (Promissory Notes.) 37 Vt. 421. 46 Vt. 674. 48 Vt. 590.  
 CREDIT, sale on. 32 Vt. 616. 42 Vt. 528.  
 CREDITOR. (Trustee Act.) Brayt. 234. (Attachment.) 32 Vt. 460.  
 CRIME—OFFENSE. 26 Vt. 205.  
 CUMULATIVE EVIDENCE. 14 Vt. 414. 35 Vt. 452.  
 CURRENT BILLS. Not money. 11 Vt. 268.  
 DEAL—DEALER. (Liquor Acts.) 15 Vt. 425. 21 Vt. 484. 22 Vt. 32. 23 Vt. 293. 24 Vt. 312.  
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 DEBTS NOW DUE. (Town of Windsor—Act of 1848.) 24 Vt. 397.  
 DELIVERY. (As of crops.) 14 Vt. 14. *Ib.* 214.  
 DISINTERESTED. (Appraiser on execution.) 9 Vt. 27.  
 DISINTERESTED. (Commissioner for highway.) 47 Vt. 393.  
 DUE COURSE OF BUSINESS. 37 Vt. 421. 46 Vt. 674. 48 Vt. 590.  
 EMANCIPATION,—of infants. 5 Vt. 481. 23 Vt. 328. 37 Vt. 528. 39 Vt. 17. 41 Vt. 55.  
 ENCLOSURE. (Impounding.) 1 Vt. 470. 39 Vt. 34. *Ib.* 326.  
 ENGINEER. (*The engineer.*) 27 Vt. 678.  
 ESTATE. 45 Vt. 215.  
 ESTIMATES. (Railroad construction.) 27 Vt. 673. *Ib.* 700.  
 EXPENSES. (Reasonable), not limited to cash expenditures. 28 Vt. 401.  
 EXPERT. 48 Vt. 335. *Ib.* 366. *Ib.* 412.  
 FAMILY. (Pauper acts.) 6 Vt. 291.  
 FARMING TOOLS. 40 Vt. 138.  
 FELONY. 16 Vt. 551. 24 Vt. 130.  
 FIGURES. (Arabic), to express sums, as 37, 89. 22 Vt. 433.  
 FILED. (Affidavit for a *capias.*) 39 Vt. 585.  
 FINAL JUDGMENT. 21 Vt. 23.  
 FORTHWITH. (G. S. c. 25, s. 18.) 41 Vt. 449. 8 Vt. 264.  
 FRANCHISE. 30 Vt. 190. 36 Vt. 452.  
 FREIGHT. 27 Vt. 77.  
 FRONTIER. (U. S. Neutrality act.) 15 Vt. 162.  
 FULLED CLOTH. 14 Vt. 80.  
 FURNISH. (Liquor law.) 27 Vt. 523.  
 FURNISH THE CASTINGS. (Contract.) 36 Vt. 711.  
 GAME OR SPORT. (G. S. c. 119, s. 13.) 26 Vt. 530.

GET UP A MORTGAGE. 31 Vt. 570.  
 GOOD. . Not a warranty of quality in a sale. 1 Aik. 269.  
 GOODS. (G. S. c. 35, s. 18.) 35 Vt. 247.  
 GOOD AND COLLECTIBLE. 11 Vt. 265. 30 Vt. 127. *Ib.* 246.  
 GOOD COARSE SALT. 21 Vt. 437.  
 GOOD WARRANTY DEED. 33 Vt. 470. 13 Vt. 66.  
 GOOD WHITE MARBLE. 37 Vt. 114.  
 GRAIN—GRAIN IN THE STRAW. The expression in an officer's return describing the property attached by copy left in the town clerk's office, as all "the hay and grain in the barns and in stack," &c., was held to embrace grain in the straw. *Briggs v. Taylor*, 35 Vt. 57.  
 HABITUAL DRUNKARD. 34 Vt. 323.  
 HALF-BLOODED MERINO WOOL. 22 Vt. 301.  
 HEALTHY AND ABLE-BODIED. (Pauper acts.) 15 Vt. 200.  
 HEIRS. (Used as words of purchase.) 27 Vt. 475. 29 Vt. 240. 36 Vt. 210.  
 HEIRSHIP AND REPRESENTATION. 40 Vt. 354.  
 INADVERTENCE. (U. S. Stamp Act.) 44 Vt. 13.  
 INOUMBRANCE BE REMOVED. 13 Vt. 129.  
 INDORSE. 7 Vt. 351.  
 INFAMOUS CRIME. (U. S. Constitution.) 8 Vt. 57.  
 INHABITANT. (Trustee Act.) 2 Aik. 345.  
 INJURY. The word *injury*, as used in Stat. 1869, No. 4, s. 3, means unlawful damage or hurt, and not a justifiable act. *Smith v. Wilcox*, 47 Vt. 537.  
 INJURIOUSLY AND WRONGFULLY, (in an indictment.) 27 Vt. 103.  
 INN KEEPER. 6 Vt. 295.  
 IN REM. 20 Vt. 65.  
 INTERVENING DAMAGES. 1 Tyl. 264. 17 Vt. 46. *Ib.* 562. 19 Vt. 573. *Ib.* 592. 20 Vt. 297. 27 Vt. 276. 28 Vt. 757. 37 Vt. 16.  
 INTOXICATED. (Liquor Law.) 47 Vt. 294.  
 IRREPARABLE INJURY. 32 Vt. 423.  
 JUDICIAL ACT. 6 Vt. 509. 10 Vt. 261. 19 Vt. 304.  
 KNOWN PROPERTY. (Stat. Limitations.) 12 Vt. 240. 15 Vt. 727. 20 Vt. 113. 29 Vt. 538. 44 Vt. 97.  
 LAID OPEN TO BE WORKED. (Highway Acts.) 16 Vt. 415.  
 LEATHER. Payable "in leather." 17 Vt. 105.  
 LEGISLATURE. General Assembly. 4 Vt. 215.  
 LIEN. (Bankrupt Act.) 21 Vt. 529.  
 LOAD. (G. S. c. 25, s. 41.) 25 Vt. 162.  
 MASTER. (Master and apprentice.) Brayt. 158. 1 Vt. 69. 7 Vt. 446.  
 MAY,—in legislative resolution, construed as permissive. 44 Vt. 356.  
 MEANING TO SELL. (Clause added.) 18 Vt. 111.

- METES AND BOUNDS. (Levy of execution.) 9 Vt. 352. 27 Vt. 252.
- MONEY—means legal tender. 11 Vt. 268.
- MONTH—means calendar month. 2 Vt. 188.
- NEGOTIATE A LOAN. 29 Vt. 127.
- NEXT OF KIN—includes half-bloods. 1 D. Chip. 360.
- NEXT TERM. 10 Vt. 123. 11 Vt. 331.
- NON-RESIDENT PROPRIETOR. (Taxation.) 34 Vt. 433.
- NUMERALS. (Figures and characters.) 22 Vt. 433.
- OCCUPATION—a fact. 43 Vt. 717. 46 Vt. 47.
- OFFICER. (Stat. for impeding.) 6 Vt. 215.
- OR. (Marriage Act.) 2 Aik. 41.
- ORDER. (Forgery.) 23 Vt. 519.
- ORDINARY BUSINESS OF FAMILY CONCERNS. (Turnpike Acts.) 2 Vt. 512. 12 Vt. 212.
- ORDINARY CARE AND PRUDENCE. (As distinguished from that of a prudent and careful man.) 28 Vt. 184. 36 Vt. 591.
- OUT OF THE STATE. (Process Act.) 1 Aik. 107. 12 Vt. 212.
- PARTY. (Corporation.) 6 Vt. 315. (Town.) 38 Vt. 440.
- PEDDLER. 41 Vt. 139.
- PERFECTLY GOOD. (Sale of a note.) 7 Vt. 67.
- PER MILE. (Side tracks of railroad.) 27 Vt. 766.
- PERSON INJURED. (Inspections Act.) 26 Vt. 737.
- PERSON INTERESTED. (Probate appeal.) 10 Vt. 420. 16 Vt. 225.
- PERSONAL PROPERTY. 28 Vt. 26.
- PLACE OF PUBLIC RESORT. (Liquor Acts.) 34 Vt. 323.
- POUND. 36 Vt. 341.
- PREMISES. (In a deed.) 19 Vt. 272.
- PROBABLE CAUSE. (U. S. Revenue Acts.) 22 Vt. 655.
- PROPER AND LAWFUL AUTHORITY. The plaintiff and defendant were owners in severalty of several parts of a lot bounded on the west line of the town, and, in order to ascertain the true division line between them, it was necessary to ascertain the true south-west corner of the town. The parties, then supposing a certain point to be such south-west corner, agreed in writing that a certain line should be the permanent boundary between them, provided that the understood corner "shall not be moved on proper and lawful authority and manner either to the eastward or westward." *Held*, that the parties must have intended to refer to such a tribunal, for determining the corner, as the law has invested with authority to decide the question,—as, a court of competent jurisdiction; and that it could be determined in this present action of ejectment. *Bishop v. Babcock*, 22 Vt. 295.
- PUBLICATION OF AWARD. 28 Vt. 445.
- PUBLIC PEACE. 11 Vt. 236. 23 Vt. 323.
- PUBLIC PLACE. (G. S. c. 47, s. 4.) 31 Vt. 617. 36 Vt. 645. 40 Vt. 448.
- PUBLIC TAXES. 46 Vt. 773.
- PUBLIC USE. (Taxation.) 1 Vt. 350.
- PURCHASED. 48 Vt. 166.
- REASONABLE CAUSE. (U. S. Revenue Acts.) 23 Vt. 655.
- REASONABLE COSTS. 46 Vt. 724.
- REASONABLE TIME. 5 Vt. 299. 30 Vt. 633. 41 Vt. 233. *Reasonable time* does not begin to run, until some one interested in the matter calls for some thing to be done respecting it. *Cameron v. Wells*, 30 Vt. 633.
- RECEIVED INTO RECORD. 17 Vt. 619.
- RECORD, of deed, &c. 8 Vt. 172. 19 Vt. 77. 24 Vt. 27. 25 Vt. 273.
- RECOUPMENT. 28 Vt. 413.
- RELATIONSHIP. Reckoned by the civil law. 12 Vt. 661.
- REMOVAL. (G. S. c. 30, s. 73.) 46 Vt. 60.
- RENTS, ISSUES AND PROFITS. (Married Woman's Act.) 26 Vt. 741.
- REPRESENTATION. 40 Vt. 354.
- RESERVATION. 26 Vt. 64. 44 Vt. 416.
- RESIDE. 2 Vt. 437. 23 Vt. 275.
- REVERSION. (Special sense.) 15 Vt. 479.
- RIGHT. (Stat. Fraudulent Conveyances.) 10 Vt. 54. 26 Vt. 736.
- RIP-RAP WALL. 24 Vt. 608.
- ROAD—includes bridges. 12 Vt. 679. 20 Vt. 16.
- RUNNING AT LARGE. (G. S. c. 100, s. 29.) 46 Vt. 600.
- SAME OFFENSE. (Liquor Act.) 27 Vt. 325.
- SAW-MILL SAW. Part of machinery of the mill. 44 Vt. 629.
- SCHOOL PURPOSES. 45 Vt. 202.
- SELL. (Probate Act.) 44 Vt. 529.
- SEQUESTERED TO PUBLIC USE. 1 Vt. 336.
- SLANDEROUS WORDS. (Act restricting costs.) 1 Tyl. 164. 2 Vt. 434.
- SOLDIER IN ACTUAL MILITARY SERVICE. (Wills Act.) 39 Vt. 111. *Id.* 498.
- SOLE SEPARATE USE, OR SEPARATE ESTATE. 37 Vt. 78.
- SOUND AND RIGHT. 43 Vt. 608.
- SPIRITUOUS LIQUORS. 15 Vt. 290.
- SPRING—OF WATER. A spring of water is a place where water by natural forces usually issues from the ground. Hence, a grant of the privilege of taking water from *springs* in a particular locality, conveys no right to take the water from a place where it does not thus issue from the ground,—as by digging wells. *Magoon v. Harris*, 46 Vt. 264.
- STEER. (Cattle.) 20 Vt. 537.
- SUFFER. (Impounding acts.) 1 Aik. 316.
- SUFFICIENT SECURITY. 18 Vt. 87.
- SUIODE. 48 Vt. 335.
- SUIT. *Held*, that the word "suit" used in



Stat. 1864, No. 31, s. 1; the words "suit or proceeding at law" used in G. S. c. 36, s. 24, and the word "action" in the proviso of that section, are used in the same sense. *Caldenwood v. Caldendwood*, 38 Vt. 171.

**SUPPORT**—for one's self. 45 Vt. 300.

**SUPPORTS**—of a bridge. 38 Vt. 666.

**THEN AND THERE.** (In pleading.) 5 Vt. 28. 14 Vt. 296.

**TOOL.** 2 Vt. 404. 3 Vt. 183. 6 Vt. 594. 29 Vt. 248. 35 Vt. 427. 45 Vt. 472.

**TRANSIENT PERSON.** (Pauper Acts.) 6 Vt. 200. 10 Vt. 22. 19 Vt. 267. *Id.* 392. 29 Vt. 894. 33 Vt. 159. 44 Vt. 886. 46 Vt. 606.

**TREAT**, by way of. (G. S. c. 37, s. 16.) 38 Vt. 440.

**UNCOLLECTED DEMANDS.** 10 Vt. 529.

**VALUE RECEIVED.** 1 D. Chip. 345. 1 Vt. 247. 19 Vt. 202.

**VOTE**—means by vote of a majority. 38 Vt. 177.

**WAGER.** 22 Vt. 291.

**WARRANTY DEED.** 28 Vt. 382.

**WASTE.** 11 Vt. 293.

**WATER PRIVILEGE.** 20 Vt. 250.

**WEARING APPAREL.** 28 Vt. 249.

**WELL—OF WATER.** The conveyance of "a well," by that name, creates more than an easement, or right to take water. It creates a fee, and the term "well," *ex vi termini*, includes not only the orifice reaching down to the water but the whole opening in the earth before it was stoned, and the stone laid in the wall, and the water therein, and all the land within these outside boundaries. *Mizer v. Reed*, 25 Vt. 254.

**WHENEVER.** (G. S. c. 30, s. 73.) 40 Vt. 103.

**WILLFULLY.** (Trespass Act.) Brayt. 228.

The word *willfully*, as used in Stat. 1869, No. 4, s. 3, means such willfulness as a drunken person may have, and if the act is the result of such capacity for determining what he will do as the intoxicated person has, it is within the statute. *Smith v. Wilcox*, 47 Vt. 537.

**WORK OF NECESSITY.** (Sabbath Act.) 35 Vt. 297. 47 Vt. 28.

**WORTH \$60**—as descriptive of the article. 27 Vt. 237.

**WRITING OBLIGATORY.** In a declaration upon a jail bond, the words "writing obligatory" were held to be of the same import as *deed in writing*, and to imply both signing and sealing. *Denton v. Adams*, 6 Vt. 40. 32 Vt. 298.

**WRITTEN.** Ballot printed is *written*. 4 Vt. 535.

sition to be thereafter used on a trial of the cause in the county court. *Bowen v. Hall*, 23 Vt. 612. (Changed by G. S. c. 36, s. 4.)

**2. Deposition of party.** Before 1855, the deposition of a party, in the action of book account, could not be used before the auditor. *Pike v. Blake*, 8 Vt. 400; but might be used by the adverse party, as an admission. *Gilbert v. Toby*, 21 Vt. 306.

**3.** The witness act of 1852, No. 13, contemplated the examination of a party as a witness only in open court, and did not authorize the taking of his deposition. (This authority was first given by statute of 1855, No. 8.) *Armstrong v. Grincol*, 28 Vt. 376.

**4. Right of party to take.** It is the unquestionable right of a party to a suit to take a deposition in view of possible or supposable contingencies, to be used or not, as should seem expedient on the trial; and the legal duty of the witness to make his deposition does not depend on the contingency of its being used as evidence, nor on the settled and exclusive purpose to so use it. Though an important, but not exclusive, purpose be "to get light" as to pleadings and preparation for trial, this purpose is not unlawful in such sense as to deprive of the right to take the deposition at all. *In re Foster*, 44 Vt. 570.

**5.** This extends to the case of enforcing a deposition from the adverse party, even by a commitment to jail in case of a refusal. *Id.*

**6. Witness refusing.** The refusal of a witness, after having commenced the giving of his deposition, to answer further questions, and to perfect it by subscribing and swearing to it, is a refusing "to make his deposition," within G. S. c. 36, s. 12. *Id.*

**7. Death of deponent.** A deposition, not legally taken, does not become admissible by the deponent's death. *Johnson v. Clark*, 1 Tyl. 449.

**8. Commissioner.** A deposition taken otherwise than in the manner prescribed by the statute—as of a witness in the State by a commissioner appointed under a rule of court—is not admissible. *Farm. & Mech. Bank v. Hathaway*, 36 Vt. 539.

**9. Form, the law.** The form of the caption of a deposition is a part of the law. It is not a form got up in accordance with the provision of the law, but it is the law itself. *Hibbard, J., in Whitney v. Sears*, 16 Vt. 591.

**10.** Though the form given in the statute is to be regarded as a part of the law governing the taking of depositions, it has never been regarded as necessary that the form should be literally and exactly followed, but all it contains and requires should be substantially used and embraced, in order to make a sufficient compliance with the law. *Poland, C. J., in McCrillis v. McCrillis*, 38 Vt. 136.

## DEPOSITIONS.

**1. Cause in supreme court.** While a cause is pending in the supreme court, the law does not authorize a justice to take a depo-

11. The form of the certificate and caption prescribed by the statute is a part of the law relating to depositions, and must be observed in matters of substance, and facts required to be stated therein cannot be supplied by parol—as, that the deponent was sworn; or was incapable of traveling and attending court by reason of sickness. *Lund v. Dawes*, 41 Vt. 370; or that the adverse party lived more than 30 miles from the place of caption. (Under old statute.) *Chipman v. Tuttle*, 1 D. Chip. 179. *Pingry v. Washburn*, 1 Aik. 264.

12. **Notice.** A commission to take a deposition out of the United States must direct notice to be given to the adverse party, and such notice must be proved. *Ferguson v. Morrill*, Brayt. 44.

13. — **must be reasonable.** Whether a “reasonable time” has been allowed in the notice for taking a deposition, is entirely a matter of discretion with the court in which the deposition is to be used, which the supreme court will not revise. *Hough v. Lawrence*, 5 Vt. 299.

14. The notice of the time and place of taking a deposition should be such that the adverse party may have reasonable time and opportunity to attend, by himself, and his counsel in the cause. *Kimpton v. Glover*, 41 Vt. 283.

15. Thus, a party cannot be required to attend the taking of a deposition during a term of the court, unless by leave of court upon due notice and sufficient cause shown. *Id. Stephens v. Thompson*, 28 Vt. 77. *Bemis v. Morrill*, 38 Vt. 153.

16. Notice for the taking of a deposition set the time of taking as “on or about” a certain day. *Held* insufficient;—the time and place must be specifically named. *Miller v. Truman*, 14 Vt. 138.

17. Where a party verbally agreed with the adverse party upon the time and place of taking a particular deposition, and the deposition was taken accordingly, though without the attendance of the adverse party, and the party prepared and appeared for trial relying upon using the deposition;—*Held*, that the adverse party could not repudiate the agreement, and was estopped from objecting to the deposition for want of notice. *Ormsby v. Grandy*, 48 Vt. 44.

18. Under G. S. c. 36, s. 6, requiring notice of the taking of a deposition to be given to the adverse party;—*Held*, that in case of a number of plaintiffs or defendants, notice to one plaintiff or defendant who is a real party, or apparently such, is *prima facie* sufficient;—leaving it to the court to decide whether the party giving the notice acts in good faith in selecting the one to be notified, and whether the relations of the parties are such that the notice affords a reason-

able protection to the interests of all. *Spaulding v. Ludlow Woolen Mill*, 36 Vt. 150.

19. **Citation—Authority signing.** A justice, notary, or other officer signing the citation, who shall have been of counsel in the case, cannot authorize an indifferent person to serve it;—this being a judicial act. *St. Johnsbury v. Goodenough*, 44 Vt. 662.

20. **Service.** The service of such citation by reading is not sufficient. A deposition taken only upon such notice, was *held* not admissible. *Fitts v. Whitney*, 32 Vt. 589.

21. Legal notice to the attorney of a party to appear at the taking of a deposition, can be given only by a citation, duly served. *Brintnall v. Sar. & W. R. Co.*, 32 Vt. 665.

22. Such notice given to one, not an attorney in the cause, but only an attorney of the adverse party for a special service, was *held* not sufficient. *Id.* (G. S. c. 36, s. 6.)

23. **Return.** The return of the citation should be made to the magistrate issuing it. *Parker v. Meader*, 32 Vt. 300.

24. A citation was issued by a justice of Orange county, directed to any sheriff or constable in the State, citing a party in Caledonia county to be present at the taking of a deposition without the State, and was served in Caledonia county by a deputy sheriff of Orange county, and returned to the justice. *Held* correct. *Id.*

25. An apparent alteration in a citation is not, in the absence of evidence, to be presumed made after service, but before. *Davis v. Davis*, 48 Vt. 502.

26. **Name of magistrate to take deposition.** Where the name of the magistrate before whom a deposition is to be taken is inserted in the citation, the deposition is not admissible if taken before another magistrate. *Henry v. Huntley*, 37 Vt. 316.

27. Nor is it admissible, if the name of such magistrate is omitted in the citation. *St. Johnsbury v. Goodenough*, 44 Vt. 662. *Davis v. Davis*, 48 Vt. 502.

28. **Taking of the deposition—Time.** The adverse party notified to be present at the taking of a deposition, has not two hours after the hour named in the citation to make his appearance. The statute makes no provision requiring the magistrate to delay for the party. *Morrill v. Moulton*, 40 Vt. 242.

29. The plaintiff, being cited to attend the taking of a deposition, attended, and waited the full two hours after the hour set, without any appearance by the defendant, when, being informed by the magistrate that the time for taking the deposition had expired, he departed. *Held*, that the deposition thereafter taken according to a notice of adjournment given by the defendant, and not emanating from the magistrate, and where the plaintiff did not

attend, was not admissible. *Hennessey v. Stewart*, 31 Vt. 486. (G. S. c. 86, s. 9.)

**30. Adjournment.** The taking of a deposition may be adjourned by the magistrate, and a verbal notice of the adjournment, given to the adverse party by the magistrate, is sufficient. *Edgell v. Lowell*, 4 Vt. 405.

**31.** The magistrate may adjourn the taking of a deposition, though neither party appear, to another day than that first set, provided reasonable opportunity be given to the adverse party to participate in the taking, on the adjourned day. *Pindar v. Barlow*, 31 Vt. 529.

**32. Question of names.** Notice was given for the taking of the deposition of "Mrs. J. V. Perley." The deposition was signed by Emily A. Perley, and by that name, and she was the wife of J. V. Perley. This the adverse party knew when the notice was served upon him, and was not misled. *Held*, that the deposition was admissible. *Kent v. Buck*, 45 Vt. 18.

**33. Deposition taken abroad.** The county court has power, on the application of one party, to issue a *dedimus potestatem* to take testimony in a foreign country, without the consent of the adverse party. *Farnsworth v. Pierce*, 7 Vt. 83.

**34.** A deposition taken in a foreign government was *held* not admissible, without proof of the official character of the certifying magistrate, and of his authority to take depositions. *Bown v. Bean*, 1 D. Chip. 176.

**35.** The authority of a magistrate of another State to take depositions, and the fact that the deposition was taken according to the law of the place of taking, may be determined by the court upon their own knowledge, or upon the introduction of parol evidence, or in any other way which satisfies the court. *Danforth v. Reynolds*, 1 Vt. 259. 18 Vt. 387.

**36.** A justice of the peace in the State of New York has authority to take a deposition to be used in this State. *Pike v. Blake*, 8 Vt. 400. *Mattocks v. Bellamy*, 8 Vt. 463.

**37.** It is the settled practice in this State, to receive depositions taken in any of the United States, provided they *purport* to have been taken by competent authority, which is not impeached. The court will presume the officer taking the testimony to be lawfully entitled to the official character he assumes, and to have competent authority to take the deposition, until the contrary appears. *Crane v. Thayer*, 18 Vt. 162. *Barron v. Pettes*, 18 Vt. 385.

**38.** As to depositions taken without this State, it has sometimes been the practice to inquire of witnesses in regard to the power of certain officers, under the laws of such State, to take depositions, and perhaps the form of taking. But the rule finally established is, that the fact of their being taken is *prima facie* evidence of the power of the officer to take; and

where they are taken professedly according to the form of the place where taken, it is not required to produce a copy of the statute of that State, ordinarily, perhaps. *Redfield, C. J.*, in *Smith v. Potter*, 27 Vt. 804.

**39. Agent or attorney not to write.** The provision that "no agent, attorney, or person interested in any cause, shall write or draw up the deposition of any witness," (G. S. c. 86, s. 14), includes an agent or attorney employed by the party to take the deposition, although not otherwise employed in the case; but does not extend to one who should merely assist the magistrate in drawing up the deposition, as the agent of the magistrate, although paid by the party, but not acting essentially as his agent or attorney. *Moulton v. Hall*, 27 Vt. 233. See *Heacock v. Stoddard*, 1 Tyl. 344.

**40.** The *writing or drawing up* of a deposition, so prohibited, does not extend to the mere copying of it, but signifies composing, or inditing the story; giving it form, expression, and dress. *Moulton v. Hall*.

**41.** The law partner of the master who took certain depositions, acted as counsel in taking them, for the party for whom taken. Nothing more appearing,—*Held*, that the court could not presume that the partnership covered business of this nature, so as to bring the case within the prohibition of the statute. *Whitcher v. Morey*, 39 Vt. 459.

**42. Unfairness in taking.** Where a party was excluded, against his protest, from being present on the giving in of the direct testimony of a deposition;—*Held*, that the deposition was improperly admitted, although he afterwards cross-examined the deponent—it not appearing that he intended to waive the previous irregularity. *Pratt v. Battles*, 34 Vt. 891.

**43.** So, where the agent of the party in whose behalf the deposition was taken so interfered with the witness, by suggesting or dictating his answers, as to make it doubtful whether the answers taken down were such as the witness would have given, if left free to dictate them himself. *Id.*

**44. Jurat.** A deposition was *held* inadmissible, where the certificate was simply that the witness was sworn to the truth of the deposition—although the certificate further stated, that he was previously cautioned to tell the truth, the whole truth, and nothing but the truth. *Burroughs v. Booth*, 1 D. Chip. 106.

**45.** It is not important whether a deponent is sworn before he gives his evidence, or whether he swears to the deposition after it is made up by the magistrate. A certificate in either form satisfies the statute. *Barron v. Pettes*, 18 Vt. 385.

**46.** The jurat of a deposition following the letter of the statute form—"personally appeared A B, and made oath, &c.," not naming the de-

ponent—was *held* insufficient. *Lund v. Dawes*, 41 Vt. 370.

47. The jurat was, that the deponent “personally made oath,” &c., omitting the words “appeared and” after the word *personally*, as in the statute form;—*Held* sufficient. *Streeter v. Evans*, 44 Vt. 27.

48. **Caption.** The residence of a deponent appeared in the body of his deposition, but was not stated in the magistrate’s certificate. *Held* sufficient. *Houghton v. Stark*, 10 Vt. 520.

49. A deposition taken in a *qui tam* action is admissible, although in the caption the prosecutor is named as plaintiff, simply, omitting the *qui tam*. *Dupy v. Wickwire*, 1 D. Chip. 237. 45 Vt. 329.

50. —as to names of parties. It must appear in the caption that the deposition was taken at the request of one of the parties. Where it was certified to be have been taken at the request of A B, who was not a party, it was *held* not admissible. *Whitney v. Sears*, 16 Vt. 587.

51. Where the caption wholly omitted the names of some of the defendants, describing them as “Lyman Cobb and others,” the deposition was *held* not admissible. *Swift v. Cobb*, 10 Vt. 282. *Haskins v. Smith*, 17 Vt. 263.

52. The caption described the defendants as “H. C. & N. B. Flanagan”—both defendants having that same surname. *Held* sufficient. *Adams v. Flanagan*, 36 Vt. 400.

53. The caption stated that “the deposition was taken at the request of Carr & Blanchard, in which cause Carr & Blanchard are plaintiffs.” The style of the plaintiffs’ partnership was “Carr & Blanchard,” and by this name the suit was instituted. *Held*, that the caption was sufficient. *Carr v. Manahan*, 44 Vt. 246.

54. The omission, addition or misstatement of the initials of a middle name, in describing the parties in the caption, is not cause for excluding the deposition. *Allen v. Taylor*, 26 Vt. 599. *Isaacs v. Wiley*, 12 Vt. 674. *Hopkinson v. Watson*, 17 Vt. 91. *Walbridge v. Kibbee*, 20 Vt. 543.

55. The caption stated that the deposition was taken at the request of the “plaintiff,” without naming him, but in another part of the certificate it was stated who the plaintiff was. *Held* sufficient. *Harrison v. Nichols*, 31 Vt. 709.

56. In the writ, the plaintiff being named, was described as “a corporation duly established by an act of the legislature of the State of Connecticut, doing business at Hartford in the State of Connecticut.” In the caption of a deposition taken in the cause, the plaintiff named was described as “a corporation established in the State of Massachusetts.” *Held*, that the word “established” in the caption should be taken as expressing a state of being simply, and as if the words *in business* had been

inserted after it, and that it was sufficient—since the corporation might well be *doing business* at Hartford, and at the same time be *established in business* in Massachusetts. *Hayward Rubber Co. v. Dunklee*, 30 Vt. 29.

57. The caption of a deposition was: “Taken at the request of Robert McCrillis, defendant, and to be used in an action now pending between him and Evans McCrillis, plaintiff”—naming the court and term. *Held* sufficient. *McCrillis v. McCrillis*, 38 Vt. 185.

58. In the caption of a deposition, the christian name of one of two defendants was written Edward, instead of the true name, Edwin; but both defendants were correctly described as the trustees of a certain railroad, named—in which capacity they defended the suit, and appeared at the taking of the deposition. *Held*, that the deposition was admissible. *Mann v. Birchard*, 40 Vt. 326.

59. The citation for taking a deposition described the parties to the cause as—“Aretus Stephens is plaintiff, and Margaret Joyal, so called, administratrix of the estate of Joseph E. Joyal, is defendant.” The caption described them as, “Aretus Stephens as plaintiff, and Margaret Joyal, so called, is administratrix, is defendant.” On the docket the case was entitled, “Aretus Stephens v. Joseph E. Joyal’s estate.” *Held*, that as said Margaret was in fact the party defendant, the parties were sufficiently named, and that the deposition was admissible. *Stephens v. Joyal*, 45 Vt. 325.

60. —time, place, court and suit. In the caption of a deposition to be used before an auditor, the time and place of trial should be as definitely stated, as if taken to be used before a justice. *Pike v. Blake*, 8 Vt. 400.

61. Where a declaration on book is filed in offset, this is only a branch of the original cause, and a deposition to be used before the auditor, certified as taken to be used in the original cause, is properly so certified. *Cross v. Haskins*, 13 Vt. 536.

62. Where a deposition is taken to be used before auditors, the caption may describe the case as to be tried before the auditors, on a day certain, or “to be tried by the county court at a term next to be holden, &c.” *Churchill v. Briggs*, 24 Vt. 498.

63. A deposition taken to be used in a cause pending in the county court, which cause becomes discontinued by the death of the defendant and the appointment of commissioners, cannot be used on the trial of an appeal from the adjudication of the commissioners upon the same claim. *Austin v. Slade*, 8 Vt. 68. This was construing the statute most strictly, according to the letter. *Bennett, J.*, in *Pierce v. Paine*, 32 Vt. 231; and *quære*.

64. The time and place of the sessions of the several county courts being fixed by statute,

it is a sufficient designation of the court and time of trial for which the deposition is taken to be used, to describe them, in the caption, as "the county court *next* to be holden at"—naming the statute place of session. *Clark v. Brown*, 15 Vt. 658.

65. For the same reason, the place of session need not be named, where the county court and time are stated. *Chandler v. Spear*, 22 Vt. 388.

66. The caption of a deposition, taken on the first day of May, stated that it was taken to be used at a term "next to be holden on the first Tuesday of May next." *Held*, that either of the words "next" might be rejected, and that the deposition was admissible for the May term following the taking, or any subsequent term. *Gallup v. Spencer*, 19 Vt. 327.

67. The caption of a deposition, taken out of the State, described the court as to be held at "Woodstock within and for the county of Windsor," without naming the State, but named the party for whom taken as of "Ludlow in the county of Windsor and State of Vermont." *Held* sufficient. *Spaulding v. Robbins*, 42 Vt. 90. See *Harrison v. Nichols*, 31 Vt. 709.

68. Instance of disregarding the specific day named in the caption for the hearing before referees, where the record showed it erroneous, and the adverse party had sufficient notice. *Davis v. Davis*, 48 Vt. 502.

69. The caption of a deposition taken to be used before commissioners under the reference act of 1856, p. 10, described them as *referees*, without naming the court in which the cause was pending. On a trial of the cause by jury in the county court;—*Held*, that the deposition was not admissible. *Plimpton v. Somerset*, 42 Vt. 35.

70. **Agreement.** Where a deposition was taken according to a written agreement of the parties attached to the deposition, and so certified;—*Held*, that it was admissible, although the *time* and *place* of the trial were omitted in the caption,—the cause and trial being sufficiently identified. *Bates v. Maack*, 31 Vt. 456.

71. **Separate signatures.** The statute contemplates separate signatures of the magistrate, one to the *jurat* or certificate, and the other to the caption, of a deposition; and where these were separately drawn, a blank being left for the signature to the certificate, and the only signature being at the foot of the caption;—*Held*, that the deposition was not admissible. *Shed v. Leslie*, 22 Vt. 498.

72. But where the certificate and caption were drawn together, forming one connected statement of facts;—*Held*, that one official signature at the foot of the entire statement, was sufficient. *Hauhurst v. Hovey*, 26 Vt. 544.

73. **Other errors.** Where the cause of taking a deposition was certified in these words: "The deponent *being* more than thirty miles

from the place of trial"—instead of *living*; *Held*, that the deposition was not admissible,—that the defect could not be supplied by intendment, nor by the body of the deposition. *Barron v. Pettes*, 18 Vt. 385.

74. The cause of taking was stated thus: "The said deponent living beyond the jurisdiction of the court where the said action now pending is to be heard and tried," &c. *Held* equivalent to a statement that the deponent resided out of this State, and to be sufficient. *McCrillis v. McCrillis*, 38 Vt. 135.

75. "The deponent being in feeble health is the cause of taking this deposition,"—without stating that the deponent is thereby rendered *incapable of traveling and appearing at court*—is insufficient in the caption. *Lund v. Dawes*, 41 Vt. 370.

76. The certificate of the cause of taking was, that the deponent was so aged and infirm in health as to render him "unsuitable" to attend the trial—the statute word being *incapable*. *Held* insufficient. The word "unsuitable" being changed to *unable*, this was *held* sufficient. *Oatman v. Andreu*, 43 Vt. 466.

77. A deposition taken to be used in two different cases, though between the same parties, but not so taken by consent, was *held* not admissible. *Bemis v. Morrill*, 38 Vt. 158.

78. **Superscription.** "The within deposition was taken and sealed up by me"—omitting the name of the deponent—was *held* a sufficient superscription of a deposition. *Nye v. Spaulding*, 11 Vt. 501.

79. **Wrapper lost.** A deposition got separated from its wrapper, on which was the filing, and the county court found, on evidence, that the paper offered was the deposition originally filed, and admitted it. *Held*, that such determination was final. *Walbridge v. Kibbee*, 20 Vt. 543.

80. **Copy of deposition.** Where a deposition had been taken and filed, but was destroyed by the burning of the clerk's office where it was lodged;—*Held*, the witness being still living, that a copy of the deposition could not be used as evidence on the trial. *Follett v. Murray*, 17 Vt. 580.

81. But where the deponent had deceased, and on proof that the deposition was taken with all due formalities, and on proof of loss, a copy, proved to be correct, was *held* admissible, although the deposition had not been filed. *Lou v. Peters*, 36 Vt. 177.

82. **Conclusiveness of certificate.** The certificate of the magistrate of the cause for taking a deposition, is not conclusive,—as, that the deponent was incapable of appearing at court, &c. The magistrate acting as agent of the court, no deceit practised by him, or upon him, will be sanctioned. *Pingry v. Washburn*, 1 Aik. 264.

83. It is the province of the magistrate taking a deposition to determine the capacity of the witness to relate the facts; and where a boy of fourteen years had given his deposition, and the facts narrated were few and simple, the county court rejected the offered testimony of the magistrate to show apparent want of intelligence in the boy. *Held* correct. *Hough v. Lawrence*, 5 Vt. 299.

84. **Cause for taking—continuing.** Although the cause for taking a deposition may be temporary, more or less, it is to be treated as continuing and as existing at the time when the deposition is offered, unless the removal of the cause be shown by the opposite party. *Pierson v. Catlin*, 18 Vt. 77. *Randolph v. Woodstock*, 35 Vt. 291.

85. —**removed.** If a deponent is personally present in court, his deposition cannot be used. *Sergeant v. Adams*, 1 Tyl. 197.

86. A deposition, taken for the cause that the deponent resides more than 30 miles from the place of trial, cannot be used, if, at the time of the trial, he resides within that distance, the cause of taking having ceased. *Gallup v. Spencer*, 19 Vt. 327.

87. **Computation of distance.** The distance of the witness's residence from the place of trial, as affecting the right to take and use, or to enforce the giving of his deposition, is to be computed upon the way of usual travel from one point to the other,—although there be a shorter way not usually or but seldom traveled. *In re Foster*, 44 Vt. 570.

88. **Suit continued.** A deposition was taken by the defendant, the cause of taking being the inability of the deponent to attend the trial; but he was produced by the plaintiff at the trial, and testified. The witness afterwards died, and at a subsequent trial;—*Held*, that the deposition was admissible as testimony in chief;—as was also the testimony given by the witness on the former trial. *Starksboro v. Hinesburgh*, 15 Vt. 200. 42 Vt. 196.

89. A deposition was taken, the cause stated being that the deponent was going out of the State, not to return before the then next term of the court in which the suit was pending. The deponent did leave the State and had not returned before said term, at which the cause was continued without trial. After said first term and before the next, the deponent returned to the State, remained for a time, and again went out of the State and remained and was out of the State when the trial came on. *Held*, that the deposition was admissible. *Johnson v. Sargent*, 42 Vt. 195.

90. **Amendment.** A deposition was admitted, against exception taken thereto for a defect in the caption and certificate. After the term, the magistrate, without leave of court, amended his certificate making it conform to

the statute. On a second trial, the court admitted the deposition against exception. *Held*, that although on the first trial the court erred in admitting the deposition, and although the magistrate had no authority without leave of court to amend his certificate, yet, as such amendment might have been made by leave of court in its discretion, the subsequent admission of the deposition was a ratification of the act of the magistrate, and the admission of the deposition was not error. *Oatman v. Andreu*, 43 Vt. 466.

91. **Substance of deposition.** Where a deponent testified that he received of the defendant certain property for which he now claims pay of the plaintiff, and had credited the defendant therefor on the deponent's books, and settled with him therefor;—*Held*, that it was no objection to the admission of the deposition, that such books were not produced on the trial,—they not being within the plaintiff's control. *Cross v. Haskins*, 18 Vt. 536.

92. Where a witness in his deposition detailed a statement which H, a third person, had made, and added, that the defendant "affirmed all that H had previously stated;"—*Held*, that the deposition was admissible against the defendant. *Hicks v. Crane*, 17 Vt. 449.

93. A deposition, at the close of the examination in chief, had these words: "The above is a copy of a deposition which I gave in 1849 (except the date having been altered), when the facts were fresh in my recollection." Then followed the cross examination, and then the deposition was signed and sworn to. *Held*, that the deposition was admissible, and was a sworn statement of all the facts contained in it. *Robinson v. Hutchinson*, 31 Vt. 448.

94. The question being whether a negotiable promissory note had been transferred to the plaintiff in such way as to cut off a defense as against the payee, the deposition of the witness stated that the note was transferred to him by the payee "before the maturity thereof and before due; that he received the same in the course of business, without any knowledge or notice of any claim or defense, &c." The county court, on motion, ordered the words "in the course of business" to be erased, before submitting the deposition to the jury. *Held*, by a majority, that this was properly done,—that these words were only an expression by the witness of his judgment of the legal result of the facts which he had specifically stated. *Clough v. Patrick*, 37 Vt. 421.

95. Where a deposition is equivocal, the better rule is to admit the testimony, and leave the interpretation to the jury with proper instructions from the court; but the court may also put its own construction upon the evidence, and direct a verdict, but is not obliged to do so,

as it is in case of written contracts. *Powers v. Leach*, 26 Vt. 270.

96. Where a deposition is shown by special verdict of the jury to be wholly immaterial as evidence, the supreme court will not consider the question whether the county court erred in excluding it because of an alleged defect in the caption. *Fullam v. Goddard*, 42 Vt. 162.

97. **Practice.** A deposition once used becomes a part of the papers and exhibits of the cause, for use in any future stage of the same cause,—as, on appeal, or before auditors or referees. By allowing it to be once read without objection, the party waives, for that and all future trials of the case, all objections to any informality or irregularity in the taking, of which he has knowledge, whether apparent in the caption and certificate, or not; and can thereafter raise objections only to the competency of the witness, or the subject matter of the deposition. *Randolph v. Woodstock*, 35 Vt. 291. *Walsh v. Pierce*, 12 Vt. 130. *Perry v. Whitney*, 30 Vt. 390.

98. Where a deposition contains matter improper or irrelevant, it should not be delivered to the jury, and only such part be read as is admissible. *Wood v. Stewart*, 7 Vt. 149.

99. Though some portions of a deposition should have been excluded, if particularly pointed out and objected to, it is not necessarily error to admit the deposition against a general objection "for lack of substance." *Webb v. Richardson*, 42 Vt. 465.

100. The testimony of a witness given by deposition may be impeached by proof of inconsistent declarations of the deponent, without first calling his attention to them; and this, whether the deposition was taken with or without notice, and whether or not the adverse party attended the taking. *Downer v. Norton*, 19 Vt. 338. *Robinson v. Hutchinson*, 81 Vt. 443.

101. A party taking a deposition at law is not obliged to exhibit it to his adversary before trial, *Skinner v. Tucker*, 22 Vt. 78; nor to use it in evidence, nor to permit his adversary to use it, *Lord v. Bishop*, 16 Vt. 110;—although the adverse party appeared at the taking and cross-examined the deponent, and although the deposition has been filed, but not once used. *Wait v. Brewster*, 31 Vt. 516. *Wing v. Hall*, 47 Vt. 182.

102. A deposition, properly taken to be used before a justice, may be opened by the justice before the day set for trial, and can be used before an auditor after an appeal, although not used before the justice, nor filed in the county clerk's office. *Skinner v. Tucker*, 22 Vt. 78.

103. Depositions taken to be used in a case referred, need not be filed with the clerk before being opened, but the referee may open them, and should file them as opened by him;—the same as to an auditor. *Ladd v. Lord*, 36 Vt. 194.

104. **Ex parte depositions.** It was no objection to an *ex parte* deposition that it was not filed 30 days before the next term of court after it was taken, if it was filed 30 days previous to the term at which it was offered in evidence. *Smith v. Woods*, 3 Vt. 485. *Clark v. Brown*, 15 Vt. 658.

105. Only depositions taken *ex parte* were required to be filed 30 days before court. If taken with notice, the deposition was admissible without previous filing, although the case was such that the deposition might have been taken *ex parte*. *Wainwright v. Webster*, 11 Vt. 576.

106. Where a deposition was taken *ex parte*;—*Held*, that the magistrate must certify the reason why the adverse party was not notified; and that the court could not judicially take notice of any facts, as a reason for not so notifying him, which do not appear in the certificate. *Hopkinson v. Watson*, 17 Vt. 91.

107. Under the statutes for taking depositions without notice;—*Held*, that an *ex parte* deposition, taken to be used before auditors, was not required to be filed thirty days before the hearing. *Brigham v. Abbott*, 21 Vt. 455. *Churchill v. Briggs*, 24 Vt. 498.

108. A deposition taken without notice and not filed 30 days before court, and so inadmissible under the law as it then was, was *held* to have become admissible under s. 3 of the Act of 1854, No. 4, which repealed the former acts requiring such filing. *Armstrong v. Griswold*, 28 Vt. 376.

*Note.* By this Act (G. S. c. 36, s. 6), notice is required to be given in all cases, except as specified in s. 7, of same chapter.

109. **Fees.** The statute fee of thirty-four cents allowed to a justice for "taking a deposition including caption and certificate," does not exclude a proper charge for writing it. *Lockwood v. Cobb*, 5 Vt. 422.

## DIVORCE.

- I. CERTAIN CAUSES.
- II. POWERS OF COURT.
- III. PROCESS, PROCEEDINGS AND EVIDENCE.
- IV. DECREE AND ITS EFFECT.

### I. CERTAIN CAUSES.

1. **Alienation.** A total alienation of the affections of one or both of the parties, is not cause for a divorce. *Brainard v. Brainard*, Brayt. 55.

2. **Idiocy.** Nor, that the wife has become an idiot and impotent. *Norton v. Norton*, 2 Aik. 188.

3. **Refusal to support.** A husband appro-

priated to his own use all his wife's property, having none of his own, and then abandoned her without any means of support, and refused to provide support. This continued for several months. The court granted the wife a divorce, on the ground of the husband's refusing support, having sufficient ability. *Hurlburt v. Hurlburt*, 14 Vt. 561.

4. In order to warrant the granting of a divorce to a wife, for the cause that the husband, being of sufficient ability to provide suitable maintenance for her, without cause, grossly or wantonly and cruelly refuses or neglects so to do (G. S. c. 70, s. 19), something more, and other, than the ordinary case of willful desertion, or abandonment and refusal to support, must exist. *Mandigo v. Mandigo*, 15 Vt. 786. *Jennings v. Jennings*, 16 Vt. 607.

5. **Willful desertion.** A desertion to be "willful," such as to justify the granting of a divorce for "willful desertion," must be without any sufficient cause, or any cause which the deserting party, upon probable proof, believes to be sufficient. *Powell v. Powell*, 29 Vt. 148.

6. Where a wife refused to go with her husband "to live with him near his relations," and both parties persisted in their contrary resolutions;—*Held*, that in the absence of evidence that this was a simulated excuse, the court would regard it as made in good faith; and that if her refusal to go and live with him in that locality, was because she believed that her comfort would thereby be destroyed, or her health, it should not be treated as willful. *Id.*

7. **Annulling marriage.** A marriage was annulled for fraud where the petitioner, a weak-minded woman and town pauper, was imposed upon by the town authorities to consent to the marriage, and they hired the petitionee, whose settlement was in another town, to go through the form of marriage without afterwards intending to fulfil or fulfilling its obligation, and where this was done only for the purpose of changing the petitioner's settlement. *Barnes v. Wyethe*, 28 Vt. 41.

8. A petition to annul a marriage, void from the beginning, cannot be sustained after the death of one of the parties, but only, in certain specified cases, where the marriage is voidable. *Pingree v. Goodrich*, 41 Vt. 47. (G. S. c. 69, s. 4. *Id.* c. 70, ss. 1, 2, 5, 6.)

9. Nor can an administrator in any case bring such petition, but only some relative of the deceased. *Id.*

10. It is only where a decree of nullity is necessary in order to the proper descent or distribution of an estate, that a petition for that purpose, after the death of one of the parties to the marriage, would seem to be necessary or proper. *Peck, J. Id.*

11. **Practice.** The practice of transferring petitions for divorce in the supreme court from

county to county, discountenanced. *Chamberlain v. Chamberlain*, 2 Aik. 232.

## II. POWERS OF COURT.

12. The supreme court, in the matter of granting divorces and annulling marriages, has other powers than those which are expressly conferred by statute. It has all those incidental powers which are necessary to make the exercise of the jurisdiction conferred by the statute effectual; and they are to be exercised in accordance with the principles and practice of the English courts in like cases. *LeBarron v. LeBarron*, 35 Vt. 365..

13. **Personal examination.** Thus, under a petition for annulling a marriage for the cause of impotency, the court, upon motion, ordered a personal examination of the defendant, but declined to order that he answer interrogatories;—the question of the court's power in respect to this last point, not decided. *Id.*

14. **Temporary alimony.** So, also, the court may order temporary alimony during the pendency of the petition, though not prescribed by statute. *Id.*—herein overruling *Harrington v. Harrington*, 10 Vt. 505. *Hazen v. Hazen*, 19 Vt. 603.

15. **Alteration of decree.** The court under G. S. c. 70, ss. 31, 39, has power to alter former decrees in divorce cases, at least so far as to give further allowances for the support of the minor children, and to grant further alimony; and is not limited to cases where the original decree was for an annual allowance. *Buckminster v. Buckminster*, 38 Vt. 248.

16. But although the court has the power, it should be very slow, under any circumstances, to revise or alter the original decree for alimony. (Reasons given for a refusal to increase the amount, but the petitionee was decreed to make up the original sum.) *Id.*

17. The statutes of 1870, Nos. 27 and 28, do not confer upon the county court jurisdiction in matters of divorce which had their inception in the supreme court by original libel. Orders in such cases, after decree, must be made in the supreme court. *Preston v. Preston*, 44 Vt. 680.

## III. PROCESS, PROCEEDINGS AND EVIDENCE.

18. **Petition and summons.** Petition for divorce dismissed, because the citation was signed by a justice of the peace, instead of a judge of the court. *Parker v. Parker*, N. Chip. 27.

19. So, also, because the citation, petition and order were served by an indifferent person not named in the deputation. *Moffat v. Moffat*, 10 Vt. 492.

20. *Held*, in such case, that it was not such a notice as the petitionee was bound to regard—



and, he not appearing, the court refused to proceed. *Spafford v. Spafford*, 16 Vt. 511.

21. Where the libel was not signed, and the summons was signed by a justice;—*Held*, that the proceedings were fatally irregular, and not cured by the appearance of the libellee at the taking of the testimony; and that these defects were not amendable. *Philbrick v. Philbrick*, 27 Vt. 786.

22. The date and issuing of the summons and order of notice attached to a petition for a divorce were *held* to be the time of "bringing the petition," under G. S. c. 70, s. 20, and not the date of the petition. *Blain v. Blain*, 45 Vt. 538.

23. **Specifications.** Where a divorce is sought for adultery, the libellee is entitled to a specification, either in the libel or separately filed, stating the *particeps* and the time and place of committing the offense, to be furnished before the testimony is taken. If the *particeps* be unknown, and presumptive evidence of guilt is relied upon, and a specification cannot be given, a statement of the evidence relied upon will be required. *Sanders v. Sanders*, 25 Vt. 713.

24. **Condonation.** The condonation of injury by husband or wife is always conditional upon kind treatment and proper conduct in future. In order to cancel the condonation, it is not necessary that the same injuries should be repeated, nor, if of a similar character, that they should go to the former extent. *Langdon v. Langdon*, 25 Vt. 678.

25. **Evidence.** The confession or admission alone of the party charged with adultery, has never been deemed sufficient evidence of the fact for the purpose of granting a divorce. *Gould v. Gould*, 2 Aik. 180.

26. On a petition for a divorce, the court admitted proof of the marriage, by reputation, where no record of the marriage could be found, and the magistrate who was reported to have solemnized the marriage was dead. *Mitchell v. Mitchell*, 11 Vt. 134.

27. The court permitted depositions to be read, which had been taken *ex parte* and not filed for 30 days, but taken during the term—though objected to for this reason. *Booth v. Booth*, 11 Vt. 206.

28. On the petition of a wife for divorce for intolerable severity;—*Held*, that the record of a conviction of the petitioner of an assault and battery upon the petitioner, was not admissible as evidence of the fact of the assault, but could only be proof of the fact of conviction. *Quinn v. Quinn*, 16 Vt. 426.

29. In divorce proceedings, it is not error, but is within the discretion of the court, to receive in evidence, on the trial, the record of a former adjudication, not specially pleaded. *Blain v. Blain*, 45 Vt. 538.

30. **Witness.** In divorce cases, notwithstanding the witness act of 1852, neither party can be a witness. *Manchester v. Manchester*, 24 Vt. 649. (Changed by Act of 1870, No. 27, where the cause alleged is intolerable severity; and by Act of 1876, No. 77, where the cause alleged was willful desertion.)

31. On a petition of a woman for a decree of nullity of marriage, on the ground that her consent to the marriage was obtained by force and fraud;—*Held*, that she was not a competent witness, although the pretended husband was dead, and although the petition was brought in her behalf by her guardian. *Davis v. Plymouth*, 45 Vt. 492.

32. **Amicus curiæ.** On a petition by a wife for divorce, the attorney of certain creditors of the husband who had levied on the husband's interest in the wife's real estate, moved for leave to appear and oppose the petition, in behalf of such creditors, and for leave to inspect the affidavits and other evidence, upon the suggestion that the petition was collusive between the husband and wife. The court refused both motions, but ruled that such attorney, or any member of the bar, might as *amicus curiæ* make such suggestion of collusion, and direct the attention of the court to such parts of the testimony as might show collusion, or as might be insufficient to sustain the petition. *Stearns v. Stearns*, 10 Vt. 540.

#### IV. DECREE AND ITS EFFECT.

33. A decree in a divorce case, giving to the mother the care and custody of the children, does not discharge the father from his natural obligation to contribute reasonably to their support; and the court will enforce this duty by subsequent decree under proper circumstances. So done in *Buckminster v. Buckminster*, 38 Vt. 248.

34. A lease by the husband of lands held in right of his wife is terminated by a divorce *a vinculo*; but the tenant will be entitled to his emblements. *Gould v. Webster*, 1 Tyl. 409.

35. An estate during coverture is determined by a divorce *a vinculo*. *Mattocks v. Stearns*, 9 Vt. 326.

36. A woman divorced *a vinculo* is not a competent witness against her former husband, on trial of an indictment for an offense committed during coverture. *State v. Phelps*, 2 Tyl. 374. *Tyler, J.*, dissenting. Overrules *State v. J. N. B.*, 1 Tyl. 36.

37. **Presumption.** A former marriage having been proved, the law will not presume a divorce in order to legalize a second marriage. *Morristown v. Fairfield*, 46 Vt. 33.

38. Where a decree of divorce is introduced in evidence, the jurisdiction of the supreme court in granting it will be presumed, and need

not appear by the record. *Huntington v. Charlotte*, 15 Vt. 48.

**39. Decree of another State.** Parties married in New York in 1831 and there lived together for more than 30 years, when they removed to S, in this State, and there resided some six months, when the husband left the wife, and she returned to New York, and was there domiciled when she preferred her complaint to the supreme court of New York for a divorce, alleging for cause the adultery of the husband in this State, while they were living here and afterwards, and setting the husband up as having had his last known residence in S, but as then being of parts unknown. Notice of the suit was given by publication in New York, and by mailing a copy of the complaint and summons to the husband at S, whence he had removed to another town in this State. He did not appear in the suit, and the wife obtained a decree of divorce and for alimony. *Held*, that said court acquired no jurisdiction of the person of the husband, to render a decree for alimony which bound him in this State;—and, *semble*, that the decree of divorce was not binding in this State. *Prosser v. Warner*, 47 Vt. 667.

### DOWER.

**1. Of what dowerable.** By the probate act of 1799, the widow of a testator, though he died without issue, could not, by waiving the provisions of the will, be endowed of any more than the use for her life of one-third of the real estate. *Hendrick v. Cleaveland*, 2 Vt. 329.

**2.** The widow of a mortgagee is not entitled to dower in the mortgaged estate, before foreclosure. *Reed v. Shepley*, 6 Vt. 602.

**3. When estate vests.** Under the statutes of this State, the widow's right of dower becomes a present vested estate on the decease of the husband, which does not depend on the contingency of the dower being assigned, or set out. *Dummerston v. Newfane*, 37 Vt. 9. *Grant v. Parham*, 15 Vt. 649. *Gorham v. Daniels*, 23 Vt. 600, 611.

**4.** "She may continue to occupy the same," with the heirs, before assignment (G. S. c. 55, s. 10), and so has a right of entry, and may convey her right. *Id.*

**5. Conveyance to defeat dower.** A conveyance made by a husband, in anticipation of his death, of all his property to his children, without valuable consideration, and with intent to defeat his wife of her dower and her share, as widow, of his personal estate, securing to himself at the same time the possession and use of the property during his life at a nominal rent, was *held* to be in fraud of the claims of

the wife, as his widow, and was set aside in chancery, although the husband and wife had separated. *Thayer v. Thayer*, 14 Vt. 107.

**6.** A person seized of lands executed a deed of them to his brother, for the consideration, as expressed, of love and affection and one dollar, and afterwards delivered the deed to a third person to keep in trust for the grantee, and to deliver to him, when called for, after the death of the grantor. After the grantor's death the depository delivered the deed to the grantee. *Held*, that the estate did not pass, for want of a legal delivery of the deed until the widow's right of dower had attached;—and she was allowed dower therein. *Ladd v. Ladd*, 14 Vt. 185.

**7.** One cannot hold, exempt from a widow's right to dower, property received by him from her deceased husband as a gratuity, or as an heir, and conveyed to him to defeat such right, but may be held to account in chancery to the widow to the extent of her right. *Jenny v. Jenny*, 24 Vt. 324.

**8. Waiver of jointure, &c.** By the Act of 1864, No. 66, the probate court may allow a waiver of a jointure, or other provision by settlement, or will in lieu of dower, upon application of the widow made at any time before the settlement of the estate is closed. It is not necessary that she should petition for an extension of the time for an election, within the eight months named in G. S. c. 55, ss. 5, 6. *Hathaway v. Hathaway*, 44 Vt. 658.

**9.** Where by an ante-nuptial agreement a pecuniary provision was made for the wife, expressed to be in lieu and discharge of her dower, and she covenanted therein not to claim any share of her husband's estate otherwise;—*Held*, the widow not having waived such provision within the time limited by the statute and according to its terms, that the probate court had no power to decree to her either dower, or homestead, although such provision was wholly inadequate to her support. *S. C.*, 46 Vt. 234.

**10. Contribution towards incumbrance.** One to whom dower has been assigned in an equity of redemption, may maintain a bill in chancery for contribution to the payment of the incumbrance, before having paid it;—the debt having become due, and the estate in danger. *Danforth v. Smith*, 23 Vt. 247.

**11.** In apportioning the incumbrance between the dowress and the reversioner, it is not competent for the court of chancery to prescribe any rule for repairs of the estate. *Id.*

**12.** I do not think the American courts have generally required any tenant for life, certainly not a dowress in an equity of redemption, to keep down the interest of the mortgage. I see no reason why the dowress should. *Redfield, J. Id.*

**13. Jurisdiction of probate court.** The

probate court has exclusive jurisdiction of the assignment of dower, and if the dowress claimed to have a special rule of apportionment of a mortgage resting on the premises, the probate court, we are inclined to say, alone has the power to establish any such rule in her favor. But if the probate court assigns dower generally in an equity of redemption, without in any manner determining the proportion which the widow shall pay in lessening the incumbrance, this is equivalent to saying it shall be in proportion to her estate;—that is, one-third shall be placed upon the widow's thirds, and two-thirds upon the other portions; and the court of chancery, upon bill by the dowress for that purpose, will apportion the burden according to this general rule in equity, except so far as the parties may have waived that rule, by an agreement executed—the mere fact that the estate may have been purchased subject to the widow's dower, not seeming sufficient to raise any special

rule of apportionment, different from the general rule. *Ib.*

**14. Repairs.** A tenant in dower is not held, under G. S. c. 55, s. 18, to any more rigid rule in the management and preservation of the property, than would be observed by a prudent owner of the entire estate. If the want of repair is causing no immediate injury, the tenant may pay a reasonable regard to a present very high price of materials and labor, and wait a reasonable time for prices to be reduced to the ordinary level. What acts are not waste, considered and decided. *Harvey v. Harvey*, 41 Vt. 373.

**15. Setting out dower.** In the setting out of dower, it is the duty of the commissioners to appraise all the lands of the estate, and this they must do on view of the premises;—for lack of this, their report was set aside. *Kendrick v. Harris*, 1 Aik. 273.

As to assignment to widow, see PROBATE COURT, II. 2. (d).

## E.

### EJECTMENT.

#### I. EJECTMENT.

1. *For what the action lies.*
2. *The plaintiff and his title.*
3. *The defendant,—his possession,—ouster.*
4. *Joinder of defendants.*
5. *Declaration.*
6. *Defense.*
7. *Extent of recovery.*
8. *Effect of judgment.*

#### II. DECLARATION FOR BETTERMENTS.

##### I. EJECTMENT.

1. *For what the action lies.*

1. Ejectment does not lie for an easement,—as a right of way. *Judd v. Leonard*, 1 D. Chip. 204.

2. A, owning land in fee, allowed B to erect a house upon it, under a contract to pay B for the house when completed or convey him the land for a price stipulated, at A's election. The plaintiff, a creditor of B, set off the house on execution against him. The defendant, a creditor of A, set off the land, expressly excepting B's interest in the house, on execution against A. A had never expressed his election to B. *Held*, that the ejectment for the house lay for the plaintiff upon an ouster by the defendant. *King v. Catlin*, 1 Tyl. 355.

3. Commissioners set off to a widow, as dower, "three west rows of apple trees on the west side of the orchard, running north and south in the center between the third and fourth rows." *Held*, that this was a setting out of territory, and not merely a right to take and use the fruit of the trees; and that ejectment lay therefor. *Patch v. Keeler*, 27 Vt. 252.

4. Commissioners set to a widow, as dower, "two stalls at the south-west corner of the horse-barn," &c., "also twelve feet square on the loft over said stalls for hay." *Held*, that the identity of the stalls and space above could be shown by parol evidence; that the widow took a life estate therein, and that an action of ejectment lay therefor. *Ib.*

2. *The plaintiff and his title.*

5. **Equitable title.** Ejectment does not lie upon a mere equitable title. *Dewey v. Long*, 25 Vt. 564. *Cheney v. Cheney*, 26 Vt. 606. *South Royalton Bank v. Downer*, 28 Vt. 635. *Buck v. Gilson*, 37 Vt. 653.

6. Where A holds the legal title to lands, but in trust for B, and the same are set off on execution against B, the levying creditor acquires only the equitable title of B, and cannot maintain ejectment or trespass *qua. clam.*, unless where the previous legal title was in B and he had conveyed the land by a deed void as to creditors. The creditor's remedy is in equity. *Dewey v. Long*. *Buck v. Gilson*.

7. The plaintiff in possession of land under S sold his betterments to the defendant, who afterwards procured a conveyance of the land from S. *Held*, that the plaintiff could not maintain ejectment, although the defendant had not paid for the betterments, as agreed. *Downer v. Richardson*, 9 Vt. 377.

8. Under the general Banking Act of 1851, the plaintiff bank assigned a bond and mortgage to the State Treasurer. *Held*, that without a re-assignment, the bank could not maintain ejectment upon the mortgage, for want of title. *South Royalton Bank v. Downer*, 28 Vt. 635.

9. **Legal title.** If the plaintiff in ejectment has no title at the commencement of the suit, it cannot be aided by any thing done afterwards. *McKenzie v. Putney*, N. Chip. 11. *Shattuck v. Tucker*, *Ib.* 69.

10. The plaintiff in ejectment, in order to recover, must have title both when his action is commenced and when it is tried. He cannot recover damages for rents and profits, unless he recovers the land sued for. *Burton v. Austin*, 4 Vt. 105. 20 Vt. 88. *Tryon v. Tryon*, 16 Vt. 318. *McDaniels v. Reed*, 17 Vt. 674. *Cheney v. Cheney*, 26 Vt. 606. (Changed by G. S. c. 40, s. 4.)

11. Where several plaintiffs in ejectment count upon a joint title and right of possession, such title and right must be in them all, not only at the commencement of the suit, but also at the time of trial. In such case, where some of the plaintiffs have parted with their title to the defendants before trial, the case is not aided by G. S. c. 40, s. 4. *Cheney v. Cheney*.

12. If the plaintiff in ejectment have title at the commencement of his suit and also at the time of trial, he may recover possession and his damages, notwithstanding he may, during the intervening period, have been without title by having conveyed the premises to a third person. *Beach v. Beach*, 20 Vt. 83. *Edgerton v. Clark*, 20 Vt. 264.

13. A decree of foreclosure obtained by a third person against the plaintiff, but not yet expired, does not prevent a recovery. *Catlin v. Washburn*, 3 Vt. 25.

14. The plaintiff is not prevented from recovering, by having executed a mortgage of the premises after the bringing of his action, although by a deed absolute in terms, but with a writing of defeasance back. *Gibson v. Seymour*, 3 Vt. 565.

15. An objection that the plaintiff had conveyed away his title, is answered by the fact that such deed was void, under the statute, by reason of an adverse possession. *Nason v. Blaisdell*, 17 Vt. 216.

16. **Plaintiff's possession.** In order to maintain ejectment, it is not necessary that the plaintiff, having title, should ever have been

actually in possession. *Rood v. Willard*, Brayt. 67.

17. Actual prior possession, not apparently tortious, will furnish a *prima facie* case for the plaintiff in ejectment. *Perkins v. Blood*, 36 Vt. 283. *Ellithorp v. Dewing*, 1 D. Chip. 141. *Hathaway v. Phelps*, 2 Aik. 84. *Doolittle v. Linsley*, *Ib.* 155. *Warner v. Page*, 4 Vt. 291. *Reed v. Shepley*, 6 Vt. 602. *Russell v. Brooks*, 27 Vt. 640.

18. An execution debtor remaining in possession of the land after levy is, by statute, tenant of the creditor, and may maintain ejectment against a stranger who ousts him. *Hathaway v. Phelps*.

19. A prior seisin and possession, though of less than fifteen years' standing, if not abandoned, give a right of entry, or right to maintain ejectment, against any one having no prior or better right. *Hall v. Dewey*, 10 Vt. 593.

See POSSESSION.

20. **Administrator—Heirs.** Where no administrator of an estate has been appointed, the heirs may maintain ejectment without an order of distribution from the probate court. *Buck v. Squiers*, 22 Vt. 484. See PROBATE COURT, II. 1.

21. The residuary devisee consented to a sale by F, the executor, of a part of the real estate, for the payment of debts and specific legacies; and to enable him to do so, without an order of sale by the probate court, he quit-claimed the premises to F, who sold the same, giving a bond to convey, and applied the price received in payment of such debts and legacies, and gave the purchaser authority to sue in the name of F, the executor, to recover possession of the premises then in the adverse possession of the defendant. The purchaser brought ejectment in the name of F, as executor, and, he having deceased, the suit was further prosecuted in the name of an administrator *de bonis non* of the estate. The deed to F, the executor, was not recorded, but the defendant had knowledge of it, and afterwards, and while the suit was pending, and after a decree of the probate court assigning all the estate to such devisee, he obtained from her a deed of the premises. *Held*, that the title of the devisee under the will, and the assignment by the probate court, enured to the benefit of the purchaser by force of the deed to F, the executor; that the defendant acquired no right by his deed, as against the plaintiff; that the action was not defeated by the devisee's deed to F, since the defendant was then in adverse possession; and that the suit could go on in the name of the administrator *de bonis non*. *Smith v. Hall*, 28 Vt. 364.

22. **Original proprietor.** The plaintiff in ejectment, on showing himself an original proprietor in the town, need not show a division

in severalty, unless the defendant shows such an interest as makes him tenant in common with the plaintiff, or shows a separate interest; but the plaintiff may recover, against a stranger to the title, his undivided interest, and put the defendant out of the possession of the whole. *Coit v. Wells*, 2 Vt. 818.

### 3. The defendant—his possession; ouster.

23. To recover in ejectment, the plaintiff must prove the defendant in possession at the bringing of the action. *Evarts v. Dunton*, Brayt. 70. *Stevens v. Griffith*, 3 Vt. 448. *Skinner v. McDaniel*, 4 Vt. 418.

24. In such action commenced in May, the defendant was proved in possession in March previous. *Held*, that this was sufficient evidence of possession at the commencement of the suit, where there was no evidence of abandonment. *Chilson v. Buttolph*, 12 Vt. 231.

25. To maintain ejectment, there must be not only a right of possession in the plaintiff, but a wrongful possession by the defendant amounting to a disseisin of the plaintiff. Where the possession is by the plaintiff's license or consent, the action will not lie. *Chamberlin v. Donahue*, 41 Vt. 306. *Campbell v. Bateman*, 2 Aik. 177.

26. Ejectment does not lie against a mere lodger or boarder with the party in possession. *Jones v. Webber*, 1 D. Chip. 215.

27. Acts of trespass upon land, by one claiming title, may be considered acts of possession and an ouster of the true owner, so as to enable him to sustain ejectment. *Chilson v. Buttolph*, 12 Vt. 231. 14 Vt. 404.

28. It is a sufficient possession in the defendant to sustain an action of ejectment against him, that he has a deed of the land upon record and claims it, though not in actual possession. *McDaniels v. Reed*, 17 Vt. 674.

29. In ejectment, it appeared that D was in fact in possession, having previously conveyed his right in the premises to the defendant, with an agreement that D should retain the use and occupancy of the land for one year. *Held*, that D thereby, became the tenant of the defendant, and that the defendant was so in possession, as D's landlord, as to be subject to the action. *Hodges v. Gates*, 9 Vt. 178.

30. The parties owned lands situate upon opposite sides of a stream and extending to the center. The defendant, by permission of the plaintiff, extended a dam from his side across, and upon the plaintiff's land, thereby setting back the water upon the plaintiff's land. Afterwards the plaintiff requested the defendant to remove the dam, or else take a lease of the land. The defendant refused to do either, but did not thereafter enter upon the premises, nor do any act thereon, though he continued to use the

water of the pond to supply his trip-hammer shop on his own side of the stream. *Held*, that here was no such disseisin, or wrongful possession, as would sustain ejectment;—that the plaintiff's remedy was to remove the dam himself. *Cooley v. Penfield*, 1 Vt. 244.

### 4. Joinder of defendants.

31. If the grantee in an absolute deed leaves the grantor in possession, the grantor becomes a *quasi* tenant of the grantee, a tenant at sufferance; and both may be joined as defendants in ejectment. *Patch v. Keeler*, 27 Vt. 252.

32. The plaintiff in ejectment is not obliged to join the landlord with the tenant in possession who holds by a parol lease, or by a written unrecorded lease, unless it is shown that the plaintiff, at the time of the commencement of his suit, had knowledge of the existence of such lease. *Wallace v. Farnsworth*, 2 Tyl. 294. *Brush v. Cook*, Brayt. 89. *Paris v. Bartlett*, 19 Vt. 639.

33. The grantee of a mortgagor, where the mortgagor remains in possession by his consent after the law day has expired, may be joined with the mortgagor as defendant in ejectment by the mortgagee, and both are liable for the rents and profits. *Warner v. Pate*, 5 Vt. 166.

34. The lessee of a mortgagor, who has taken possession under his lease which remains unexpired, does not free himself from liability to be joined in an action of ejectment upon the mortgage, by merely leaving the premises, without a surrender of his lease. *Collins v. Gibson*, 5 Vt. 243.

35. In ejectment against a mortgagor in possession, the suit will not abate for the non-joinder of the mortgagee, although the mortgagee, in such case, may properly be joined. *Paris v. Bartlett*, 19 Vt. 639.

36. A joint action of ejectment lies against all who occupy the premises, though their occupation be several—as, of different rooms in a house. Each may plead severally as to the part occupied by him, and disclaim as to every other part, if he does not choose to be responsible for the other defendants. *Marshall v. Wood*, 5 Vt. 250; and see 18 Vt. 309. 26 Vt. 13.

37. **Freehold action.** A freehold action before a justice to be restored to possession of lands leased, under G. S. c. 46, s. 22, is analogous to an action of ejectment. The lessee and his several subtenants may be joined in it as defendants, although the lessee is not in actual possession, and although the subtenants claim, and are in possession of, several and distinct portions of the premises; and if such defendants sever in their defense, the damages may be apportioned among them according to their respective possessions, and separate judgments

may be rendered therefor. *Middlebury College v. Lawton*, 28 Vt. 688.

### 5. Declaration.

**38. Description of premises.** In ejectment, the premises should be so described in the declaration, that the defendant may be able to ascertain for what he is sued, and that the record of the recovery may enable the plaintiff to point out to the sheriff, who serves the writ of possession, the land recovered, and that the record may furnish evidence of the limits to which the title is established by the judgment. *Davis v. Judge*, 44 Vt. 500. *Clark v. Clark*, 7 Vt. 190.

**39.** Thus, where the premises were described as bounded "south by the defendant's land," (*Davis v. Judge*); "on the north and west by the land on which the defendant resides," (*Clark v. Clark*)—judgment for the plaintiff was arrested after verdict, because the declaration left it uncertain to what extent, or to what limit, the plaintiff claimed.

**40.** A special verdict, in such case, that a certain line indicated on the plaintiff's plan was the true line, was held not to cure the defect, inasmuch as the plan was not incorporated into the record, and, if it could be, it could not be located on the land. *Davis v. Judge*.

**41.** Where the lands of a town had been surveyed into lots and numbered, though never legally divided;—*Held*, in ejectment by an original proprietor, that the land was sufficiently described by the number of the lot, with parol evidence that the lot bore that name and description. *Coit v. Wells*, 2 Vt. 318.

**42.** In ejectment the land was described, after giving the *terminus a quo*, by courses and distances only, without reference to lot lines, or any ancient survey, or any certain or natural monuments. *Held*, that the lines must be run according to the direction of the magnetic needle at the time the action was brought. *Brooks v. Tyler*, 2 Vt. 348; and see 13 Vt. 263.

**43. Amendment.** An amendment of the statutory form of a declaration in ejectment, by adding an allegation of special damage done to the premises, is allowable, in the discretion of the court. *Lippett v. Kelley*, 46 Vt. 516.

### 6. Defense.

**44. Abatement.** The non-joinder of the landlord, with the tenant as defendant in ejectment, can only be taken advantage of within the rules applicable to pleas in abatement. *Wallace v. Farnsworth*, 2 Tyl. 294. *Tucker v. Starks*, *Brayt*. 191.

**45. Common source of title.** Where both parties claim title from the same person, neither

can dispute the title of such person. *Ames v. Beckley*, 48 Vt. 895.

**46. Outstanding title.** A defendant in ejectment who did not derive his possession from the plaintiff, and claims adversely, may, at any time before trial, purchase in an outstanding title to protect his possession. *Tucker v. Keeler*, 4 Vt. 161.

**47.** In ejectment, the defendant may show an outstanding title in a stranger, and such title may be established by presumptive proof, although the defendant be in no way connected with it. *Townsend v. Downer*, 32 Vt. 183.

**48.** As against a prior actual possession, not apparently wrongful, a defendant in ejectment cannot set up an outstanding title in a stranger unless he connects himself with that title; and the rule that the plaintiff in ejectment must recover by the strength of his own title, without regard to the weakness of the defendant's, must be taken subject to this qualification. *Perkins v. Blood*, 36 Vt. 273. *Hathaway v. Phelps*, 2 Aik. 84. *Stevens v. Dewing*, *Id.* 112. *Braintree v. Battles*, 6 Vt. 395. *Russell v. Brooks*, 27 Vt. 640. *Stacy v. Bostwick*, 48 Vt. 192.

**49.** A defendant in ejectment cannot claim that the taking of a lease by the plaintiff from a party to whose title the defendant is a stranger, was *in law* an abandonment of the prior possessory right of the plaintiff. As to him, the question is one of fact. *Perkins v. Blood*.

**50. Estoppel.** A deed was executed in 1819, but retained subject to the control of the grantor, until his death in 1836, and after his death was delivered by his administrator. The deed conveyed a life estate to his daughter A, remainder to "her eldest son which should be living at the time of her decease." A went into possession under the deed, and occupied until 1829, and then conveyed in fee with warranty; and her grantee and successors in the title occupied, under the deed from her, until after her death in 1865. In ejectment by such eldest son against the last grantee;—*Held*, that the defendant could not impeach the deed. A for want of a proper delivery, so as to set up a title by adverse possession under color of title given by the deed of A to him. *Ford v. Flint*, 40 Vt. 382.

### 7. Extent of recovery.

**51. As to interest and quantity.** In ejectment the plaintiff recovers according to his right, though it be less than he declares for;—thus, he may sue for a whole lot, and recover a less quantity; may declare for an estate in fee, and recover against a stranger a term of years; may declare for an interest in severalty, and recover the share of a tenant in

common. *Evarts v. Dunton*, Brayt. 67. *Chapin v. Scott*, N. Chip. 33. 1 D. Chip. 41.

52. The plaintiff in ejectment declared for and recovered a fee, upon proof of an estate for 999 years. The court refused to set aside the verdict. *Rood v. Willard*, Brayt. 67.

53. **Damages—Mesne profits.** The claim for mesne profits, after judgment for the plaintiff in ejectment, is local in this State, in New Hampshire and at common law. *Burgess v. Gates*, 20 Vt. 326.

54. In ejectment, under the statutory form of declaration, the plaintiff recovers, as damages, mesne profits derived only from the use and occupancy of the land, and not for such acts of trespass as arose from the wanton misconduct of the defendant. Hence, a judgment in ejectment is not a bar to an action of trespass for such acts committed while the action of ejectment was pending. *Walker v. Hitchcock*, 19 Vt. 634.

55. The plaintiff in ejectment may recover, in addition to mesne profits, all damage done by the defendant to the premises while he was wrongfully in possession, provided such damage is specially declared for; and such profits and special damage may be reckoned from the time of actual ouster, although that was before the date laid in the declaration. *Lippett v. Kelley*, 46 Vt. 516.

56. On default in ejectment for lands held by levy of execution against the defendant, mesne profits, as damages, are to be computed from the date of the levy. *Little v. Meachum*, 1 Tyl. 438.

57. **Where there are several defendants.** In ejectment against several, as against a landlord and sundry tenants holding under him, the plaintiff may recover, as damages, the rents of the whole premises against all the defendants, although they may have severally held only distinct parts of the premises in severalty, unless they separate in their defense by a disclaimer under the statute. *Wires v. Nelson*, 26 Vt. 13; and see *Lamson v. Sutherland*, 13 Vt. 309. *Rood v. Willard*, Brayt. 67. *Marshall v. Wood*, 5 Vt. 250.

58. In ejectment against S and M, where M was in possession as tenant of S, judgment passed against both, and they reviewed, and thereafter the suit was delayed, for some years, by an injunction from chancery procured by S, and finally judgment passed against both by *nil dicit*, when, on the assessment of damages, their relative situation to each other was disclosed, and it appeared that M had remained in possession only part of one season after the commencement of the suit. *Held*, that the plaintiff was entitled to recover rents and profits, as damages, against both jointly, for the full time he had been kept out of possession. Whether a different rule could, or could not,

be adopted, if M had suffered judgment by default, or disclaimed title as soon as he abandoned possession—*quære*. *Lamson v. Sutherland*, 13 Vt. 309. 20 Vt. 269.

59. In ejectment against landlord and tenant, and a joint verdict, damages cannot be assessed, embracing rents and profits which accrued before the entry of the tenant. *Edger-ton v. Clark*, 20 Vt. 264.

60. In ejectment against mortgagor and mortgagee, the mortgagee will not be answerable for rents and profits unless he has received them; and if the defendants plead severally, as they may, judgment for damages may be rendered against the mortgagor alone. *Marvin v. Dennison* (U. S. C. C.), 20 Vt. 662.

### 8. Effect of judgment.

61. **To settle title.** A general verdict in ejectment is conclusive of the title, as between the parties, according to the statute; hence, where the plaintiff is entitled to recover but a special interest, the verdict should be special, describing the interest recovered. *Warren v. Henshaw*, 2 Aik. 141.

62. The object of the action of ejectment in this State is not merely to recover the possession of lands, but to settle the title and establish the right of property thereto; and the judgment is, as between the parties, conclusive evidence of that title. *Marvin v. Dennison*, 20 Vt. 662. *Hunt v. Payne*, 29 Vt. 172.

63. A recovery in ejectment by an executor or administrator against the devisees or heirs of the estate, is conclusive as to his title, and also in behalf of an administrator *de bonis non* succeeding him, unless it appear that the devisees or heirs have acquired a right in the premises subsequent to such recovery. *Hunt v. Payne*.

64. One who unsuccessfully defends an action of ejectment brought against another who claims the land as his, is not necessarily concluded by the judgment in that case from again contesting that plaintiff's title;—as was allowed in this case in chancery. *Clark v. Lyman*, 8 Vt. 290.

65. The *prima facie* effect of a judgment may be qualified, even in ejectment, by showing by parol that the title was not in fact litigated; or by showing that the judgment was against the plaintiff, not on the title, but because he did not prove that the defendant was in possession; or because the defendant showed a temporary estate or right in himself, which has since expired. *Collamer, J., in Parks v. Moore*, 13 Vt. 183.

66. The defendant in ejectment pleaded in bar a former recovery in ejectment by his landlord against the plaintiff, alleging it to have been for the same land,—and this was traversed. *Held*, that the evidence must be confined to the

question of identity, for, (1), that was the issue; (2), the former recovery was conclusive, and could not be impeached by evidence which would have constituted a defense in that action. *Id.*

67. The defendant had conveyed to the plaintiff's grantor a right of land, with covenants of warranty. The plaintiff afterwards brought ejectment against one K for the whole right, and cited in the defendant to maintain his warranty, but proved K to be in possession of only one lot of the right, and that was the only lot in controversy on the trial. The plaintiff failed to recover of K. In an action on the covenant;—*Held*, that that judgment was conclusive as to the title of that lot only; and that the plaintiff could not, relying on the record alone, recover the value of the whole right, but only of that lot. *Brown v. Taylor*, 13 Vt. 631.

68. Where a judgment in ejectment had terminated the defendant's right of possession in land and the defendant still remained in possession and raised crops;—*Held*, that he did so without right, and acquired no title to such crops, although no writ of possession was ever issued. *Adams v. Dunklee*, 19 Vt. 382.

69. As a bar to action for mesne profits. A recovery in ejectment is a bar to an action of trespass for mesne profits, or assumpsit for use and occupation, for the period covered by the judgment;—and this, though only nominal damages, or no damages, were recovered. *Strong v. Garfield*, 10 Vt. 502. 33 Vt. 90. 46 Vt. 524.

70. As to landlord not joined. A landlord is not concluded by a judgment in ejectment against his tenant, where he is not joined in the suit. *Brush v. Cook*, *Brayt*. 89.

71. A judgment in ejectment against landlord and tenant is not conclusive of the title of the landlord, where it was obtained by collusion of the tenant; and, *held*, that the landlord might prove that he had no notice of the suit, and that an appearance entered by an attorney, as for both, was by the procurement of the tenant without authority of the landlord. *Rider v. Alexander*, 1 D. Chip. 267. (G. S. c. 40, s. 8.)

See LANDLORD AND TENANT; MORTGAGE; TENANCY IN COMMON.

## II. DECLARATION FOR BETTERMENTS.

72. The Betterment Act. It has always been held in this State and may be considered as settled law, that the *Betterment Act* is always in force, but suspended in its application by the restriction that it shall not extend to entries thereafter made; and that where this restriction is repealed, the act extends to all who were before within the restriction. *Whitney v. Richardson*, 81 Vt. 800.

73. Its application. Under the general issue, the defendant's claim for betterments can

be used only to the extent of excluding from the plaintiff's claim for mesne profits anything on account thereof. *Ford v. Flint*, 40 Vt. 382.

74. After judgment in ejectment, the defendant may, as matter of statutory right which the court cannot refuse, file his declaration for betterments, and upon such declaration the action for betterments must be tried. *Gage v. Ladd*, 5 Vt. 266. 17 Vt. 116. 18 Vt. 535. *Bingham v. Smith*, 1 Tyl. 287.

75. In a declaration for betterments, the questions of law in relation to the claim can only be determined on the trial to be had before the jury, subject to revision in the supreme court, and not on demurrer. *Beckley v. Willard*, 18 Vt. 538.

76. A declaration for betterments is a mere incident or adjunct of the action of ejectment, and is not a "cause tried" to which the right of review applies. *Gage v. Ladd*, 6 Vt. 174. 24 Vt. 688. *Allen v. Taylor*, 26 Vt. 599.

77. The right of a defendant in ejectment to recover for betterments (G. S. c. 40, s. 15), depends solely on his *bona fide* supposition that at the time of his purchase he was purchasing a title good in fee, &c. *Whitney v. Richardson*, 81 Vt. 800.

78. The records of previous conveyances are not such constructive notice of the true state of the title, as to preclude such supposition. *Id.*

79. Nor will notice to him, after his purchase, that his title in fee was doubtful, preclude him from recovering for betterments thereafter made. *Id.*

80. And he may recover for all betterments made by himself and by all his predecessors in the title, except such, if any, as did not suppose when they purchased that they were obtaining a good title in fee. *Id.* *Brown v. Storm*, 4 Vt. 37.

81. Where one purchased, by what he supposed a good title, an interest as tenant in common of lands and went into possession and made improvements, and was afterwards ejected by action by the right owner;—*Held*, in a declaration for betterments, that he was entitled to recover such proportion of the value of the betterments to the whole interest, as the part recovered bore to the whole. *Strong v. Hunt*, 20 Vt. 614.

82. No recovery can be had in a declaration for betterments founded on an alleged want of title in the defendant, (the plaintiff in the ejectment.) *Brown v. Storm*, 4 Vt. 37. 17 Vt. 114.

83. A levying creditor recovered in ejectment against a party who took a previous conveyance from the debtor, on the ground that such deed was fraudulent as to such creditor, and that the defendant participated in the fraud. In a declaration for betterments;—*Held*, that such judgment was conclusive of the right, and



of the facts found, and that no recovery could be had. It was not a case where the defendant in the ejectment had a right to "suppose such title to be good in fee." *Thompson v. Gilman*, 17 Vt. 109.

84. *Held*, that one could not recover for betterments made by himself, where his entry was made and the trial had while the restrictive provision of the Betterment Act was in force; nor for betterments made by his grantor, who did not suppose, when he made his purchase, that he was acquiring a good title. *Winslow v. Newell*, 19 Vt. 169.

## ERROR.

- I. WRIT OF ERROR.
- II. WHAT IS REVISABLE ON WRIT OF ERROR, OR EXCEPTIONS.

### I. WRIT OF ERROR.

1. **When the writ lies, and when not.** *Held* (1802), that a writ of error would lie from a justice's judgment in a criminal case. *Brckett v. State*, 2 Tyl. 152. (Since changed by statute, G. S. c. 80, s. 95.)

2. A writ of error does not lie to test the authority of the tribunal to act as a court and render a judgment, since such writ supposes a record and a judgment, and so the existence of a court to render it. *Adams v. Wheeler*, 1 D. Chip. 417. 2 Aik. 195.

3. A writ of error does not lie for rejecting a report of auditors, or referees—this being but an interlocutory proceeding, and there being no judgment in the case. *Richards v. Wheeler*, 2 Aik. 161. *Id.* 369.

4. But where the court, in such case, rendered judgment for costs;—*Held*, that a writ of error lay. *Chittenden v. Wright*, 2 Aik. 198.

5. Error lies to reverse a judgment rendered upon a report of auditors, as in other cases. *Read v. Barlow*, 1 Aik. 145.

6. Probably, questions of law standing upon the record by a report of auditors, or upon pleadings, or placed upon the record by agreement of the parties, may be revised by writ of error, although no exceptions to the judgment, in conformity with G. S. c. 80, s. 57, be filed. *Redfield, C. J.*, in *Small v. Haskins*, 30 Vt. 174, citing *Carpenter v. Dole*, 18 Vt. 578.

7. From a judgment dismissing a suit with costs, being a final disposition of the suit, error lies. *Barber v. Ripley*, 1 Aik. 80.

8. Two writs of error, one for error in law and the other for error in fact, may be sustained at the same time, for reversing one and the same judgment. *Herring v. Selding*, 1 Aik. 101.

9. The statute giving an appeal to the supreme court did not take away the remedy by writ of error, in any case. *Hathaway v. Allen*, 1 Aik. 18. (1825.)

10. In trespass to the person and to property, the general issue was pleaded and joined, as to the first, and a justification was pleaded, as to the second, which was demurred to. The record showed no trial of the issue of fact, and no judgment except in these words: "Damages, \$53; costs \$37.58; agreed to." *Held*, that there was error in the record and judgment, and the same were set aside. *Andrew v. Conro*, Brayt. 72.

11. The court will not sustain a writ of error *coram nobis* for error in law, where the same point was decided in the same cause on motion in arrest. *Cook v. Chipman*, 2 Tyl. 45, *note*.

12. Where a party traverses a defective pleading, and the issue is found against him and judgment follows, he cannot assign for error such defect. *Brydia v. Platt*, 2 Tyl. 369.

13. A writ of error does not reach such formal errors as the omission of a *similiter*, or of the word *plaintiff* in the *ad damnum*, nor noticed below. *Stons v. Van Curler*, 2 Vt. 115.

14. A writ of error does not lie for entering up too large a judgment through an error in computation, or misprision of the clerk, but application for correction of the error, should be made to the court which rendered the judgment. *Campbell v. Patterson*, 7 Vt. 86. *Arthur-ton v. Durkee*, 2 D. Chip. 20.

15. After plea to the action, the plaintiff's incapacity to sue,—as, that being administratrix, she had before suit married, whereby her right was extinguished—can no longer be questioned, either in the progress of that cause, or afterwards by writ of error. *Lyman v. Albee*, 7 Vt. 508.

16. If a *feme sole* plaintiff marries pending the suit, and it proceeds to judgment without objection taken on the ground of her coverture;—*Held*, that the judgment is not erroneous;—the coverture was but matter in abatement. *Bates v. Stevens*, 4 Vt. 545.

17. The omission to suggest upon the record the death of one of several plaintiffs, or defendants, pending the suit, and the entry of judgment in the names of all, is not, in a case where the cause of action survives, such an error as to warrant a reversal of the judgment. On writ of error for this cause, the judgment was affirmed in the name of the survivor. *Herring v. Selden*, 1 Vt. 14.

18. If it appears distinctly upon the record that the defendant in error is entitled to judgment, the judgment below will not be reversed for an error which could not have affected the result. *Houghton v. Slack*, 10 Vt. 520.

19. **Parties.** All the parties against whom a judgment is rendered must join in a writ of

error. Hence, where one of the parties was an infant, and the writ issued within one year after his arriving of age;—*Held*, that it came within the saving clause as to infants, and so was not barred as to either. *Priest v. Hamilton*, 2 Tyl. 44.

**20. When returnable.** Writ of error abated because not made returnable to the next term after signed. *Rogers v. Brace*, Brayt. 21.

**21.** Where a term of the supreme court intervenes between the service and the return of a writ of error, such writ is not abatable merely, but is absolutely void. *Brace v. Squire*, 2 D. Chip. 49. 25 Vt. 350.

**22. Supersedeas.** A *supersedeas*, on allowing a writ of error, only affects the execution and leaves the judgment in force, on which debt or *scire facias* may be maintained. *Dictum. Ib.*

**23.** An order of *supersedeas* arrests forthwith all the proceedings, to remain *in statu quo*; and, if to an execution, renders the execution wholly powerless and inoperative. Where such order was exhibited to a sheriff after he had levied an execution, but before sale, and he still insisted upon collecting it, and it was paid to him;—*Held*, that he acted without authority, and was liable, in an action for money had and received, to repay the money. *Hopkinson v. Sears*, 14 Vt. 494.

**24.** The showing of an order of *supersedeas* to the person to be affected by it, is a sufficient service to bind him. *Ib.* See G. S. c. 42, s. 3.

As to *Bail in error*, see RECOGNIZANCE.

See G. S. Ch. 42 for provisions regulating *Writs of error*.

*Form of a writ of certiorari in error*, *Brackett v. State*, 2 Tyl. 152.

## II. WHAT IS REVISABLE ON WRIT OF ERROR, OR EXCEPTIONS.

**25. Common law proceedings.** A writ of error (or exceptions) does not lie to the action of the county court, except when it exercises its jurisdiction substantially according to the course of the common law. The remedy, in other cases, is by *certiorari*, *mandamus*, or other proper writ. *Stiles v. Windoor*, 45 Vt. 520. *Beckwith v. Houghton*, 11 Vt. 608. *Courser v. Vt. Central R. Co.*, 25 Vt. 476. *Whitcomb v. Burlington & Lamoille R. Co.*, Chittenden Co., January T, 1877.

**26. Change of law.** A court of error is only to determine whether error was committed at the time of rendering the judgment which is on review; to do which, we are to look at the matter as the law then stood, and not at any alteration of the law since. *Barker v. Esty*, 19 Vt. 181.

**27.** The error of admitting an incompetent witness is not cured by the fact that, pending the exceptions, a statute has been passed under

which he would be competent on another trial. *Hulett v. Hulett*, 37 Vt. 581. *Johnson v. Dexter*, 37 Vt. 641.

**28. New facts.** The supreme court can only pass upon the case as it was in the county court. No new proof can be made, nor new facts introduced—not even facts proved by record. *Blake v. Tucker*, 12 Vt. 89. 19 Vt. 364. 25 Vt. 564. *Note.*

**29. Harmless error.** A judgment will not be reversed for an error in the judge's charge, where it could not have affected the verdict rendered, and where justice has been done. *Ross v. Bank of Burlington*, 1 Aik. 43. 24 Vt. 265.

**30.** Though the county court in their charge may lay down a rule which, as a naked proposition of law without reference to the facts, could not be supported, yet if in its application to the facts in evidence the jury could not have been misled by it, a new trial will not be granted. *Brackett v. Wait*, 6 Vt. 411.

**31.** Although it is erroneous to leave matter of law to the jury, yet if the verdict is in accordance with the law, the error is cured and the verdict will not be disturbed, nor the judgment thereon be reversed. *Danforth v. Evans*, 16 Vt. 538. *Castleton v. Langdon*, 19 Vt. 210.

**32.** It is not an error of which a party can complain, that the court omitted to charge upon a point raised by him, where a right charge would have been against him. *Beebe v. Steele*, 2 Vt. 314.

**33.** Although the ruling below was erroneous, yet if a correct ruling would have produced the same result, the judgment will not be reversed. *Burnell v. Maloney*, 39 Vt. 579.

**34.** A judgment will not be reversed for an error that, by the verdict, is rendered immaterial. *Nones v. Northouse*, 46 Vt. 587.

**35.** A party cannot except to a judgment because it awards him a greater sum than he claims, by having credited him a sum which should go to the credit of some other person, or firm. *Wheelock v. Moulton*, 13 Vt. 430.

**36.** A judgment is never reversed on exceptions for errors in the proceedings in the county court which have in no wise harmed the excepting party. *Sampson v. Warner*, 48 Vt. 247.

**37.** A judgment will not be reversed for a technical error in the charge, which had no bearing upon the case as it actually appeared in the court below. In order to warrant a reversal, there should be something more than the mere possibility that the jury were misled. There should be a reasonable probability, at least. *Fletcher v. Cole*, 26 Vt. 170.

**38.** The court refused to reverse a judgment rendered on the report of auditors, although the auditors admitted improper evidence, where it was so remote that it was absurd to suppose it could have had any bear-

ing in determining their findings. *Carter v. Wright*, 25 Vt. 656.

39. Where the plaintiff in ejectment claimed title through a supposed devisee, under a will improperly admitted in evidence because not duly probated, and recovered;—*Held*, that the judgment must be reversed, although it appeared that the plaintiff might, otherwise, have made title through the same party as heir,—his own evidence showing that the ancestor did not die intestate. *Ives v. Allyn*, 12 Vt. 589.

40. **Presumption in case of apparent error.** Where a verdict is general, the judgment must be reversed for any error which is the subject of exception unless it appears that both the verdict and the judgment would have been the same, if there had been no error. *Johnson v. Burden*, 40 Vt. 567.

41. Where the county court makes a wrong ruling, in a matter apparently material, against the party who is cast in the suit, it cannot be assumed in the supreme court that there was something in the case that made this of no importance, but this must be shown affirmatively, in order to heal the error. *Armstrong v. Colby*, 47 Vt. 359.

42. **Matters of fact—Issue of fact.** Where an issue of fact is put to the court, their finding, as to the facts, cannot be re-examined on writ of error, or exceptions. *Noble v. Jewett*, 2 D. Chip. 36. 1 Aik. 41.

43. The supreme court can no more revise the judgment of the county court in relation to matters of fact, than the verdict of the jury upon the same facts; so the sufficiency of the testimony cannot be inquired into, if it was legal in its character and tended to prove the issue. *Card v. Sargeant*, 15 Vt. 398. *Stevens v. Hewitt*, 30 Vt. 262. *West River Bank v. Gale*, 42 Vt. 27.

44. In ejectment, where the issue was tried by the court, there was evidence from which a jury might have inferred an adverse possession and ouster, and the county court found these facts. *Held* conclusive in the supreme court. *Kirby v. Mayo*, 13 Vt. 103.

45. Where an issue of fact is tried by the court, upon testimony properly before it, and the testimony warrants the judgment rendered, error cannot be predicated of it, on the ground that if the court had taken another view of the testimony, it could not have arrived at the result without an erroneous decision of a question of law. *Cilley v. Cushman*, 12 Vt. 494.

46. Where an issue of fact has been tried by the county court, without a jury, the supreme court cannot correct the judgment rendered, unless it appears that the whole testimony was clearly and legally insufficient to support the judgment, and that the county court was bound to have rendered judgment the other way. *Emerson v. Young*, 18 Vt. 603.

47. Where an issue of fact was tried by the court, and the whole evidence was stated in the exceptions, and the evidence did not warrant a recovery, the judgment rendered thereon for the plaintiff was reversed. *Benedick v. Champlain Glass Co.*, 11 Vt. 19.

48. Where an issue of fact is tried by the county court, and the facts are found and placed upon the record, the supreme court will revise the decision of the county court upon the legal effect of the facts found, and render such judgment as the county court should have rendered; and this applies to the case of an issue formed on a plea in abatement, as in other cases;—as where, in an action of book account, the supreme court reversed the judgment of the county court that the writ abate, and rendered judgment that the defendant account, and appointed an auditor. *Peach v. Mills*, 13 Vt. 501. *Vanderburg v. Clark*, 22 Vt. 185.

49. Where an issue of fact is tried by the county court and judgment is rendered upon the facts stated in the bill of exceptions, the judgment will not be reversed if the facts found, together with such inferences as may properly be made and legitimately drawn from them, are sufficient in law to uphold the judgment, although the case may not expressly find such inferences and deductions to have been made by the county court. *Smith v. Day*, 23 Vt. 656.

50. The supreme court cannot reverse a judgment rendered upon a finding of facts by the county court, on the ground of any apparent error in finding and stating the facts, where the evidence is not reported. *Roberts v. Welch*, 46 Vt. 164.

51. A question of fact decided by an auditor, and then by the county court on the report, cannot be revised by the supreme court, however questionable it may seem, unless there was no testimony tending to prove such fact. *Harrington v. Edson*, 24 Vt. 555.

52. It is never the province of a court of errors to deduce inferences of fact from a case agreed, a special verdict, or a report of referees, or of auditors. Thus *held* in a case where it was evident from the judgment below that the county court did not intend to make the inference claimed. *Abbott v. Camp*, 23 Vt. 650; and see *Pratt v. Page*, 32 Vt. 13.

53. Upon a report of auditors, and especially of a referee, all inferences of fact are to be made, and can only be made, by the court to which the report is returnable; and after that court has rendered judgment upon the report, if the judgment can be fairly sustained by any inference of fact which that court might have drawn from the report, it is the duty of a court of error to presume that the judgment was based upon such inference. *Wills v. Judd*, 26 Vt. 617. *Emery v. Tichout*, 18 Vt. 15. *Stone v.*

*Foster*, 16 Vt. 546. *Birchard v. Palmer*, 18 Vt. 203. *Barber v. Britton*, 26 Vt. 112.

54. But where the county court is silent on the subject of its finding of facts, and only sends up its decision, accompanied by the report upon which it is based, the supreme court will only presume, in aid of the judgment, that the county court inferred such facts from the report as, on examination of it, the supreme court can see that the county court fairly ought to have inferred. *Pratt v. Page*, 32 Vt. 13. *Corliss v. Putnam*, 37 Vt. 119.

55. **Matters of discretion.** The decision of a court on a matter addressed to, and properly falling within, its discretion, is not subject to revision either upon exceptions, or writ of error, or *audita querela*. *Foster v. Austin*, 33 Vt. 615. *Sutton v. Tyrrell*, 10 Vt. 87. *Cummings v. Fullam*, 13 Vt. 459. *Perry v. Ward*, 18 Vt. 120. *Mosseaux v. Brigham*, 19 Vt. 457. *Rut. & Bur. R. Co. v. Wales*, 24 Vt. 299. *Banfill v. Banfill*, 27 Vt. 557. *Amidon v. Aiken*, 28 Vt. 440.

56. **Instances.** As, for the acceptance or setting aside of a report of referees. *Whitmore v. Rider*, 1 D. Chip. 279.

57. —For the refusal of an auditor to continue a case, *Hickok v. Ridley*, 15 Vt. 42;—so as to give opportunity to procure the release of an interested witness. *Newton v. Higgins*, 2 Vt. 366.

58. —For a denial of a motion for a new trial on the ground of misconduct of the jury—the question standing upon affidavits. *Bloss v. Kittridge*, 5 Vt. 28.

59. —For refusing to allow an amendment, although, by the rules of law, the court might have granted it. *Probate Court v. Hall*, 14 Vt. 159.

60. Though the county court, in the exercise of its discretion, may, under certain circumstances, refuse to receive a plea, yet the receiving of it, against objection, is not ground of exception or error, but being received it must be answered by replication, or demurrer. *Emerson v. Paine*, 9 Vt. 271.

61. That a deposition went to the jury without an obliteration of certain rejected portions, is not error in law revisable in the supreme court, so long as the court below made no wrong decision to which exception was taken. *Hopkinson v. Steel*, 12 Vt. 582.

62. Questions as to the manner of obtaining the disclosure of a trustee, the conducting of the examination, disposition of a motion to re-commit, and the like, rest in the discretion of the county court, and are not revisable on exceptions. *Peck v. Merrill*, 26 Vt. 686.

63. The allowing of an entry of non-suit, or the refusing to vacate such entry, whether in the action of account, book account or other action, rests in the discretion of the county

court which, whether properly or improperly exercised, can never be assigned for error. *Squires v. Burgess*, 31 Vt. 466.

64. The power to set aside a default, either at the term at which it is entered, or at a subsequent time on petition and citation, is incident to the court where the default is entered, and is addressed solely to the discretion of that court. Jurisdiction in such cases is not given to the supreme court. *Scott v. Stewart*, 5 Vt. 57. *Adams v. Howard*, 14 Vt. 158. *Goddard v. Fullam*, 38 Vt. 75; and see *Mosseaux v. Brigham*, 19 Vt. 457. *Foster v. Austin*, 33 Vt. 615.

65. The county court may, in their discretion, in cases not provided for by statute, strike off a default on terms, such as paying costs to the plaintiff, or of waiving some advantage. But where, in such case, the court ordered the plaintiff to enter his cause anew and pay the entry fees therefor, and upon his refusal ordered a judgment of non-suit;—*Held*, that this was error. *Hale v. Grinbold*, 1 D. Chip. 107.

66. The county court, on motion, dismissed an appeal from commissioners of claims, because the appellant had failed to give any notice to the adverse party of the appeal, as required by statute. *Held*, that this rested in the discretion of the county court, and could not be revised on exceptions. *Rutland & Burlington R. Co., v. Wales*, 24 Vt. 299; and see *State Treasurer v. Raymond*, 16 Vt. 364.

67. **Preliminary question.** It is not ground of error that the county court admitted secondary evidence of the contents of a paper, claimed to be lost, upon proof of loss which the supreme court might deem unsatisfactory. *Janes v. Martin*, 7 Vt. 92.

68. Most matters of discretion, occurring in the course of a trial, are considered subject to revision in a court of error, the facts being conceded or found;—as, in regard to the interest of witnesses, the loss of original papers, the challenge of jurors. *Redfield, J., in Hart v. Skinner*, 16 Vt. 144.

69. Upon a preliminary question made to the court—as upon the admission in evidence of a confession—the decision of the county court that the confession was voluntary and so admissible, may be revised in the supreme court where there was no conflict in the testimony, nor dispute about the facts upon which such decision was based. *State v. Walker*, 34 Vt. 296. *State v. Phelps*, 11 Vt. 116.

70. **Certificate of "willful and malicious."** After a verdict for one cent damages in an action for an assault and battery, upon an application for a certificate of "willful and malicious," the county court refused to receive the affidavits of the jurors that they did not consider the assault willful and malicious, and refused to hear further evidence beyond what

had been given on the trial, and granted the certificate. *Held*, that there was no legal error; that the opinion of the jury was not material; that no legal inference as to the character of the assault could be drawn from the verdict; and that it rested in the discretion of the county court whether, or not, to allow further hearing. *Robinson v. Wilson*, 23 Vt. 35.

71. Whether a trespass to land was willful and malicious, so as to entitle the plaintiff to full costs, must be determined by the court before which the action is tried. Where the county court refused such certificate, the supreme court refused to revise the decision. *Dodge v. Carpenter*, 18 Vt. 509.

72. If the county court were to grant a certificate of "willful and malicious" in a case where, from the form of action, none could be legally granted, or were to refuse one on the ground that the form of action would not allow it, such decision would furnish ground for exception or writ of error. But in cases where the court may grant the certificate upon proper evidence, the allowance or refusal of it becomes necessarily a matter of fact and of discretion which the supreme court cannot revise. *Soule v. Austin*, 35 Vt. 515.

73. The decision of the county court, granting a certificate under the statute that the cause of action arose from the willful and malicious act or neglect of the defendant, &c., is not revisable, so far as it proceeds upon matter of fact. If granted in an "improper case," it might be otherwise. *Robinson v. Wilson*, 22 Vt. 35. *Whiting v. Dow*, 42 Vt. 262. *Langdon v. Bowen*, 46 Vt. 512. *Styles v. Shanks*, 46 Vt. 612.

74. **Criminal case.** Before the Statute of 1856, No. 9, the allowance of exceptions in a criminal prosecution was matter of discretion, and could not be revised by the supreme court. *State v. Hebert*, 27 Vt. 595.

## ESTATES.

1. **Definition.** A devise of all the testator's "estate, real and personal," does not pass land of which the testator had but a naked possession, without title, or color of title. This is no estate. *Austin v. Rutland R. Co.*, 45 Vt. 215.

2. **Fee simple in form of lease.** A conveyance, in the form of a lease to one and his heirs, but reserving no rent, and to continue "so long as wood grows and water runs," was held to convey a fee. *Arms v. Burt*, 1 Vt. 303. *Stevens v. Dewing*, 2 Vt. 411.

3. So, where, in like case, the reservation of rent was "one barley corn annually, if demanded." *Propagation Soc'y. v. Sharon*, 28 Vt. 603.

4. **Distinction.** But where by the lease, though perpetual, a substantial and adequate annual rent was reserved during the whole term, with right of re-entry for non-payment of rent or non-performance of other conditions;—*Held*, that the relation of landlord and tenant was thereby created, and this was properly a lease only. *White v. Fuller*, 38 Vt. 193.

5. **Fee tail.** A devise of lands in this State, by will dated in 1774 and approved in 1781, to one "and to the lawful heirs of her body," was held to create an estate tail in the devisee; and held, that the deed of such devisee and her husband, executed in 1797, and after issue born of their marriage, which deed contained covenants of warranty, had no effect, by way of estoppel or otherwise, to bar the issue in tail after her death. *Giddings v. Smith*, 15 Vt. 344; and see 31 Vt. 300.

6. A conveyance of lands was in this form: "To said Almena and heirs of her body forever," &c., "to have and to hold," &c., "to the said Almena and heirs aforesaid, their heirs and assigns, to her and their own use and behoof forever." *Held*, that this created an estate in fee tail and not in fee simple. *Haynes v. Bourn*, 42 Vt. 686.

7. **Estate for life with remainder over.** A deed was to A B "for and during his natural life, and no longer, and in remainder to the heirs of his the said A B's body, C B, son of the said A B, *excepted*, forever." *Held*, that this did not create an estate tail in A B; that he took only a life estate, and that the remainder in fee vested immediately in his children who would become his heirs, if they survived him, excluding C B; that they took as purchasers, and not by inheritance. *Blake v. Stone*, 27 Vt. 475.

8. A deed of land was made to one in trust, for the use of Mary, wife of William, during the lifetime of said Mary, "and at the decease of the said Mary, the said land and premises to be and become the property of the five children of the said William and Mary, and their legal representatives in equal shares. The said premises to be held by the said trustee until the decease of the said Mary." Four of said children were living at the date of the deed, and the son of one who had previously deceased. *Held*, that each child, and the son of the deceased child, took a vested remainder in the premises at the date of the deed. *Gourley v. Woodbury*, 42 Vt. 395.

9. A deed of lands was "to Asenath Ford during her life time, and to her eldest son which shall be living at her decease, and to his eldest son, and to his eldest son at his decease, and so on from the eldest son to the eldest son to the latest generation." *Habendum*—"Unto her, the said Asenath Ford, and to her heirs, as aforesaid, to her and their own use and behoof

forever." *Held*, that the deed did not create an estate tail; that it created an estate for life only in Asenath Ford with a remainder to her eldest son living at her decease; that the words in the *habendum*, "heirs as aforesaid," refer to the specific designation in the granting part of the deed, and do not enlarge the grant, but are used as *descriptio personarum*, and such eldest son takes not by inheritance, but as by purchase under the deed; and hence, that such remainder man was not barred of his right in the remainder, by any deed of Asenath Ford. *Ford v. Flint*, 40 Vt. 382.

10. **Shelley's case**—The word "heirs." The rule in Shelley's case is of no special force in this State, except as one of construction and intention; and the term "heirs" will be construed as a word of purchase, where such was the plain intent of the grantor. *Smith v. Hastings*, 29 Vt. 240. *Blake v. Stone*, 27 Vt. 475.

11. *Quere*, whether under our system of conveyancing, we should make any distinction between a covenant to convey, a will or devise, and a deed, in regard to the necessity of the use of the word "heirs," to create a fee simple, or fee tail. *Redfield, C. J.*, in *Blake v. Stone*.

12. A lease was made to a married woman for 800 years, and at her decease the premises to pass to "the legal heirs" of her husband by her, and to D S. *Held*, that the word "heirs," the parties being then in existence, was a term of purchase; and that here was an estate in remainder to such "heirs" and D S, which the husband and wife could not convey. *Sawyer v. Little*, 4 Vt. 414.

13. A deed to a daughter for love and affection, granted to her "during her natural life all the use and profits" of certain lands, *habendum* "unto the said Diana during her natural life, and then to her heirs forever"—with a condition that she should keep the buildings and fences in repair, pay the taxes, cut no wood or timber except for the use of the farm, and reserving to the grantor the privilege of cutting timber as he should please; and upon failure of any of the conditions, the deed to be void. *Held*, that the deed conveyed an estate for life only to the daughter; that her husband surviving her was not entitled to curtesy; and that her children, under the term "heirs," took a fee simple as purchasers under the deed. *Smith v. Hastings*, 29 Vt. 240.

14. A deed of lands was made to A "in trust for the heirs of B, to be deeded to them when requested by said B, and to said heirs, heirs and assigns forever"—*habendum*, "to said A in trust for B's heirs and their assigns, to their own use and behoof forever"—covenanting "with the said A and the children of said B, their heirs and assigns." *Held*, that it appeared on the face of the deed, that by "heirs" of B was intended his children, and that *prima*

*facie* such children were then in existence, and that a valid trust was created. *Flint v. Steadman*, 36 Vt. 210.

15. **Courtesy**. By the statute of 1823 (Slade's Stat. 359,) (G. S. c. 55, s. 15) *curtesy* is given in lands of which "any man and his wife shall be seized in her right in fee simple," &c. *Held*, that the surviving husband does not become tenant by the *curtesy* of the land of his deceased wife, held by her in tail. *Giddings v. Cox*, 31 Vt. 607. *Haynes v. Bourn*, 42 Vt. 686.

16. **Relation of tenure**. There is no such relation of tenure between life tenants and remainder men under a will or grant, as that a partition between the life tenants will bind the remainder men. *Austin v. Rutland R. Co.*, 45 Vt. 215.

17. **Limitations**. The statute of limitations does not commence to run against the issue in tail until at the death of the donee in tail. *Giddings v. Smith*, 15 Vt. 344.

## ESTOPPEL.

- I. IN GENERAL.
- II. BY DEED.
- III. BY RECORD.
- IV. EQUITABLE ESTOPPEL.
- V. PLEADING, AND GIVING IN EVIDENCE.

### I. IN GENERAL.

1. **General rule**. One who claims to do an act in one right shall not afterwards be permitted to refer the act to another right, and for a different object. *Panton Turnpike Co. v. Bishop*, 11 Vt. 198.

2. **Instances**. An absolute refusal by the defendant to surrender to the plaintiff on his demand a note belonging to the plaintiff, unaccompanied by any intimation that he would ever comply, was *held* to preclude the defendant from setting up, on the trial, the excuse that he was away from home and had not the note with him when the demand was made, and so had not had reasonable time and opportunity to comply with the demand before the commencement of the suit. *Albee v. Cole*, 39 Vt. 319; and see *Whitcomb v. Hutchinson*, 48 Vt. 310.

3. As payment of the note in suit, the plaintiff took another note with different signers executed and payable in New York, embracing usurious interest. In answer to the defense of payment;—*Held*, that the plaintiff was estopped from setting up the illegality of the second note as being void by the laws of New York. *Austin v. Chittenden*, 38 Vt. 553. *Id.* 620. 36 Vt. 306. See *Austin v. Dorwin*, 21 Vt. 38.

4. S sold a quantity of wool to H, and

shipped it to B, a forwarder in Burlington, Vt., subject to the order of H, and sent H a bill of sale of the wool with advice of the shipment subject to his order. H took possession of the wool in Burlington and reshipped it, through B, consigned to D, a commission merchant in Boston, Mass., taking B's receipt for the wool to be forwarded, and sent the receipt to D and drew on D for the value of the wool, and D accepted and paid the drafts. While *in transitu* to D in Boston, the wool was attached by B and others as the property of H and was put back in the possession of B for custody. In trover by D against B for the wool;—*Held*, that S, H and B were each, by their acts and the papers, estopped from setting up any title to the wool as against D. *Davis v. Bradley*, 24 Vt. 55. *S. C.*, 28 Vt. 118. 45 Vt. 198.

5. Where an attempted reorganization of a school district by the selectmen was unauthorized and void;—*Held*, that the defendant was not estopped from denying the legality of such organization, by reason of having expressed his assent thereto, and by having presided as moderator of the district under such organization. There could not be one district as to him, and another as to others of the same territorial district. *Thomas v. Gibson*, 11 Vt. 607.

## II. BY DEED.

6. **Recital.** A recital in a deed does not conclude as an estoppel, because it is no direct affirmation. Where the verity is apparent in the same instrument or record, there is no estoppel to allege the truth. *Probate Court v. Matthews*, 6 Vt. 269.

7. The grantor in a deed poll, and, to some extent, all who claim title under him, are bound by recitals in the deed; but they are bound by a deed recited, only to the extent of its obligation, and are not precluded from producing it to the court, nor from proving that it is defective. *Blake v. Tucker*, 12 Vt. 39.

8. In order to an estoppel by deed, it is essential that it be a valid instrument. No estoppel by deed is created by a void deed. *Abell v. Lothrop*, 47 Vt. 375.

9. The recital in the defendant's deed of warranty, that the land so conveyed had been deeded to him by a certain person named, was *held* to be plenary evidence of that fact, and to estop him from disputing the fact recited, and from setting up a title adverse to it as derived from such person. *Green v. Clark*, 13 Vt. 158.

10. Where the terms of an indenture were recited in a bond conditioned for its performance;—*Held*, that the signers of the bond, upon general principles of estoppel, were concluded, and that other proof of the terms of the indenture was not needed. *Fletcher v. Jackson*, 28 Vt. 581.

11. **Grant.** A conveyance according to a lot line "as run out" by commissioners of the Legislature, was *held* to be such an acquiescence in the accuracy of the lot line, as to conclude the grantor from any claim by constructive possession beyond that line. *Hull v. Fuller*, 7 Vt. 100.

12. Parties having a special interest, as mortgagees, in certain machinery, joined in conveying their interest to a third person, but for the benefit of the mortgagor, and the machinery was thereafter run, used and possessed for his benefit. *Held* to be a release of their special interest, and that they were estopped from setting it up against a subsequent attaching creditor of the mortgagor. *Wakeworth v. Readsboro*, 24 Vt. 252.

13. Where a deed of the lands of a *feme covert* was not properly acknowledged by the *feme*;—*Held*, that as against the grantee it was good by way of estoppel, as showing claim of title under the wife, and that his possession would not become adverse to the heirs of the wife, until after their right of entry had accrued, which could not be during the coverture, or the husband's estate by the curtesy. *Smith v. Perry*, 26 Vt. 279.

14. Where one of two adjoining proprietors took from the other a warranty deed of a strip of land off the edge of the grantor's farm where the two farms joined;—*Held*, that this was in law a concession that the grantor was the owner of the strip so conveyed, and precluded the grantee from claiming that he was, at that time, holding by adverse possession to a boundary still farther upon the grantor's land. *Hodges v. Eddy*, 38 Vt. 327. See *Shepherd v. Hayes*, 16 Vt. 486.

15. E executed a deed of land to M, without M's knowledge or any understanding with him in respect to it, and left it in the town clerk's office with directions to have it filed but not put upon the record, and to retain it until he should pay M what he owed him, and then to return the deed to him, E. The town clerk afterwards, by mistake, recorded the deed, and E afterwards took the deed from the town clerk's office, and it was among his papers when they were destroyed by fire. M never had the deed in his possession and never saw it. He had no knowledge of it, until some six or eight months after it was executed, at which time E informed him of it, and at the same time told him it was recorded by mistake. E was indebted to M and others, and E's object in the transaction was to prevent his other creditors from attaching the land. On a bill brought by E against M and certain creditors of M, who had levied their executions upon the lands as the property of M, praying a perpetual injunction against setting up title to the lands;—*Held*, that there had been no such delivery of the

deed as to transfer any title to M; and that, as none of these claims were created upon the faith of the title being in M, the orator was not estopped, and was entitled to the relief prayed. *Elmore v. Marks*, 39 Vt. 538.

**16. Covenants of title.** Where A conveyed lands in mortgage with covenants of title to J, A having no valid title at the time, and such mortgage was duly recorded, and afterwards A acquired a title from the rightful owner, and thereupon conveyed with covenants of warranty to M, which deed was duly recorded;—*Held*, that the estate of M was subordinate to the mortgage to J; and, by *Bennett, J.*, the covenants in the mortgage bound A as an estoppel until he acquired a title, and then the estate which devolved upon him fed the estoppel, and ceased to be an estoppel only, and became an interest, and gave J precisely what he would have had, if A had had such title when he executed the mortgage. An estoppel which runs with the land operates upon the title, so as actually to alter the interest in it in the hands of the grantor, his heirs or assigns. *Jarvis v. Aikens*, 25 Vt. 635.

**17.** Where an executor, who was sole devisee under the will, conveyed lands, describing himself as executor and as selling and conveying by virtue of a license from the probate court, but added personal covenants of title and warranty, it was *held*, in an action of ejectment against a stranger to the title, that it must be understood that the executor intended to convey all the title he had, and, although no license to sell was shown, yet, as no claim of creditors intervened, the defendant could not set up a title in the executor, or the estate he represented, in defense,—for that the covenants in the deed operated as an estoppel against both the executor and the defendant, and to convey the whole title of the executor to the plaintiff. *Carbee v. Hopkins*, 41 Vt. 250; and see *Brown v. Edson*, 23 Vt. 435. *Middlebury College v. Cheney*, 1 Vt. 386. *Blake v. Tucker*, 12 Vt. 39, and *Smith v. Hall*, 28 Vt. 364.

### III. BY RECORD.

**18. Question adjudicated.** Where a fact appearing to have been put directly in issue on the face of the pleadings, is determined by a jury in one case, the verdict, when properly pleaded in a subsequent suit between the same parties, is conclusive as to the facts found by the verdict in the first case. This is by way of an estoppel. *Isaacs v. Clark*, 12 Vt. 692.

**19. Trespass for taking certain goods of the plaintiff from his warehouse;** Plea—that, the goods belonged to A, and that the defendant took them by legal process against A; Replication,—that the goods were the property of B, and not of A, and that the plaintiff had received

them of B to keep for him and to deliver on demand; Rejoinder,—that B brought his action of trespass against this defendant for the same taking, and on issue joined as to B's title, judgment was rendered for the defendant. On demurrer;—*Held*, that such judgment was well pleaded as an estoppel. *Burton v. Wilkinson*, 18 Vt. 186.

**20.** A sued B in trover for certain cloth, in which suit the point litigated was, whether B had taken and carried away the cloth. B obtained a verdict and judgment. Afterwards B sued A for slander in charging him with having stolen the cloth. A set up in justification, under a notice, the truth of the words spoken. *Held*, that the judgment in the former action was conclusive against the justification set up. *Perkins v. Walker*, 19 Vt. 144.

**21.** Where there is an attempt to fix a liability upon a party to a record in a new and independent proceeding, he is not estopped from showing the true relation in which he stands to such record—as that he was a mere nominal party. *Catlin v. Allen*, 17 Vt. 158. *Ross v. Fuller*, 12 Vt. 265.

**22. Justice's judgment.** *Held, arguendo*, that the judgment of a justice, not appealed from, in an action of trespass *qua. clau.* where the title of land is brought in question and litigated, is, like the judgment of the county court, conclusive of the title. *Small v. Haskins*, 26 Vt. 209. *Redfield, C. J., contra.* But see same judge in *Reynolds v. Provan*, 31 Vt. 638.

**23.** Collateral estoppels discussed. *Small v. Haskins.*

**24. Mutuality.** Estoppels must be mutual, and can only operate upon the parties to the issue, and those who stand in privity of estate, or descent. *Wright v. Hazen*, 24 Vt. 143.

**25.** A party not concluded by a record cannot insist that the other party shall be concluded thereby, for both must be bound or neither is. *Knapp v. Marlboro*, 31 Vt. 674. But see *Austin v. Hall*, 43 Vt. 110. *Spencer v. Dearth*, 43 Vt. 98.

**26.** Husband and wife, in a joint action against a town, had recovered final judgment for personal injury to the wife caused by the insufficiency of a highway. In a second action by the husband to recover his damages for loss of service of the wife, medical attendance, &c;—*Held*, that the former judgment was conclusive upon the town as to all the facts put in issue and found against it in that suit. *Lindsey v. Danville*, 46 Vt. 144.

**27.** The defendant had agreed to pay all claims that might thereafter come up against the plaintiff, as administrator of an estate. Such a claim was presented, and the defendant, being notified of it, promised to take care of it if sued, and was afterwards notified of suit brought upon it. He had before offered



to pay part of it. He neglected to attend the suit, and judgment passed against the plaintiff, which the plaintiff paid. In an action to recover the sum so paid;—*Held*, that upon these facts the defendant was precluded from objecting that this was not a claim against the plaintiff, as administrator. *Randall v. Kelsey*, 46 Vt. 158.

28. A portion of the demanded premises had been decreed to the plaintiff in a former suit in chancery in his favor against the defendant and others. During that suit, the defendant had obtained a deed of the premises, but the title under it was not in issue nor litigated, although the defendant might have been permitted to set it up, on application to the court at any time before the final decree. *Held*, in ejectment, that the defendant was not estopped by the decree from setting up his title under said deed. *Wing v. Hall*, 47 Vt. 182.

29. A party is not estopped by his bill in chancery, though sworn to by him, from explaining by his own and other testimony, the circumstances and qualifications under which he was led to sign and swear to the bill, when it is read in evidence against him in another cause. *Whitcher v. Morey*, 39 Vt. 459.

30. Case of an estoppel by rule of court. *Stillman v. Barney*, 4 Vt. 331.

See JUDGMENT.

31. Attachment and sheriff's return. An officer was commanded by his writ to attach the goods and chattels of the defendant to the amount of twenty dollars; and he made return thereon that, by direction of the plaintiff, he had attached all the hay, grain, oats and peas in the defendant's barn.—*Held*, (1), that the officer was estopped from saying that there was no hay, grain, oats or peas in the barn; (2), that the writ and return were *prima facie* evidence that the property attached was of the value of twenty dollars. *Barney v. Weeks*, 4 Vt. 146.

32. Where an officer, having an attachment for service, represents to the creditor that he has made a valid attachment of certain property, and thereby induced the creditor to rely upon it and forego making any further attachment, which he might then have done, the officer is bound by his representations, and estopped from showing that in fact he made no legal attachment. *Hovos v. Spicer*, 23 Vt. 508.

33. The plaintiff and defendant, two officers, made attachments of the same property at about the same time, so as to make it doubtful which had the priority, and thereupon they agreed to divide the property equally between them. The property was duly charged in execution by both sets of creditors, when the defendant seized and sold all the goods on the executions committed to him. In an action of trover;—*Held*, that such agreement was upon good con-

sideration; that the defendant could not, after that, raise the question of priority; and that the plaintiff could recover the value of one-half the property. *Lyman v. Dow*, 25 Vt. 405.

34. A sold a wagon to B, to remain A's property until paid for. B repaired it, adding four-fold to its value, and without paying for it, sold and delivered it to C. A sued B for this and other indebtedness, and attached the wagon in the possession of C, and sold it on execution. In an action of trespass by C against the attaching officer;—*Held*, that he could defend, under the general issue, as the servant of A, the owner; and that the attachment was no estoppel as to A's title as owner. *Child v. Allen*, 33 Vt. 476.

35. In *scire facias* upon a recognizance for the prosecution of an appeal, where intervening damages were claimed;—*Held*, that the defendant was not estopped by the sheriff's return of *nulla bona* on the execution, from showing the real condition of the debtor's property. *Green v. Shurtliff*, 19 Vt. 592.

36. The plaintiff, a mortgagee, brought a trustee writ upon the mortgage debt, of which the officer, without direction of the plaintiff, made additional service by attaching the mortgaged premises. The plaintiff entered his suit and prosecuted it—as the fact was found—merely to hold the trustee, and not with the intention of holding the premises on the attachment. *Held*, that this was not such a ratification of the attachment of the land, as to estop the plaintiff from his right of entry on the premises under his mortgage, although there was no notice given of any disclaimer of this unauthorized act of the officer. *Mason v. Gray*, 36 Vt. 208.

#### IV. EQUITABLE ESTOPPEL.

37. Rules and instances. If one stands by and sees his own property sold, or dealt with by another, he is estopped from afterwards setting up his own title against persons thus purchasing, or giving credit upon it, even though his own conduct resulted from mere carelessness or negligence, and with no real purpose to defraud. *Oady v. Owen*, 34 Vt. 598.

38. The plaintiff was in fact the owner of certain sheep in the possession of the defendant. The defendant, being about to sell the sheep, inquired of the plaintiff if he owned them, and offered to give them up if he did. The plaintiff replied that he had no claim to or interest in the sheep. Upon this understanding, the defendant sold them. *Held*, that the plaintiff was estopped thereby from setting up any title to the sheep. *Downer v. Flint*, 23 Vt. 527.

39. Where the grantee of lands was present when his grantor re-sold them, witnessed the

deed, received part of the purchase money and fraudulently concealed his own claim;—*Held*, at law, that he was estopped from setting up his claim against the second grantee. *Ivers v. Chandler*, 1 D. Chip. 48. S. C., N. Chip. 61.

40. B, a second mortgagee, stood by and saw the mortgagor induce A, a first mortgagee, to release his mortgage and take an assignment of another security which he supposed to be next to his own, but which was in fact subsequent to B's mortgage. B was an attesting witness to the assignment, and for a long time treated it as prior to his own claim, and led A into that belief. *Held*, that such substituted security should be preferred to B's mortgage. *Stafford v. Ballou*, 17 Vt. 329.

41. Where the defendant, occupying the position of a mortgagor, had surrendered the premises to the orator, who occupied the position of a mortgagee and had paid for them their full value, and the orator had conveyed the property with covenants of warranty, being induced by the acts, declarations and conduct of the defendant so to do, and upon the professed surrender by the defendant of all claim to the premises;—*Held*, that the defendant was estopped from asserting any claim to the premises, or right to redeem them, after they had become enhanced in value. *Wheeler v. Willard*, 44 Vt. 640.

42. Effect upon one's title as mortgagee in lands, by silence as to his claim, when he witnesses the sale to another as free from any claim, reads and witnesses the deed, and knows that the purchaser believes it to be unincumbered—see *Miller v. Bingham*, 29 Vt. 82, 89.

43. The rule as to an estoppel *in pais* applicable to personal property, was *held*, in an action of ejectment, to apply equally to real property, and a title of record was defeated thereby. *Shaw v. Beebe*, 35 Vt. 204.

44. An estoppel *in pais*, as affecting a legal title, is quite as effectual in a court of law, as in a court of equity. A resort to equity, in such case, was *held* unwarranted. *Vt. Copper Mining Co. v. Ormsby*, 47 Vt. 709.

45. Where A and T owned certain land in common, and their respective titles were spread upon the town records, and T mortgaged the entire premises, and A being present drew up and signed the mortgage note as surety for T, and drew the mortgage, filled up the certificate of acknowledgement, and witnessed the execution of the mortgage;—*Semle*, that the mortgagee and his assignee were chargeable with notice of the real title of T, and that A would not be estopped from setting up his title, there being no legal fraud; and *held*, that the defendant's levy of an execution upon the share of A in the land, as it appeared on the records, was good as against the mortgage. *Bigelow v. Topkoff*, 35 Vt. 273.

46. A was confessedly the owner of a certain number of acres off the south end of a lot of land, and B of the balance of the lot, but the parts were not distinguished by any line or boundary. They employed a surveyor to run and mark the line between them, and he, by mere mistake of measurement or calculation, ran and marked the line too far south. *Held*, that the parties were not concluded thereby—the true boundary not being disputed, indefinite, or uncertain. *Burnell v. Maloney*, 39 Vt. 579.

47. It is indispensable to the creation of an estoppel by representations, that the party to whom the representations are made, should rely and act upon them. *Id.*

48. Where A, using an alley as a way to his lot, saw B erecting a barn across the alley so as entirely to close the same, without objection or notice of any claim of right in the alley, but protested against extending the building four inches upon A's lot;—*Held*, that A was estopped from thereafter claiming a right of way in the alley against B and his grantees. *Dodge v. Stacy*, 39 Vt. 558.

49. A parol declaration or stipulation of the former owner of lands as to his possession,—as that he should not claim the land by possession,—does not estop his grantee, who took his deed while his grantor was in possession and without knowledge of such stipulation. *Hodges v. Eddy*, 41 Vt. 485.

50. A party occupying lands by consent of another, is estopped from setting up an adverse title in an action against him for use and occupation. *Clough v. Horton*, 42 Vt. 10.

51. A party may vary his liability and rights as fixed by a written contract, by what he may agree or do after the making of it, and so as to be estopped from insisting upon the interpretation apparent on its face. *Montpelier & Wells River R. Co. v. Langdon*, 45 Vt. 137.

52. **Requisites.** An estoppel *in pais* exists where a party makes a statement to another, which that other relies and acts upon, and which it would be a fraud in the party making the statement to afterwards controvert, so far as the statement affects the other's pecuniary rights. *Aldis, J., in Shaw v. Beebe*, 35 Vt. 208.

53. A man who has induced a course of action in another by his conduct or declarations, must stand by them, whether true or false. *Redfield, J., in Soper v. Frank*, 47 Vt. 368.

54. If one man has made a representation, which he expects another may or will act upon, and the other does in fact act upon it, he is estopped to deny the truth of the representation. This is in order to preserve good faith and prevent fraud, and is almost the only ground of an estoppel *in pais*. *Redfield, J., in Hicks v. Cram*, 17 Vt. 455. 45 Vt. 137.

55. Thus, where one suffered himself to be

held out to the world as a partner in a firm, he was *held* liable for all debts contracted by the firm upon the joint credit of themselves and him. *Ib.* 449. See *Davis v. Bradley*, 24 Vt. 64.

56. So, when A, knowing that B was proposing to purchase a piece of land adjoining A's land, pointed out to B the division line, and B made his purchase relying upon A's representations as to the line, A is estopped from disputing B's title up to that line. *Spiller v. Scribner*, 36 Vt. 245. *Halloran v. Whitcomb*, 48 Vt. 306.

57. By arrangement between the defendant (the maker of a promissory note indorsed to the plaintiff bank), and F (the president of said bank), it was for F to pay the note. When the note fell due, the defendant and his indorser called at the bank to attend to it, and they were then told by the bank's cashier that F had informed him that the note was for F to pay, and that F had directed it to be charged to him in his account with the bank, and that this had been so done, and they need give themselves no further trouble about it. Relying upon this as true, the defendant afterwards paid over to F a sum of money belonging to him in the defendant's hands, nearly enough to satisfy the note. In fact, F had not paid the note, and it was not charged to him in his account with the bank, and he died insolvent. *Held*, that the bank was estopped from recovering upon the note, even any balance which might be due from the defendant to F upon a settlement of accounts, although the cashier did not know, when he made those representations, that the defendant had F's money in his hands. *Manufacturers' Bank v. Scofield*, 39 Vt. 590; and see *Hickok v. Farm. & Mech. Bank*, 35 Vt. 476.

58. To give one's declaration the force of an estoppel *in pais* as against his claim, it should appear that such declaration was made with the intent of leading the other party to believe that such claim would not be enforced, and thereby such party has been led to do, or to omit to do, something in regard thereto that has been to his injury. *White v. Langdon*, 30 Vt. 599. *Strong v. Ellsworth*, 26 Vt. 366.

59. An equitable estoppel, or estoppel *in pais*, cannot be set up, unless it appears that the action of the party setting it up was influenced by the act, declaration or omission claimed to constitute the estoppel. *Woolley v. Edson*, 35 Vt. 214.

60. The declarations of a party cannot operate as an estoppel in favor of a person having no knowledge of them, and consequently in no way misled by them. *Bucklin v. Beals*, 38 Vt. 653.

61. Where the conditional guarantor of a note became acquainted, after his guaranty, with facts which constituted a defense for him;

—*Held*, that his omission to give notice of such facts to the holder and of his intention to avail himself thereof, was not a waiver of such defense, where the holder had not been induced to alter his course by not having notice. *Russell v. Buck*, 14 Vt. 147.

62. A promise by a debtor to an assignee to pay the claim assigned, but which was made without consideration, and was not made a ground of action, and which the assignee had not been induced to act upon to his prejudice, was *held* not to operate as an estoppel to the setting up, in equity, of an equitable set-off against the assignee, which existed against the assignor at the time of the assignment. *Foot v. Ketchum*, 15 Vt. 258.

63. The plaintiff was in possession of three cows, two of which the defendant, an officer, attached upon a writ in favor of G. After the attachment, but before sale on the attachment, the plaintiff told G's attorney that he owned all three of the cows. Afterwards, but before the sale, he told the defendant that one of the cows attached belonged to his father, and the other was his own, and was his last and only cow, and forbade the sale of it; but the defendant proceeded to sell it. In an action of trespass for the taking and conversion of the cow;—*Held*, that the plaintiff was not estopped by his declaration to G's attorney, from claiming that this was his last and only cow; because, regarding the attachment as the trespass, the admission was made subsequent to it, so that the attachment could not have been made on the faith of it; and, regarding the sale as the trespass, the defendant took the risk as to which of the declarations of the plaintiff should prove to be true. *Robinson v. Hawkins*, 38 Vt. 693.

64. The defendant, administrator of a lessee of a farm and of stock in which the estate of the intestate had some interest, while proceeding to have the stock appraised and inventoried, inquired of the plaintiff (the lessor) if he claimed any of the property, and the plaintiff replied that he had no interest in it; whereupon the defendant proceeded and had the appraisal and inventory made, and returned and accepted by the probate court; but before the defendant had sold any of the property, the plaintiff claimed it of him and forbade the sale. In an action of trover for a subsequent sale;—*Held*, that the plaintiff was not estopped of his claim. *Turner v. Waddo*, 40 Vt. 51.

65. Assumpsit for two yoke of oxen that the plaintiff claimed to have sold to the defendant, through the plaintiff's agent. The defendant claimed that he bought the oxen as the agent of his son, and that the plaintiff's agent knew this at the time of the trade. The plaintiff called on the defendant for pay, and the defendant replied that he could not pay the

money, but offered his note, and said nothing indicating that the debt belonged to his son to pay. The plaintiff, in reply, said it was a cash trade and he wanted the money, and refused the note. The defendant's son afterwards became bankrupt. It not appearing that the defendant then understood that the plaintiff claimed that he was primarily liable, nor that the conduct of the plaintiff was influenced by the admissions or conduct of the defendant;—*Held*, that the defendant was not estopped from denying his liability. *Ripley v. Billings*, 46 Vt. 542.

66. A party is not bound or estopped by an admission or statement, when made in good faith, or under a mistaken impression of its nature or extent in fact. In order to an estoppel thereby, it must appear affirmatively that the declarations were made with an intent to induce a line of conduct which the other party would not otherwise have taken, and that in reliance upon those declarations that line of conduct was pursued—so that, if the fact stated or admitted were allowed to be disproved, it would operate as a fraud and injury to the party relying upon it. *Wakefield v. Crossman*, 25 Vt. 298.

67. No party is estopped by an admission made in ignorance of his rights, induced by an innocent mistake of facts in material points. *Thrall v. Lathrop*, 30 Vt. 307.

68. An estoppel *in pais* was held not to apply to a case where there was no intent to deceive by the representations made, and where the party's attention was not called to the material fact in question. *Church v. Fairbrother*, 38 Vt. 33.

69. A party cannot be covertly led into a declaration which shall operate as an estoppel *in pais*, or equitable abandonment of a claim, a kind of perpetual disclaimer. In order to this, he should be made fully aware of the interest of the party making the inquiry, or that the declaration is going to be, or will be likely to be, relied upon by some one. *Wooley v. Chamberlain*, 24 Vt. 270.

70. The defendant gave the plaintiff a promissory note for his accommodation and without consideration, to be used by him as collateral security for his debt to A, and it was so used. The plaintiff paid that debt. Afterwards, and while the note was overdue, A, proposing to take the same note as collateral security for a new obligation for the plaintiff, inquired of the defendant whether the note was due and whether there was any offset to it, but did not inform him that the debt for which it was originally used as collateral was paid, nor did the defendant know that fact. The defendant replied that the note was due, and that there was no offset to it. Thereupon A took an assignment of the note from the plaintiff as

collateral security for such new obligation assumed by A. In an action upon the note brought for the benefit of A;—*Held*, that the defendant was not bound by the admission so made by him, by reason of A's suppression of the fact that the debt was paid for which it had been first given as collateral; and that the plaintiff could not recover. *Sargeant v. Sargeant*, 18 Vt. 371.

71. Where one is inquired of as to a matter in respect to which his answer may affect his pecuniary interest, he has a right to know whether the person making the inquiry has an interest which entitles him to make it, and what the object of the inquiry is, and that the answer will be relied upon. Unless so informed, and where he may think that mere inquisitiveness, or idle or impertinent curiosity prompts the question, then his answers should not affect his legal rights, or pecuniary interests. *Hackett v. Callender*, 32 Vt. 97.

72. H purchased and paid for land, taking a deed in the name of F, but took and maintained possession as apparent owner. W, an attorney, having for collection a demand against H, inquired of him if he owned the land, and H replied that it belonged to F. Afterwards, W, having a demand for collection against F, again inquired of H if he had any claim to the land, and H answered substantially that he had not, but the land belonged to F; whereupon W attached it for the debt of F and set it off on execution. It appearing that W made no disclosure to H of the object of his inquiry, and that his intent was to keep H ignorant of his purpose;—*Held*, in a bill by H to enjoin the setting up of such levy, that he was not concluded by his answer so, under the circumstances, given, and that they were not sufficient to rebut the notice of equitable title raised by his possession. *Id.*

#### V. PLEADING, AND GIVING IN EVIDENCE.

73. Matter of estoppel, not relied on as such in the pleadings, cannot be urged to the exclusion of evidence of fraud in procuring the instrument claimed to be an estoppel. *Savryer v. Hoyt*, 2 Tyl. 288.

74. Where the matter does not amount to a full and complete estoppel, and cannot be pleaded as such, or the party has no opportunity to plead it, he may show it in evidence. *Dorset v. Manchester*, 3 Vt. 370.

75. Where a party has opportunity to plead matter in estoppel, he is bound so to plead it; and, if he omits it, the jury will not be bound by the estoppel, but may find according to the fact. If, however, there has been no opportunity to plead the matter as an estoppel, it may, in general, be given in evidence, and it will have the same conclusive effect as in cases

where it is pleaded. *Isaacs v. Clark*, 12 Vt. 692; and see 17 Vt. 419. 19 Vt. 144. 35 Vt. 580. *Lord v. Bigelow*, 8 Vt. 445.

76. A party cannot be estopped to plead the general issue. An estoppel can be replied only where the defendant pleads some particular fact or matter as to which he is concluded as party, or privy. On trial under the general issue, the matter relied upon as concluding the defendant can only be given in evidence. *Fry v. Cook*, 2 Aik. 342.

77. Where a former adjudication is relied upon as having determined the entire merits of the controversy now in hand, it need not be pleaded as an estoppel, but may be treated as an equitable defense, like payment, &c., and in some actions, as assumpsit, &c., may be given in evidence under the general issue; in others, as trespass, &c., it need only be pleaded as in any other plea in bar, and not as an estoppel. *Gray v. Pingry*, 17 Vt. 419.

78. The greatest strictness is required in pleading estoppels. Every fact necessary to create the estoppel must be alleged with the strictest certainty, and that all these facts appear by the record which is vouched as an estoppel; and the plea in its conclusion must rely upon the estoppel. The court then determines the matter on inspection of the plea, if demurred to, or of the record, if that be denied. *Id.*

79. Where a former adjudication is relied upon as settling some collateral fact involved in the present trial, and this is pleaded in estoppel, it must appear by the record of the former judgment vouched in the plea, in order to be conclusive, that that fact was put distinctly in issue and was determined. *Id.*

80. In order to estop a party from proving a fact because the fact had been found against him in a former suit, it must appear that the precise question was adjudicated in such suit. If, from the record relied upon, it appears possible that the question was left undecided, there is no estoppel, for an estoppel must be certain to every intent. *Aiken v. Peck*, 22 Vt. 255.

## EVIDENCE.

- I. NATURE, KINDS AND EFFECT, IN GENERAL.
- II. CIRCUMSTANTIAL AND CORROBORATIVE.
- III. PRESUMPTIONS—BURDEN OF PROOF.
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- VI. DYING DECLARATIONS.
- VII. TESTIMONY OF FORMER WITNESS.
- VIII. RES GESTÆ.
- IX. OPINION—PURPOSE, INTENT, &C.
- X. HANDWRITING — ATTESTING WITNESS.
- XI. ORDINANCES; PRIVATE STATUTES; FOREIGN LAWS; JUDICIAL PROCEEDINGS.
- XII. BEST AND SECONDARY.
- XIII. DOCUMENTARY.
  1. *Town clerk's records and certificates.*
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- XIV. PAROL EVIDENCE.
  1. *In general.*
  2. *To vary a writing; to give it application.*

### I. NATURE, KINDS AND EFFECT, IN GENERAL.

1. **Measure of proof.** There is no middle rule of evidence between that of criminal cases, where the evidence to warrant a conviction must exclude all reasonable doubt, and that of ordinary civil cases, where a bare balance suffices. But in civil cases, whenever the act alleged involves fraud, dishonesty or crime, the legal presumption of innocence which prevails equally in all cases, criminal or civil, must be overcome by evidence by the party who asserts the contrary. The stricter rule applied to criminal trials is on account of the penal consequences of a conviction. *Brady v. Bliss*, 35 Vt. 326.

2. This ordinary rule in civil cases was applied to an action of trespass for burning a barn, which involved the crime of arson. *Id.*;—and to an action of slander, where the plea justified charge of forgery. *Briggs v. Cooper*. *Id.* 329.

3. **Good character.** Evidence of general good character is not admissible in defense in civil causes, except where the question of character is directly in issue and material to the amount of damages,—as in slander, and seduction. *Aldis, J.*, in *Wright v. McKee*, 87 Vt. 161.

4. **Held**, not admissible in an action of trover, with a count in case, where the plaintiff's testimony virtually charged the defendant with the crime of embezzlement. *Id.*

5. **Affirmative.** As a general rule, other things being equal, affirmative testimony is entitled to more weight than negative. *Bates v. Cilley*, 47 Vt. 1. *Barrett, J.*, in *Hine v. Pomeroy*, 39 Vt. 219.

6. The prisoner claimed that on a day named he was at a circus at B, and returned to R on the midnight train. As tending to contradict

this;—*Held*, that the State might show by a witness, who knew the prisoner, that he attended the circus at B that day and returned to R on the midnight train, was in and out of the circus several times and went through the train, and did not see the prisoner. *State v. Phair*, 48 Vt. 366.

## II. CIRCUMSTANTIAL AND CORROBORATIVE.

**7. Relevancy—General rule.** All facts and circumstances upon which any reasonable presumption or inference can be founded as to the truth or falsity of the issue, or disputed fact, are admissible in evidence. *Richardson v. Royallton, &c., T. Co.*, 6 Vt. 496.

**8. Application.** Where the defendant was under a written contract not to sell certain property without giving the plaintiff ninety days' notice, and likewise allowing him a preference in the purchase;—*Held*, that such notice might be proved by circumstances, as also a waiver of such notice and preference. *Wood v. Stewart*, 7 Vt. 149.

**9.** If one receives of another several chattels at the same time and under like circumstances, and uses and sells a part as his own, with the knowledge of such other and without claim on his part, this, as evidence of ownership of a part, is evidence as to all. *Moon v. Hawks*, 2 Aik. 390.

**10.** The poverty of an execution debtor was held admissible in evidence, as having some tendency to prove that the execution might have been delivered to the officer, with instructions not to commit the debtor without express direction. *Downer v. Bowen*, 12 Vt. 452. 17 Vt. 262.

**11.** Where the plaintiff's testimony was that a certain lot of wood was mostly unsound, rotten and crooked;—*Held*, that it was competent for the defendant, in contradiction, to show that the standing timber from which the wood was cut was a good fair lot of timber. *Green v. Donaldson*, 16 Vt. 162.

**12.** In an action for services, the defense was that they were rendered under a special contract for a definite time, and that the plaintiff quit such service. The parties disagreed in their testimony, as to the terms of the contract. The plaintiff was allowed to prove that the defendant had said, that the plaintiff had left him, "and he should set his long head to work to cheat him out of what he had done." *Held* admissible; (1), as impeaching the testimony of the defendant; (2), as tending to show the defendant's understanding of the contract. *Hill v. Powers*, 16 Vt. 516.

**13.** Upon the question whether a person offered as surety upon a note was a sufficient security;—*Held*, that, in addition to evidence of his solvency and credit, evidence of his

habits for industry and sobriety was admissible. *Hard v. Brown*, 18 Vt. 87.

**14.** Where, as to a person coming from abroad and stopping at a particular place, the question was, what was the character of his stay or abode at a particular time—whether temporary, merely, or permanent with a purpose and intent to make that his residence or home—his continuing to reside or board there after the date in question, was held admissible, as tending to show a purpose to remain there from the beginning. *Hulett v. Hulett*, 37 Vt. 581.

**15.** Where the question was, whether or not one coming from the State of New York into this State had changed his domicile, evidence that during his stay in this State he continued to pay, in the State of New York, taxes upon his personal property, was held admissible, though in the absence of evidence as to the law of New York on the subject of taxation. *Ib.*

**16.** Evidence of a promise to pay a debt, not effective to take the case out of the statute of limitations because not in writing, was admitted as tending to prove the original indebtedness—the judge so limiting the effect of the promise in his charge. *Held* correct. *Brewin v. Farrell*, 39 Vt. 206.

**17.** A fact that illustrates, as by an experiment, the condition of the subject matter of the issue in controversy, is not collateral to that issue, but is direct evidence bearing upon it—as, the condition of a highway, where the question is as to its sufficiency. *Walker v. Westfield*, 39 Vt. 246. *Kent v. Lincoln*, 32 Vt. 591.

**18.** To prove the fact that B had purchased of A, and was the owner of, certain tan-bark delivered by A at B's tannery, evidence was held admissible (A being dead), that immediately after such delivery, A, on coming from the direction of the tannery to a store a few rods distant, exhibited to the witness a note, signed by B alone, for a sum which was the value of the bark. *Henry v. Huntley*, 37 Vt. 316.

**19.** The fact that a child at its birth had spasms and convulsions was allowed to be proved, as tending to show the condition and health of the mother during the latter part of her time of pregnancy, as affected by a personal injury. *Held* correct. *Earl v. Tupper*, 45 Vt. 275.

**20.** The note sued upon being properly in evidence, and bearing an indorsement of part payment in the handwriting of the plaintiff, with other evidence of such payment and indorsement, the court charged that if the indorsement was made in good faith and the money was actually paid by the defendant understandingly to be applied as payment on the note, this was a very strong circumstance tending to show that he executed the note. *Held*, not error. *Wright v. Williams*, 47 Vt. 222.

21. A witness who formerly owned a lot and was acquainted with a stake and stones corner as the N. E. corner, and who had lately examined the lot and corners, was allowed to be asked and to answer the question, where was the stake and stones corner when he owned the lot, in reference to the corner now claimed as the N. E. corner. *Small v. Ball*, 47 Vt. 486.

22. On the question whether a person did a particular thing or not, the character of the subject matter, and the circumstances affecting the relation of the parties to that subject matter, affect the probability of the thing in question having been done as claimed; and, in contested questions of fact, this principle is applicable as to the admissibility of circumstantial evidence. *Barrett, J., in Kimball v. Locke*, 31 Vt. 686. 38 Vt. 165. *Camp v. Page*, 42 Vt. 739.

23. The plaintiff had let his farm to C at the halves, and certain cattle were purchased to be put on the farm, for which purchase the plaintiff advanced his own money. The plaintiff claimed that he bought and owned the cattle. The defendant claimed that the plaintiff and C bought the cattle together, and that C was to repay the plaintiff half whenever he should be able, and that the cattle were owned in common; and there was evidence on both sides. *Held*, that at this stage of the case it was competent for the plaintiff, as bearing upon the probability of the fact in question, to prove that at the time of the alleged joint purchase C was poor and of no pecuniary responsibility. *Kimball v. Locke*, 31 Vt. 683; citing three unreported cases; and see *Houghton v. Clough*, 30 Vt. 312. *Buzzell v. Willard*, 44 Vt. 44; and for distinction, see *Way v. Holton*, 46 Vt. 184.

24. The intestate made an agreement with the plaintiff to pay her a certain sum per year, payable at his death, if she would live with him and keep his house. This sum was apparently greatly in excess of the value of the services, and the defense was that it was understood by the parties to be in part a mortuary gift. *Held*, that evidence of the narrow circumstances of the intestate was admissible in defense, as tending to contradict the claim that the sum promised was for services merely. *Frost v. Frost's Est.*, 33 Vt. 639.

25. Evidence that the plaintiff had paid a debt to the defendant under difficulty and pressure, without making any effort or proposition to apply it upon an older pretended debt of the defendant to him, or making any claim therefor, was *held* admissible as tending to disprove the existence of such claim. *Strong v. Slicer*, 35 Vt. 40.

26. In an action on a promissory note, the question was whether the plaintiff had agreed, on receiving from the defendant a re-conveyance of certain lands, to surrender this note in

addition to certain mortgage notes, or not; and there was direct evidence on both sides, and contradictory. *Held*, that it was competent for the plaintiff, as adding probability to his testimony, to prove that the lands were not, at the time of the re-conveyance, worth more than the amount of the mortgage notes agreed to be surrendered. *Houghton v. Clough*, 30 Vt. 312.

27. Where the testimony was conflicting as to the price agreed to be paid upon the sale of property;—*Held*, that evidence of the real value was admissible as showing a probability which party was right. *Kidder v. Smith*, 34 Vt. 294.

28. In a bastardy prosecution, the complainant had testified that she was fourteen years of age when her child was begotten; that it was begotten by the defendant while she was riding home with him from a concert and dance, and that she had not seen him for a year or more before this. She was then allowed, against objection, to state that when she was eleven years old she and the defendant lived in the same family, and that he then had connection with her. *Held*, that this evidence was admissible; that the previous familiarity or intimacy between the parties was a circumstance bearing on the probability of the fact in question, as it tended to illustrate the relation between the parties. Imperfectly reported in *Thayer v. Davis*, 38 Vt. 163; as see *Sterling v. Sterling*, 41 Vt. 93. *Kimball v. Locke*, 31 Vt. 683.

29. Evidence not of itself, and independent of the testimony of other witnesses, material, but tending to confirm the testimony of another witness as to a material matter, upon which the testimony is contradictory, becomes material and is admissible. Instance—*Brown v. Welch*, 38 Vt. 241. *Bennett v. Stacy*, 48 Vt. 163. *Davis v. Windsor Savings Bank*, 48 Vt. 532.

30. The plaintiff having testified that a certain agreement was made by the defendant in the presence of H, and that H, acting for both parties, made a written statement of their accounts upon the basis of which such agreement was then made;—*Held*, that such written statement was admissible as corroborative of the plaintiff's testimony. *Norton v. Downer*, 38 Vt. 26.

31. Where a sheriff had testified that the plaintiff's attorney gave him instructions to take a particular person as the receptor of property to be attached, and the attorney in reply had testified that he did not give such instructions;—*Held*, that the attorney might further testify in corroboration that, at the time in question, it was his uniform habit and custom of business, as an attorney, not to give such instructions, &c.; and an offer of such testimony having been excluded, the judgment was reversed. *Hine v. Pomeroy*, 39 Vt. 211.

32. Action upon a promissory note given to

a firm in adjustment of a partnership running account against the defendant. The defendant had a running account against one of the partners, and claimed, and his testimony tended to prove, that at the time the note was given, and afterwards, it was agreed that his account should apply upon the note. The plaintiff's testimony contradicted this. *Held*, that it was competent for the defendant, as rendering his claim the more probable, to prove that the respective accounts accrued under an original agreement that the defendant's account against that one of the partners should apply upon the firm account against the defendant. *Camp v. Page*, 42 Vt. 739.

33. In an action to recover for goods sold by a traveling agent of the plaintiff's, the issue was whether the goods were sold on a credit of 30 days, as the plaintiff claimed, or on a credit of 60 days, as the defendant claimed,—and there was testimony to sustain each side. The agent testified that he sold the goods on a credit of 30 days only, and told the defendant that his employer never gave longer credit than 30 days, and that he had no authority to give a longer credit. *Held*, that it was competent to prove by the plaintiff, as tending to confirm the testimony of the agent, that he had, in no case in his business, given a longer credit on the sale of goods than 30 days, and that said agent was not authorized to give a longer credit, but that his instructions to sell only for cash down, or on a credit not exceeding 30 days, were imperative. *Hardy v. Cheney*, 42 Vt. 417.

34. In an action for wrongfully running against the plaintiff in a highway, the defendants claimed and testified that the injury was caused by their horse becoming unmanageable without their fault. *Held* proper, on cross-examination, to inquire into their line of conduct from the night before, and on their route, whether they had been drinking, whether they had driven recklessly from the start, &c. *Streeter v. Evans*, 44 Vt. 27.

35. The question was, whether the defendant had paid certain money to the plaintiff's agent. The agent denied such payment, and testified, without objection, to his mode of doing such business for the plaintiff;—among other things, that he was accustomed to enter all money received upon a cash book, and that there was no entry of such money on the cash book. On cross-examination, the questions and the answers of the witness made the impression that his denial of the payment resulted mainly from the fact that the cash book contained no entry of such payment. *Held*, that it was competent, on re-examination, as corroborative of the testimony of the witness, to show fully the manner in which the business was done and the manner of keeping and making entries in the book, and that the book was, to this extent and

for this purpose, evidence. *Missisquoi Bank v. Everts*, 45 Vt. 203. 46 Vt. 75.

36. During the trial of a case for an injury upon a highway, the plaintiff submitted to one personal examination by the defendant's medical witnesses, but refused to submit to another, for the alleged reason that she was too feeble and exhausted. *Held*, that, to rebut any unfavorable inference from such refusal, it was competent for her to show that she had, on another occasion and before the trial, requested the parties in interest to send physicians to examine her. *Durgin v. Danville*, 47 Vt. 95.

37. **Too remote.** The question being whether the name of A subscribed as witness to a note was written by him, about which there was evidence *pro* and *con*;—*Held*, that evidence that B, who once held the note, had forged the name of A as subscribing witness to another note of about the same amount, was not admissible. *Keith v. Taylor*, 3 Vt. 153; and see *Rowe v. Bird*, 48 Vt. 578.

38. Upon the question of the amount of wool certain sheep would yield as affecting their value, evidence that the sheep "compared favorably" with the best flocks in the country—without more—is too loose and indefinite to be received in evidence. *Melvin v. Bullard*, 35 Vt. 268.

39. The question being, whether it was by the action of standing water, or of frost, that the walls of a certain building were cracked and thrown out of shape, evidence of the action of frost upon the walls of another building 25 rods distant and on the slope of the same ravine, was *held* to have been properly excluded,—it not appearing that the location and surrounding conditions of the two buildings were so similar, that one would be any fair test for the other. *Haynes v. Burlington*, 38 Vt. 350.

40. An attorney having testified that he did not give instructions to a sheriff to take a particular person as receptor of property attached, another witness testified [irregularly] that the attorney told him that the plaintiff had directed him to give such instructions to the sheriff; and the court below charged that this evidence tended to impeach the testimony of the attorney. *Held* erroneous, for that there was no contradiction between the two statements, and that the last testimony was not admissible. *Hine v. Pomeroy*, 39 Vt. 211.

41. An attorney having testified that, on delivering an attachment to an officer to be served, he gave no instructions as to taking receptors, and that it had been his uniform habit and course of business as an attorney not to give such instructions;—*Held*, that it was not competent, on the other side, to prove that it was the practice of other attorneys in the same place to give such instructions. *S. C.*, 40 Vt. 103.



42. The plaintiff, a creditor of A, claimed that the defendant agreed to pay the debt. *Held*, that the fact that the defendant, under circumstances similar or identical, agreed to pay A's indebtedness to another creditor, had no legal tendency to prove such claim of the plaintiff. There is no necessary or legal connection between the two facts. *Phelps v. Conant*, 30 Vt. 277; and see 8 Vt. 285, and *Bishop v. Wheeler*, 46 Vt. 409.

43. A witness having testified in his deposition that he witnessed a collision between the carriages of the parties, and that at the time the defendant's carriage struck the plaintiff's the defendant was driving at a fast gait;—*Held*, that the court properly excluded other parts of the deposition, in which the witness stated that in driving up and down the road, before the accident, the defendant was driving at a very fast gait, and that the gait at the time of the collision was the same. *Nones v. Northouse*, 46 Vt. 587.

### III. PRESUMPTIONS—BURDEN OF PROOF.

44. In general. Presumptions must always rest upon acknowledged or well established facts, and not upon presumptions. *Richmond v. Aiken*, 25 Vt. 324. One presumption cannot be based upon another. *Hammond v. Smith*, 17 Vt. 281.

45. Instances—Assent. Where one offered as a witness, who is incompetent through interest, executes a release to the party calling him, such act being apparently for the advantage of the party, his assent to it will be presumed, and a delivery to his attorney will be sufficient. *Porter v. Munger*, 22 Vt. 191.

46. Letters. Except in cases governed by the law merchant, a letter properly directed and deposited in the postoffice is not *per se* notice of the contents to the party addressed. *Prima facie*, the letter in such case will be taken to have been received, but this may be rebutted. *Wainworth v. Seaver*, 30 Vt. 728.

47. Where a letter was written to the defendant, a hotel keeper, and was answered by the defendant's clerk;—*Held*, that it was to be inferred that the defendant received the letter and directed the reply, and the letter in reply was therefore evidence. *Weeks v. Barron*, 38 Vt. 420.

48. Settlement. A 'general settlement made is *prima facie* a settlement of all claims then existing, but does not exclude proof to the contrary, nor bar a claim or item not in fact included in the settlement. *Nichols v. Scott*, 12 Vt. 47. *Austin v. Berry*, 8 Vt. 58. *Darling v. Hall*, 5 Vt. 91. *Whiting v. Corwin*, *Id.* 451. *Newell v. Keith*, 11 Vt. 214. *Wood v. Johnson*, 13 Vt. 191. *Bushee v. Allen*, 31 Vt. 631.

49. Note. The giving of a note for a claim

and receiving a discharge therefrom, affords no presumption, either way, between a compromise and substitution, unless the party knew the full grounds of his defense to the claim at the time. *Middlebury College v. Williamson*, 1 Vt. 212.

50. Burden of proof—Instances. If a party would avoid the effect of his promise, insisting that it was made in ignorance of material facts, the burden is upon him to prove such ignorance. *Burton v. Blin*, 23 Vt. 161.

51. In case for deceitfully exchanging property with the plaintiff upon which a third person had a lien;—*Held*, that the plaintiff was not bound to aver or prove that he had no notice of such lien. *Patee v. Pelton*, 48 Vt. 182.

52. It being conceded that the defendant received the money recovered for, in a fiduciary capacity and without authority to appropriate it to his own use;—*Held*, that the burden was on him, if he would avoid a certified execution, to prove that the plaintiff afterwards permitted him so to use it. *Lamb v. Fairbanks*, 48 Vt. 519.

53. Contract. A married woman, holding as her separate estate a note against the defendant, made an arrangement with him, with the assent of her husband, to supply her family with goods from his store, to be applied upon the note. In pursuance of this arrangement, the defendant furnished the family with goods, charging them to the husband, and the account also contained charges for goods not for the use of the family, but delivered to persons not members thereof, upon the orders of the husband. In an action on the note after the husband's death;—*Held*, that such articles of the account as were furnished for the family were a payment upon the note, but those only; and that the burden was upon the defendant to distinguish the articles, and none could be allowed upon the note except those which he proved to have been for the use of the family. *Barber v. Slade*, 30 Vt. 191.

54. In an action on a contract by which the defendant was to purchase butter for the plaintiff at a certain commission per pound, and to render the plaintiff a true statement of the weights at which he should purchase it, and should be allowed by the plaintiff the same weights, the breach alleged was, that the defendant had rendered an untrue statement of the weights at which he had purchased the butter, whereby the plaintiff had overpaid him, &c. *Held*, that the burden was on the plaintiff to prove that the weights at which he received the butter of the defendant exceeded the weights at which the defendant bought the same. *Hibbard v. Mills*, 46 Vt. 243.

55. Payment. In an action upon a bond conditioned that the defendant would pay cer-

tain outstanding notes of the plaintiff's;—*Held*, that the plaintiff need not prove that he had paid them, nor need he produce them; that the onus of proof of payment was on the defendant. *Everts v. Bostwick*, 4 Vt. 349.

56. An admission of indebtedness to the plaintiff's intestate contained in a disclosure by the defendant as trustee, in a case which ended without judgment, is sufficient evidence of a continuing and present indebtedness to sustain an action therefor, in lack of any evidence of payment, or other discharge. *Farr v. Payne*, 40 Vt. 615.

57. **Imperfect deed.** A paper purporting to be a deed, duly signed, witnessed and acknowledged, and having the clause, "In testimony whereof I have hereunto set my hand and seal," but having no seal affixed, furnishes sufficient testimony on its face that the signer intended to seal it, but omitted it by mistake; and a court of chancery will correct such omission. *Colchester v. Culver*, 29 Vt. 111.

58. **Law of other States.** The presumption is that, upon a common law question, the common law of a sister State is the same as our own. If it be claimed that there is a difference, the burden of proof is upon the party claiming it. *Ward v. Morrison*, 25 Vt. 593.

59. —of Canada. Where a submission, arbitration and award were had in Canada, and the award was sued in this State;—*Held*, that although the transaction was governed by the laws of Canada, the court would assume that there was no distinction between those laws and our own, without evidence of such difference. *Woodrow v. O'Connor*, 28 Vt. 776.

60. **Presumption of regularity.** Evidence that a person testified as a witness tends to prove that he was sworn, and is sufficient proof, if there is no evidence to the contrary. *Cass v. Anderson*, 33 Vt. 182.

61. Where a town treasurer made a payment upon a debt owing by the town;—*Held*, in the absence of proof to the contrary, that the payment was made with the approbation of the town, so as to bind the town. *Sargeant v. Sunderland*, 21 Vt. 284.

62. Where an administrator conveyed a farm subject to the widow's dower, and possession was taken of all except the one-third set off to the widow and was so held for thirty years;—*Held*, in the absence of a perfect record in the probate court, that the presumption of regularity of the administrator's proceedings, prior to his deed, applied as well to the reversion of the dower as to the other two-thirds. *Hazard v. Martin*, 2 Vt. 77. 26 Vt. 590. 32 Vt. 210.

63. Circumstances stated, under and from which the granting of license to an administrator to sell real estate, and the regularity of his proceedings and of the probate court in reference thereto, may be presumed and found as

facts by the jury, in the absence of original or record evidence. *Doolittle v. Holton*, 28 Vt. 819; and see 2 Vt. 77. 26 Vt. 588. 29 Vt. 111. 32 Vt. 183.

64. Where, in one contingency, the act of a public officer—as State's treasurer, or sheriff—may be lawful, and he acts, the court must by legal intendment suppose that that contingency existed and that he acted lawfully, until the contrary is shown. *Chandler v. Spear*, 22 Vt. 388. *Bank of U. S. v. Tucker*, 7 Vt. 134.

65. That the justice went to the place named in the writ for trial, after the lapse of two hours from the time set for trial, and entered judgment by default, is very slight ground for presuming against his having been there within the two hours, and is not sufficient to change the burden of proof, or overcome the presumption in favor of the regularity of the proceedings. *Underwood v. Hart*, 23 Vt. 120.

66. **Lapse of time.** Where objection was taken to the record of proceedings in the probate court, which had jurisdiction of the subject, that it did not show that they were taken in compliance with the requirements of the statute, but the record did not show anything done contrary to such requirements, and the proceedings were ancient;—*Held*, that the regularity of the previous proceedings should be presumed. *Ford v. Flint*, 40 Vt. 382. *Giddings v. Smith*, 15 Vt. 344; and see *Judge of Probate v. Fillmore*, 1 D. Chip. 420. *Collard v. Crane*, Brayt. 18.

67. The question of presumption in favor of the regularity of the proceedings of an administrator in the sale of real estate, after great lapse of time, should be submitted to the jury, as an open question for them to determine according to their view of the facts. If not so submitted, it is error. *Doolittle v. Holton*, 26 Vt. 588. *S. C.*, 28 Vt. 819.

68. A presumption of the termination of an agency, a demand for an accounting, and a settlement, may be presumed from lapse of time,—as twenty years. *Staniford v. Tuttle*, 4 Vt. 82.

69. The abandonment of a legal claim, or demand, or debt, is never presumed, though from lapse of time it may be presumed, when not rebutted, that the claim has been paid. *Rice v. Smith*, 6 Vt. 348.

70. An account rendered, if no objection be made thereto in a reasonable time, will be presumed to have been acquiesced in as an account stated, and settled. So *held*, after many years of acquiescence. *Tharp v. Tharp*, 15 Vt. 105.

71. Presumption of payment from lapse of time is one of fact, depending upon the particular circumstances of the case. It does not arise, as matter of law, short of a period of twenty years [*quare*, fifteen years in this State] and even

then, it is but a presumption, subject to be removed by evidence. *Graves v. Weeks*, 19 Vt. 178. *Dunning v. Chamberlin*, 6 Vt. 127. *Everts v. Nason*, 11 Vt. 122. *Kimball v. Ives*, 17 Vt. 480. *Grafton Bank v. Doe*, 19 Vt. 463; and see *Mattocks v. Bellamy*, 8 Vt. 463. *Sparhawk v. Buell*, 9 Vt. 41, 75.

72. Where there were no records of the county court by which the jail limits could be ascertained;—*Held*, that proof of general understanding and acquiescence of all concerned for more than 15 years—in this case, 30 years—in certain recognized and well-defined boundaries, as the jail limits, was equivalent to record proof. *Downer v. Dana*, 19 Vt. 338. *Perkins v. Dana*, 19 Vt. 589.

#### IV. ADMISSIONS AND DECLARATIONS.

73. **In pleadings.** Matters stated in a notice under the general issue cannot be taken as admissions, or evidence against the defendant. *Smith v. Shumway*, 2 Tyl. 74.

74. A judgment suffered by default in an action upon a contract specially declared upon, is to be regarded in another suit between the same parties reversed, as, at least, an admission by the former defendant of the contract as set forth in that declaration. *Suttons v. Tyrell*, 12 Vt. 79.

75. **Declaration of purpose.** The declaration of a party that he intended to do a certain act is not evidence against him, without other evidence that the act was in fact committed. *Bullock v. Beach*, 3 Vt. 78; and see *Barnard v. Henry*, 25 Vt. 289.

76. The question being whether the defendant cut certain pine trees, it was *held* admissible, as tending, in connection with other evidence, to prove the fact, that five or six weeks before the trees were cut, the defendant proposed to the witness that he should go with him and cut some pine timber on that lot. *Hunt v. Taylor*, 22 Vt. 556.

77. **By whom proved.** The admission of a person that he signed a promissory note was excluded, on the ground that he might be called as a witness. *Werner v. McGary*, 4 Vt. 507. But see *Aiken v. Peck*, 22 Vt. 255, 262. *Alger v. Andrews*, 47 Vt. 238, and *infra*.

78. When the admissions or declarations of a party are competent evidence, it is not necessary to call such party to prove them, although he may be a competent witness, but they may be proved in other ways;—as by writing, or by a witness who heard them, &c. *Reed v. Rice*, 25 Vt. 171.

79. Whenever it becomes necessary to prove a declaration made by one person to another, there is no rule of evidence which confines the proof to the person who made the declaration.

Any person who heard it is competent to testify to it. *Miller v. Wood*, 44 Vt. 378.

80. **Qualified by state of health.** Evidence that a person was in poor health, hypochondriac, and subject to depression of spirits, is admissible as qualifying his declarations about his property, and as showing that they ought not to be weighed as if made in a state of better health. *Brackett v. Wait*, 6 Vt. 411.

81. **The whole is evidence.** When one party introduces in evidence the admission of the other, he makes the whole declaration evidence to be weighed by the jury, that part which makes against him, as well as that which makes in his favor. But he is not bound by the admission, and though he cannot impeach his own witness, he may contradict the witness or the admission. *Patrick v. Hazen*, 10 Vt. 183.

82. The general admission of a party—as that he had sold certain property to the other—should be treated as evidence against him according to its terms, and should be left to the jury to have its proper influence, as such, unless explained and counteracted by other testimony;—and, *held*, that it was error for the court, in such case, to assume that such admission had reference to a previous written contract, so long as no other and distinct contract was disclosed, and so put the opposite party on proof of some independent contract by evidence beyond the admission itself. *Ripley v. Paige*, 12 Vt. 358.

83. Where declarations or admissions of a party are offered in evidence, the whole, made at one time, must be received and weighed, as well that which is in his favor as that which is against him. But the jury are at liberty to believe one portion and disbelieve the other—to give effect to that part which is against him, and, if from the evidence and all the circumstances of the case they believe the other part untrue, to set the latter aside. *Mattocks v. Lyman*, 18 Vt. 98; and see *State v. Mahon*, 32 Vt. 241. *State v. McDonnell*, 32 Vt. 491.

84. Where an admission of a party is given in evidence against him, whatever was said by him at the time, which in any way qualifies or explains such admission, is admissible in his favor, but no further. *Dean v. Dean*, 43 Vt. 337..

85. The defendant read in evidence certain portions of the plaintiff's testimony on a former trial. *Held*, that the plaintiff was entitled to have read all that he testified to at the same time and in connection with what had been read, which related to the same subject matter. *Wright v. Williams*, 47 Vt. 222.

86. In an action by husband and wife to recover for a personal injury to the wife, the defendant put in testimony that the husband, soon after the alleged injury and in the pres-

ence of his wife, told the witness that his wife's infirmity was caused by hard work in the sugar place in gathering and boiling sap. *Held*, that it was clearly admissible for the plaintiffs to prove by the same witness, and as part of the same conversation, that the wife denied her husband's statement, and declared that she had not gathered and boiled sap. *Lindsey v. Danville*, 45 Vt. 72.

87. Where a party who has heard a witness testify, admits the testimony to be true, he thereby makes that testimony evidence against him, not as independent evidence, but as explanatory of the admission, and, by reference, a part of it. *State v. Gilbert*, 36 Vt. 145.

88. **Private memorandum.** A private memorandum of a parol contract, made by one of the parties to the contract for his own use, being not of itself evidence of the contract against the other party, is not conclusive upon the party who made it: but is only his admission, subject to explanation. *Stannard v. Smith*, 40 Vt. 513.

89. **Advancement.** Declarations made at different times by an intestate, in substance, that he had given his son something handsome, and if he did well for him he should give him more; that he had held a writing, not a note, against his son, and had made him a present of it; that he once had claims against him, but had none then,—were *held* admissible as tending to prove the surrender by him to the son of a receipt evidencing an advancement, in the absence of evidence tending to show that he had ever given the son anything else, or had held any other writing or claim against him. *Wheeler v. Wheeler*, 47 Vt. 637.

90. **Admission by town agent.** The admission of a fact by a town agent, while executing his agency in defending a suit against the town, made at the time and place of trial, and to obviate the necessity of proof, was *held* admissible, on a subsequent trial, as evidence against the town of the fact. *Burlington v. Calais*, 1 Vt. 385. See 23 Vt. 130.

91. — **by agent.** In trover for a barber's chair against a hotel keeper, where the defendant denied that he had ever had the chair, W, testified, for the plaintiff, without objection, that before the demand made he had called at the hotel for the chair by the plaintiff's request, and, in the absence of the defendant, asked the defendant's clerk who had the general supervision and charge of the hotel, if the chair was there, and the clerk replied that it was. *Held*, that this testimony, having been received without objection, became legitimate evidence, and tended to prove that the chair was at the defendant's hotel when W called for it. *Weeks v. Barron*, 38 Vt. 420.

92. — **by conduct of party.** The plaintiff, an attorney, having argued a cause on trial at

the suggestion of the counsel employed in it;—*Held*, that his subsequent assent to a proposal of such counsel to make application to his client to have him engage the plaintiff in the cause, was admissible in evidence against him, as tending to show what was his expectation as to being paid for the service already rendered. *Briggs v. Georgia*, 15 Vt. 61.

93. — **in course of trial.** At the trial, on appeal, of an action for an assault and battery, the defendant justified the assault as proper punishment by him as the plaintiff's school master. The plaintiff claimed that the punishment was excessive. *Held*, that evidence was admissible for the defendant, that on the justice trial the plaintiff did not claim that the punishment was excessive, but only that the defendant, under the circumstances, had no right to punish the plaintiff. *Lander v. Seaver*, 32 Vt. 114.

94. Any act or omission of a party, unnatural and inconsistent with what he claims to be true, may properly be weighed as evidence against him;—as when on a trial he calls a favorable witness who knows about a disputed fact, and examines him upon other matters, but omits to question him as to the disputed fact. Other instances given. *Seward v. Garlin*, 33 Vt. 583.

95. On a former trial of the cause, the defendant's counsel, in his presence, put the defense upon grounds wholly inconsistent with the defendant's present testimony. *Held*, that such fact was admissible in evidence. *Nye v. Merriam*, 35 Vt. 438.

96. In an action against a railway company for an injury received as a passenger, a witness for the plaintiff had testified to a particular defect in the track which he had observed both before and after the accident, upon examinations made in the presence of a section-master of the defendant. The defendant then introduced a witness, who saw the track only after the accident, and who materially contradicted the plaintiff's witness as to the condition of the track. The defendant omitted to introduce the section-master as a witness. The plaintiff was allowed then to prove that the section-master was accessible to the defendant, so as to be produced as a witness; and to urge to the jury and ask them to infer from these facts, that the account given by the plaintiff's witness was true. *Held* correct. *Beattie v. Grand Trunk R. Co.*, 41 Vt. 275.

97. Where the original declaration, in an action of assumpsit, set forth with great particularity the facts upon which the defendant's liability was claimed to arise, and, after the entry of the suit in court, an amended count was filed, in which the same transaction, as set forth, was entirely different in its material facts;—*Held*, that the original count tended

strongly to show, that the plaintiff first stated to his attorney the facts, in substance, as therein set forth, and tended strongly to disprove the facts set forth in the amended count, and to discredit the plaintiff's testimony that, before the original declaration was drawn, he stated to his attorney the same facts that are set forth in the amended count. *Hotchkiss v. Ladd*, 43 Vt. 345.

98. An affidavit, contradictory of the plaintiff's case, had been procured of the plaintiff, through the fraudulent solicitations and practices of the brother of the defendant, who was also his bail, and by the defendant's attorney. The fact that such affidavit had been given and the statements therein were made use of as a substantive ground of defense on the trial. *Held*, that this was equivalent in legal effect to the use of the affidavit in defense, and tended to connect the defendant with knowledge of and participation in the fraud of procuring the affidavit. *Nash v. Doyle*, 40 Vt. 96. 44 Vt. 145.

99. That a party sought by solicitations, money and threats to induce witnesses of the opposite party not to attend, was *held* admissible under the circumstances stated, *Hebard, J.*, dissenting. *Kirkaldie v. Paige*, 17 Vt. 256.

100. The rule which permits a party to show that the other party has used means to induce the witnesses of the first party to absent themselves from court, does not apply to a witness who is himself a party and in interest, and not a mere nominal party. *Pratt v. Battles*, 34 Vt. 391.

101. Where a will was contested on the ground of undue influence employed by the sole legatee;—*Held*, that his false statements, knowingly made, as to the execution and contents of the will, were admissible for the contestants. *Fairchild v. Bascomb*, 35 Vt. 398; and see *Robinson v. Hutchinson*, 31 Vt. 443.

102. A witness was summoned by the plaintiff, and attended the trial, but was discharged by him without testifying. The witness was afterwards called by the defendant and testified in the case. The plaintiff was afterwards inquired of on cross-examination, if he did not discharge the witness from further attendance because he apprehended that the witness would testify to a certain fact [stated], which made against the plaintiff's case. The question was objected to and excluded. *Held* correct. *Thornton v. Thornton*, 39 Vt. 122.

103. **Explorable.** In an action against principal and surety upon a note, the defense was payment by the principal. The plaintiff, claiming that this defense had but recently been conceived, was allowed to prove that the defendants, at a former term, had consented to a silent judgment and taken a review. The defendants were then allowed to prove, but only as an

answer to such claim, that when the suit was first commenced, the principal told the surety that the note was paid, and that they acted on that supposition thereafter, and that the surety employed counsel at his own expense, and attended court personally from term to term to make defense, and that this was known to the plaintiff. *Held*, that this evidence for the defendant, thus limited, was properly admitted. *Austin v. Bingham*, 31 Vt. 577.

104. **Admission by not objecting.** Instance of acquiescence and assent to a claim, inferred from not objecting when informed of it. *Willey v. Warden*, 27 Vt. 655. See *Vilas v. Downer*, 21 Vt. 419.

105. On the question whether the charges of the plaintiff, a physician, were reasonable;—*Held*, that evidence was admissible that such charges were his usual rates for similar services, in connection with other proof, that such rates were known to the defendant. *Paige v. Morgan*, 28 Vt. 565.

106. "What a man says, under the surprise of a sudden and unexpected demand for money, ought to be construed with a good deal of strictness"—applied to language from which the recognition of a claim and promise to pay it were sought to be inferred. *Brown v. Mudgett*, 40 Vt. 68.

107. **Silence of party.** The mere silence of a party, under ordinary circumstances, when a claim is made upon him, or he is asked a question in regard to his claims or pretensions in reference to a pending or expected litigation, is no ground of presuming against him. *Redfield, C. J.*, in *McCann v. Hallock*, 30 Vt. 235. *Vail v. Strong*, 10 Vt. 457. *Gale v. Lincoln*, 11 Vt. 152. *Mattocks v. Lyman*, 16 Vt. 113. *Hersey v. Barton*, 23 Vt. 685.

108. Where a third person stated to one party to a contract what he had understood from the other party to be the terms of the trade, and the party replied that "he never told his trades;"—*Held*, that such reply was not an admission of the correctness of such statement, but rebutted all inference of an admission, and had no tendency to prove the contract. *Vail v. Strong*.

109. The statement by the plaintiff of the terms of a contract, to a third person, in the presence of one of several defendants, parties thereto, to which such defendant made no reply, was *held* not to be evidence of the terms of the contract. *Gale v. Lincoln*, 11 Vt. 152. 23 Vt. 687.

110. Where a claim is made for the mere purpose of drawing out evidence, or in the way of altercation, or, in short, unless the party asserting the claim does it with a view to ascertain the claim of the other, in order to know how to regulate his own conduct in the matter, and this is known to the other party, who re-

mains silent and thereby leads his adversary astray, mere silence is no ground of inference against such other party. *Redfield, C. J., in Matlocks v. Lyman, 16 Vt. 118.*

111. But if upon a proper and *bona fide* inquiry made, the party inquired of consents to make any declarations upon the subject, he then makes all that is said to him on the occasion, and his silence as well as his answers, evidence. *McCann v. Hallock, 30 Vt. 238.*

112. To justify a presumption of an admission from the silence of a party when a statement, adverse to his interest, is made in his presence, the statement must not only be brought to his attention, but it must be such as to call for a reply. In this case, where the statement was not addressed to the party, but only made in his presence;—*Held*, that his silence afforded no presumption of assent to the statement. *Hersey v. Barton, 23 Vt. 685. See Weeks v. Boynton, 37 Vt. 297.*

113. Statements by a third person, made in a judicial proceeding, in the presence of a party, but not directed to him nor replied to, were *held* inadmissible as evidence against the party, the circumstances not calling for a reply. *Brainard v. Buck, 25 Vt. 573.*

114. The defendant was employed by the plaintiff and was his book-keeper. The plaintiff charged against him certain money lost through his negligence. This the defendant knew, but nothing was said about it between the parties. *Held*, that this was not evidence of an agreement to have these charges adjusted in the action of book account, the defendant denying his liability. *Chase v. Spencer, 27 Vt. 412.*

115. An auditor inquired of the plaintiff's attorney, in the presence of the defendant, if it was necessary to report copies of the accounts, and the attorney replied that, by the Revised Statutes, it was not. The defendant made no objection. *Held*, that his silence could not be construed as a waiver of this requirement of the law. *Flower Brook Mfg. Co. v. Buck, 16 Vt. 290.*

116. The defendant held by assignment a note which, by notice to the plaintiff, had become a perfected set-off to the plaintiff's account. The plaintiff afterwards assigned his account to A, and A notified the defendant thereof and demanded payment. The defendant made no express objection to paying, and did not claim to have any counter demand, except a book account, but did not promise to pay A. *Held*, that the defendant's silence as to the note was not a waiver or exclusion of his right to have it set off. *Keyes v. Waters, 18 Vt. 479. See Redfield, J., in Barron v. Pettes, 18 Vt. 388. Otherwise, if he had promised to pay A. Stiles v. Farrar, 18 Vt. 444.*

117. The fact that the owner of property attached often met the attaching officer and

knew how he was keeping the property and did not complain, is not admissible in evidence against his claim to recover of the officer for negligence in keeping the property. *Briggs v. Taylor, 35 Vt. 57.*

118. **Letters unanswered, &c.** *Dictum.* The mere fact that letters are received and remain unanswered, has no tendency to show an acquiescence of the party in the facts stated in them. *Hill v. Pratt, 29 Vt. 119; Criticised, 31 Vt. 352.*

119. The omission of a party to reply to statements in a letter about which he has knowledge, and which, if not true, he would naturally deny, and when he replies to other parts of the letter, is evidence tending to show that the statements so made and not denied are true. *Fenno v. Weston, 31 Vt. 345, 352.*

120. So, where there has been a correspondence between parties in regard to some subject matter, and one writes a letter to the other making statements in regard to such subject matter, of which the latter has knowledge, and which he would naturally deny, if not true, and he wholly omits to answer such letter, such silence is evidence tending to show the statements to be true. *Redfield, C. J., Ib.*

121. Still, all such evidence is of a lighter character than silence when the same facts are directly stated to the party. *Ib.*

122. **Declaration in party's own favor—of claim.** Where the defendant claimed that the plaintiff's intestate had lost a possessory right in lands by abandonment;—*Held*, that, to rebut this, declarations of the intestate made to a stranger applying to buy the land, which indicated a then claim to the land, were admissible. *Perkins v. Blood, 36 Vt. 273.*

123. Where the defence is that the plaintiff has abandoned his claim to property, he may prove his own sayings as to the property, to show that he had not so abandoned it; but no further. *Noble v. Sylvester, 42 Vt. 146.*

124. Where one is in the enjoyment of a right—as of the use of water for a mill—what he may say indicating his claim of right is evidence in his behalf of his claim, but not of the truth of the facts stated, nor that he has the right claimed. *Kimball v. Ladd, 42 Vt. 747.*

125. —**as to health, &c.** A person's state of health or feeling, when material, may be proved by his statements made at the time in respect to them. *State v. Howard, 32 Vt. 380.*

126. Where the bodily condition of a person at a certain time is in question, what that person said to his attending physician at such time, as to the nature, symptoms and effects of the malady he was then suffering from, is proper evidence for either party. *Eari v. Tupper, 45 Vt. 275. Hathaway v. National Life Ins. Co., 48 Vt. 335.*

127. In an action for personal injuries, the plaintiff was allowed, as tending to show their nature and extent, to prove by a physician who was called to examine him preparatory to being a witness on the trial, his statements, made during such examination, of his inability to move his arm in a certain direction, and the effect and pain produced by certain movements of his members. *Held* correct. *Kent v. Lincoln*, 32 Vt. 591.

128. **Private entry.** In an action of assumpsit to recover for services as an attorney;—*Held*, that the plaintiff's pocket docket, on which he had entered merely the name of the case in which he acted as counsel, was not admissible as furnishing any evidence, of itself, of his right to charge for such services. *Briggs v. Georgia*, 15 Vt. 61.

129. **Private resolution expressed.** In an action against a town to recover for plaintiff's services, as a physician, in attending the town's pauper, the question was whether the contract made with one of the three overseers, and afterwards ratified by the others, was as the plaintiff, or as the defendant, claimed it to be. *Held*, that it was not admissible for the defendant to prove that the overseers, before making any contract with the plaintiff, agreed among themselves, that they would make such a contract as the defendant claimed, and none other. *Edson v. Pawlet*, 23 Vt. 291.

130. **Subsequent declaration.** On the question whether the defendant's act in cutting a tree upon the plaintiff's land was willful and malicious;—*Held*, that evidence offered by the defendant that, a short time after the cutting of the tree, he admitted to the plaintiff that he had cut the tree and did so because he thought he owned it, and claimed the land on which the tree grew by adverse possession, &c., was properly excluded; that a declaration so made after the trespass was committed was not admissible to show the motive of his act. *Clark v. Boardman*, 42 Vt. 667.

131. **Subsequent transaction.** The question being as to whether the parties made a particular contract, and the testimony of the parties being contradictory as to this;—*Held*, that a subsequent transaction of one of the parties with a third person, although consistent with the making of the contract as he claimed it, was not admissible in his favor as evidence that such contract had been made; that an inference from what occurred afterwards could not be drawn against the party, when he in no way participated in that transaction. *Way v. Holton*, 46 Vt. 184. *Lyon v. Kidder*, 48 Vt. 42.

132. **Subsequent entry.** Long after the rendering of services in the family of the deceased by his daughter, the deceased made an entry on a leaf of his account book that he had given

her a great many things, &c., and that she had got well paid for her services, &c. *Held*, that this was not admissible as evidence against her claim presented against his estate—being a private entry not made in the usual course of business. *Putnam v. Town*, 34 Vt. 429.

133. **Declarations by former owner or grantor.** Where the defendant claimed that his liability was to a third person, as owner, to pay for certain property for which he had dealt with the plaintiff, certain letters from such third person to the plaintiff, accompanying the transaction and tending to show that the plaintiff was owner, were *held* admissible for the plaintiff. *Mills v. Brownell*, 3 Vt. 463.

134. The admission of the former holder and owner of a note, made while he was so the holder, that it was paid, was *held* admissible against an indorsee who became such after maturity of the note. *Wheeler v. Walker*, 12 Vt. 427.

135. *Held* (against argument of *Bennett, J., contra*), that the admissions of L, made while he was in possession of personal property, that it belonged to the plaintiff, were not admissible evidence against the sheriff who afterwards attached it as the property of L—L being still living, so that he might be called as a witness. *Hines v. Soule*, 14 Vt. 99. *Overruled* in *Hayward Rubber Co. v. Duncklee*, 30 Vt. 29. *Alger v. Andrews*, 47 Vt. 238. See 25 Vt. 171, *note*.

136. In an action by a creditor against a sheriff for neglect to attach, as the debtor's, certain designated property then, and for 20 months then passed, in the possession of the debtor, the defense was that the property belonged to a third person, and was held by the debtor only by virtue of a conditional sale. The plaintiff then offered evidence that the debtor while so in possession had openly and publicly called the property his own, and that such third person knew of these declarations, and had himself said that he had sold the property to the debtor. *Held*, that this evidence was properly rejected. *Redfield, J., dissenting. Deming v. Lull*, 17 Vt. 398. But see 135, *supra*, *contra*.

137. Where the owner of a mortgage note had transferred it as a collateral security, but had redeemed it and assigned it after due to another person;—*Held*, that his admission that the note was paid, made while the note was so held as collateral security, was original evidence, against the last assignee, of the fact of payment. *Miller v. Bingham*, 29 Vt. 82.

138. Admissions of a party in possession of a chattel, against his title to it, are evidence in favor of a party making claim according to such admission, in a suit against an officer attaching the chattel as the property of the party in possession. This is on the ground of *privity*

between the officer and the defendant in the attachment, or *successive relationship*, to the same rights of property. *Hayward Rubber Co. v. Dunclee*, 30 Vt. 29, overruling *Hines v. Soule*, 14 Vt. 99.

139. The declarations of a party against his own title and interest in property then in his possession, are evidence against the party who claims from him by subsequently acquired title. *Id.* *Downs v. Belden*, 46 Vt. 674. *Miller v. Bingham*, 29 Vt. 82. *Alger v. Andrews*, 47 Vt. 238.

140. Where the defendant, a savings bank, claimed in defense a right to retain, as the property of A, the money sued for;—*Held*, that the plaintiff could show against the defendant anything which he might against A, if he were the actual defendant,—as A's declaration, &c.,—and that without calling A as a witness. *Davis v. Windsor Savings Bank*, 48 Vt. 532.

141. The declarations of a person made while in possession of a farm and stock, and which related only to the relations which he sustained to the property in question, whether as owner or mere conditional purchaser, were *held* to be evidence against the defendant,—a purchaser from him of the stock—in favor of the plaintiff,—the original conditional vendor—as coming from one having privity of estate with the defendant. *Bucklin v. Beale*, 38 Vt. 653.

142. Declarations of a deceased person against his interest or right are evidence against those who claim in his interest or right. *Wheeler v. Wheeler*, 47 Vt. 637.

143. **Declarations made after transfer.** The declarations of the vendor of personal property against the title of his vendee, made after the alleged sale, are not evidence against the vendee, although the vendor was then in possession of the property. *Ellis v. Howard*, 17 Vt. 330. 41 Vt. 484.

144. After one, by conveyance or assignment, has parted with his interest in any property, right or chose in action, no declarations or admissions of his, made afterwards, although a party of record in the action, are evidence as against his grantee or assignee. *Bullard v. Billings*, 2 Vt. 309. *Brackett v. Wait*, 6 Vt. 411. *Edgell v. Bennett*, 7 Vt. 534. *Sargeant v. Sargeant*, 18 Vt. 371. 31 Vt. 447. *Hough v. Barton*, 20 Vt. 455. *Halloran v. Whitcomb*, 43 Vt. 306. *Washburn v. Ramsdell*, 17 Vt. 299. *Leland v. Farnham*, 25 Vt. 553. *Hayward Rubber Co. v. Dunclee*, 30 Vt. 29.

145. —**after action commenced.** The declaration of a former occupant of lands, made after the commencement of an ejectment against his grantee, that his own adverse possession commenced within fifteen years, was *held* not admissible against the defendant. *Shepherd v. Hayes*, 16 Vt. 436.

146. **Former owner living.** The declarations of A, the former owner of land, and now living, that his grantor was insane when he conveyed, are not evidence against the grantee of A by deed recorded, though made while A was in possession under his deed. *Carpenter v. Hollister*, 13 Vt. 552.

147. **Declarations disconnected from possession.** Where the question on trial was as to the true division line between the lands of the parties;—*Held*, that the declarations of a former owner, now living, as to where the line was, which declarations were not connected with the question of occupation, or acquiescence, or of claim while in possession, were not evidence on behalf of his grantee. *Wood v. Willard*, 36 Vt. 82.

148. **By whom provable.** The question being as to the acquiescence in a certain divisional line;—*Held* that the admission of a former occupant of the land, whether as tenant or proprietor, and made while so occupying, that that was the line, was evidence of such acquiescence as against the party who claimed from him; and that such admission could be proved by any other witness, as well as by the person who made it. *Beecher v. Parmele*, 9 Vt. 352. 17 Vt. 403.

149. **Other cases.** The claim of the former owner of a tract of land of which the defendant's land was a part, as to the boundary line of the tract, is admissible against the defendant. *Davis v. Judge*, 44 Vt. 500. *Hale v. Rich*, 48 Vt. 217.

150. The declarations of a party made upon a lot of which he was in partial possession, stating under what claim he held, were *held* admissible as evidence in chief against the defendant who claimed through such party by a subsequent arrangement. *Wing v. Hall*, 47 Vt. 182.

151. **Husband.** The declarations of a husband in possession of land in right of his wife, tending to qualify such possession and to show it not adverse but subordinate to the right of another, are evidence against one who makes claim derived from such possession. *Day v. Wilder*, 47 Vt. 533.

152. **Persons acting together.** In an action for a conspiracy, the acts or speeches of an alleged particeps will not be admitted in evidence to the jury, until a privity between him and the defendant is first shown to the satisfaction of the court. *Windsor v. Robbins*, 2 Tyl. 1.

153. Where several persons are proved to have combined together to do an illegal act, or to commit a crime, any act of any one of them, done in pursuance of the original concerted plan and in reference to and in furtherance of the common object, is evidence against the others. Their declarations stand upon the



same ground as their acts. *Aldis, J.*, in *State v. Thibau*, 30 Vt. 105.

154. Where evidence is given showing collusion, combination and co-operation between parties for the accomplishment of an unlawful purpose, it is competent to give evidence of what either party says in connection with acts in furtherance of that common purpose, and it will operate against either of the colluding parties. *Barrett, J.*, in *Jenne v. Joslyn*, 41 Vt. 484.

155. But if the declarations are merely narrative, the relation of a past transaction, and not one in furtherance of the illegal act; they are not evidence against others who were not present when they were made. So held in *State v. Thibau*, 30 Vt. 100.

#### V. HEARSAY.

##### 1. In general.

156. The statements of third persons out of court, who are still living, although made against their interest, are not, except in special cases, admissible in evidence,—much less their opinions. *Davis v. Fuller*, 12 Vt. 178.

157. It is no reason for admitting in evidence the declarations of a third person, that such person has become, or is, incapacitated as a witness. *Churchill v. Smith*, 16 Vt. 560.

158. What a witness, who is not a party, states out of court, is not evidence of the fact stated. *Law v. Fairfield*, 46 Vt. 425.

159. In an action to recover for the support of a pauper, the declaration of the husband of the pauper as to his pecuniary ability is not admissible as evidence of the fact. *St. Johnsbury v. Waterford*, 15 Vt. 692.

160. The question being whether a purchase on execution sale was collusive and fraudulent as between the purchaser, who was the execution creditor, and the debtor;—*Held*, that a declaration of the sheriff, who had taken and advertised the property, to his deputy who was about to sell it, that no one would be present at the sale but the execution creditor, was not admissible in evidence against the purchaser. *Mazham v. Place*, 46 Vt. 434.

161. A witness testifying that he told another a certain thing is not stating that the fact was so, and that he personally knew the fact. *Danville v. Wheelock*, 47 Vt. 57.

162. The question was whether the defendant was the lawful widow of J, it being claimed that E, to whom she had been married, was living when she married J. To support this claim, evidence was offered of the declarations of the deceased, made after such second marriage, that E was alive and he had met him;—also certain declarations of the parents of the deceased as to what time the

deceased and the defendant had lived together. *Held* to be hearsay, and not admissible. *Stevens v. Joyal*, 48 Vt. 291.

163. — **to identify an occasion.** It is admissible to prove what a party, or a third person, said in connection with a current transaction, for the purpose of identifying the particular occasion, or date. *Hill v. North*, 34 Vt. 604. See *Ross v. Bank of Burlington*, 1 Aik. 43.

##### 2. Declarations of deceased persons.

164. — **respecting lands.** Declarations of deceased persons in relation to the ancient course of water, may be given in evidence. *Pettibone v. Rose*, Brayt. 77.

165. The declarations of deceased persons who had actual knowledge as to the boundaries of lands, whether they concern public or private rights, or who, from their connection with the property, or their situation and experience in regard to such boundaries and the surveys thereof, had peculiar means of knowledge, so that it may be fairly inferred that they had actual knowledge of the same, made at a time when they had no interest to misrepresent, although not wholly disinterested in the subject, and made when upon or in the immediate vicinity of the boundary, and pointing it out, may be received as to the location of such boundary, when, from lapse of time, there is no reasonable probability that evidence can be obtained from those who had actual knowledge on the subject. *Wood v. Willard*, 37 Vt. 377. *Child v. Kingsbury*, 46 Vt. 47.

166. Such declarations are admissible, though not made upon the land, nor in its immediate vicinity, nor in connection with showing or pointing out the boundary. *Powers v. Silsby*, 41 Vt. 288.

167. One of the conditions upon which the declarations of deceased persons as to boundary lines and monuments are admissible in evidence is, that it shall be shown that they had knowledge of the line, marks, &c., relied on, at the time of the saying to be proved. But such knowledge is not to be proved by what was said, but is to be proved by other means. *Id.* *Hadley v. Howe*, 46 Vt. 142. *Miller v. Wood*, 44 Vt. 378.

168. **Business entries, &c.** On a trial in 1867, the issue was as to whether one Thomas, now deceased, resided in Troy in the year 1829. As tending to prove this, among other evidence, an account book of one Hovey, who resided in Troy at that date, now deceased, was introduced without objection, on which was an account with said Thomas, debt and credit, running through the year 1829, and no question was made but that the accounts were true and genuine, representing actual transactions, and

made at the time of the transactions and dates. The accounts were of such character as to indicate, if true, that Thomas then resided in the near vicinity of Hovey. The court refused the request to charge that the book had no tendency to prove the issue, and was not proper to be considered for that purpose; but charged, that the jury were at liberty to consider this with the other evidence, as bearing on the place of Thomas's residence in 1829. *Held* correct. *Cavendish v. Troy*, 41 Vt. 99; and see *Derby v. Salem*, 30 Vt. 722.

169. For the purpose of proving the residence of a person now deceased, writs brought in his name and judgments thereon, in which writs he was set up as of a particular town and the suits were made returnable there and the defendants therein were set up as of a different town, were *held* admissible in evidence. *Cavendish v. Troy*.

170. On a trial for murder, for the purpose of identifying a watch found with the prisoner as the watch of the murdered person, the entries made on his book in regular course of business, by a jeweller, since deceased, with whom the watch had been on two occasions left by the murdered person for repairs, giving a description of the watch by its number, name of maker and name of owner, &c., were *held* admissible in evidence. *State v. Phair*, 48 Vt. 366.

### 3. Recital in deed.

171. **Recent deed.** Where a deed of recent date described the grantors as heirs of a certain person;—*Held*, that the fact of heirship was not proved by such recital; that this amounted at most to a mere claim of heirship. *Potter v. Washburn*, 13 Vt. 558.

172. **Ancient deed.** The plaintiff in trespass made title through one Smith, deceased, under an ancient deed of several lots of land from persons who described themselves therein as the widow and heirs of said Smith. The grantee in that deed had conveyed different lots of the same lands to different persons, who had continued for thirty or forty years in quiet possession. *Held*, that the recital in the ancient deed, in connection with the conveyances and possessions under it, was evidence to prove that the grantors in that deed were in truth the widow and heirs of Smith. *Bell v. Barron*, 14 Vt. 307.

173. **Deed of third party.** In trespass, involving a question of boundary, the plaintiff claimed the premises as part of "the Pierce farm." *Held*, that a deed between other parties of adjoining lands, in which they were described as bounded "North on the Pierce farm," was not evidence; that such description was but a declaration of the grantor, who was

not shown to have deceased, though the deed was 42 years old. *Oatman v. Andrew*, 43 Vt. 466.

### 4. Reputation.

174. **As to solvency.** One's general reputation as to solvency or insolvency is admissible as evidence of the fact. *Bank of Middlebury v. Rutland*, 33 Vt. 414. *Hard v. Brown*, 18 Vt. 87. 28 Vt. 762.

175. **Marriage.** In all civil actions, except for *crim. con.*, a marriage may be proved by reputation and cohabitation. *Northfield v. Vershire*, 33 Vt. 110.

176. **Pedigree.** *Held*, that pedigree may be proved by near relatives from reputation in the family—*e. g.*, who was the witness's father and grandfather, and the fact and date of the death of the grandfather, as having occurred sixty-six years ago, and before the birth of the witness. *Webb v. Richardson*, 42 Vt. 465.

177. **Death.** A witness testified that her husband died two years ago; that she was not with him when he died, nor was present at the funeral, and had no personal knowledge of his death; that she only knew this from his folks telling her and writing her. *Held* competent evidence to prove such death. *Mason v. Fuller*, 45 Vt. 29.

178. **State of market.** The knowledge of a party of the general course of business in a particular trade, which he derives from being engaged in that trade, although partly derived from information from others in the course of such business, is of that general character that renders it competent evidence—as, of the state of the market. *King v. Woodbridge*, 34 Vt. 565. *Laurent v. Vaughn*, 30 Vt. 90;—the loss on sales, derived from statements of account of the commission merchant. *Draper v. Austin*, 46 Vt. 215.

### VI. DYING DECLARATIONS.

179. Dying declarations, to be admissible in evidence as such, must have been made under the full and firm belief of near and approaching death. *State v. Center*, 35 Vt. 378.

180. Whether dying declarations are made under such full and firm belief of near and approaching death as to be admissible in evidence, is a question for the court to decide. It is not enough that the evidence tends that way, and so admit them and leave it to the jury to say whether they will, or will not, regard them; but the court is to be satisfied in the first instance that they were so made as to be admissible. *Id.* *State v. Howard*, 32 Vt. 380.

181. The court below having decided that the declarations were not so made as to be admissible as evidence, that decision is con-

clusive. *Redfield*, C. J., in *State v. Howard*, 32 Vt. 404.

182. At the time of making declarations, claimed to be dying declarations, the declarant said "she knew she should die," but said further that "if she lived to get well she would never go to C's again." At that time neither her physician, nor others, thought her dangerously sick. *Held*, that the declarations were not admissible. *State v. Center*, 35 Vt. 378.

183. All vague and indefinite expressions, all language that does not distinctly point to the cause of death, and its attending circumstances, but requires to be aided by inference or supposition in order to establish facts tending to criminate the respondent, should be held inadmissible as dying declarations. *Ib.*

184. The interval of six days between the making of the declaration, and the death, is not a conclusive objection to their admission as dying declarations. *Ib.*

185. In order to make dying declarations admissible, it is not necessary that the declarant should state everything which constituted the *res gestæ* of the subject of his statement, but it is necessary that his statement of any given fact should be a full expression of all he intended to say, as conveying his meaning as to such fact. *State v. Patterson*, 45 Vt. 308.

#### VII. TESTIMONY OF FORMER WITNESS.

186. Evidence of what a deceased witness testified to on a former trial of the same cause is admissible, although he was not sworn, where the party now objecting consented to his testifying without being sworn. *Wheeler v. Walker*, 12 Vt. 427.

187. The testimony given by a witness before the committing magistrate may be given in evidence on the trial of an indictment in the same case, when such witness has deceased. *State v. Hooker*, 17 Vt. 658.

188. The defendant suffered judgment by default, without appearance, after legal notice of the suit, and the clerk, under the rules, assessed the damages without other notice to the defendant, and in his absence. At a subsequent term the default was stricken off, and the case brought forward for trial. *Held*, that on trial of the merits, the plaintiff could reproduce the testimony given before the clerk on such assessment, by a witness who had since then deceased. *Deming v. Chase*, 48 Vt. 382.

189. Whenever it becomes necessary to prove the testimony of a witness given on a former trial, it is not necessary that the witness called should be able to give the precise language of the former witness's testimony, but it is sufficient if he is able to relate, and does relate, the substance of that testimony. *State v. Hooker*, 17 Vt. 658. *Marsh v. Jones*, 21 Vt.

382. *Downer v. Rowell*, 24 Vt. 346. *Whitcher v. Morey*, 39 Vt. 459. *Earl v. Tupper*, 45 Vt. 275.

190. A witness was allowed to testify to the testimony given on a former trial by a witness since deceased, although he could not recollect the testimony given on cross-examination, but added, that if the testimony on cross-examination had altered that in chief, he thought he should recollect it. *Held* correct. *Williams v. Willard*, 23 Vt. 369.

191. The testimony given by a witness on a former trial may be proved from the judge's notes, or from notes taken by any other person who will swear to their accuracy, or may be proved by any person who will swear from his memory to its having been given. *Glass v. Beach*, 5 Vt. 172. *Johnson v. Powers*, 40 Vt. 611. *Marsh v. Jones*, 21 Vt. 383. *Earl v. Tupper*, 45 Vt. 275.

192. The testimony given by a witness on a former trial may be proved by reading the minutes taken of such testimony, which are proved to be "full, and taken with substantial accuracy." *Whitcher v. Morey*, 39 Vt. 459—or from a copy of the same, the original being lost. *Ib.*

193. In such case, the consideration that the witness cannot swear from memory, is not, at present, regarded as important. All that is required is, that the witness shall be able to state, that the memorandum is correct. He may then read it, as well as repeat it. The old rule that the witness must be able to swear from memory, is now pretty much exploded. *Downer v. Rowell*, 24 Vt. 343. 39 Vt. 472. *Johnson v. Powers*, 40 Vt. 611.

194. If a witness at one trial give testimony which includes irrelevant and incompetent matter, though no objection be then taken thereto, it is *error*, on a subsequent trial and after the death of such witness, to read the entire minutes, including such irrelevant and incompetent matter, if the admission of such part be objected to. *Willard v. Goodenough*, 30 Vt. 393.

#### VIII. RES GESTÆ.

195. Where declarations are sought to be admitted as part of the *res gestæ*, the *res gestæ* cannot be proved by declarations. *Barnum v. Hackett*, 35 Vt. 77.

196. **Declarations concurrent with the act.** The declarations of the owner of a package of bank bills, which was taken by him to be delivered and was delivered by him on board a steamer on Lake Champlain for transmission, and which, with the boat, was destroyed by fire, which declarations accompanied and explained his actions, were *held* admissible in his favor as part of the *res gestæ*, to prove the character of such bills and the amount,—as

that the package contained "\$800 Burlington Bank bills." *Ross v. Bank of Burlington*, 1 Aik. 43. 34 Vt. 616.

197. Declarations of the owner of a farm made in the presence of the occupant, and while at work for the occupant in carrying it on, and assented to by the occupant at the time, and made "in connection with some act of the owner in carrying on the farm," stating that the occupant was carrying on the farm upon shares, or at the halves, were held admissible for the occupant to prove that fact, in his action against an officer for attaching and selling the farm products as wholly the property of the owner;—that they were admissible, either as showing a mutual recognition by the owner and occupant of the terms of the occupancy, or as declarations of the owner constituting part of the *res gesta*. *White v. Morton*, 22 Vt. 15.

198. The declarations of a party paying money, made at the time of payment, showing the character and object of the payment, its application or appropriation, are part of the *res gesta* and admissible evidence for the party. *Bank of Woodstock v. Clark*, 25 Vt. 308.

199. A transaction cannot be considered as ended, so long as, before the parties to it have separated, anything, according to the usual course of business, remains to be done in regard to it—as, in this case, the giving of a receipt on the payment of money; and, until thus ended, the declarations of the parties are evidence, as being of the *res gesta*. *Fifield v. Richardson*, 34 Vt. 410.

200. Where a party's purpose in doing a certain act is material and the act is equivocal, but is relied upon as evidence against him, he may show his own declarations, made while setting about to do the act, and as part of his conduct at the time of entering upon it, which give character to it as indicating his purpose, though made in the absence of the other party. *Danforth v. Streeter*, 28 Vt. 490.

201. The declarations of a deceased person stating the purpose for which she left home and went to the respondent's [as, to have an abortion effected upon her], and made at the time of her so starting from home, are part of the *res gesta* and admissible in evidence. *State v. Howard*, 32 Vt. 380.

202. The plaintiff and respondent each claimed to be the owner of certain cattle;—the plaintiff claiming that W bought them for him, as his agent, and with his money;—the defendant claiming that W bought the cattle for himself, with his own money, and sold them to the defendant. The plaintiff gave evidence that W and P, an agent of the plaintiff, had by plaintiff's direction driven these with other cattle admitted to be the plaintiff's, to a pasture hired by the plaintiff and W, and had by his direction branded all the cattle with the mark

of the owner of the pasture. W had testified that they were so marked to identify them as belonging to that pasture, in case they should stray. Held, that the declaration of W to P and others, on the occasion of the marking, that these cattle were his and the others were the plaintiff's, was admissible as characterizing the act done, and tending to rebut the inference to be drawn in favor of the plaintiff from the acts proved; as also to strengthen the testimony of W as to the purpose of the marking. *Eddy v. Davis*, 34 Vt. 209.

203. The complainant in a bastardy prosecution admitted, on cross-examination, that since the birth of her child and the swearing to her complaint, she had admitted that the child was not begotten by the defendant, but by one W, and that she made an affidavit to that effect. On re examination, she testified that she was induced so to do by certain solicitations of the defendant, which she detailed with the circumstances. Held, that as part of the *res gesta*, it was competent for her to state what she said when so first solicited—as that she then refused to swear the child on W, and stated that the child was not his, but was the child of the defendant. *Nash v. Doyle*, 40 Vt. 96.

204. In trover for a yoke of oxen, the plaintiff claimed title, as a conditional vendor to H. The defendant claimed them by purchase from H, and that the plaintiff's sale to H was absolute. The defendant introduced a composition deed, which was signed by the plaintiff and other creditors of H, and was made after his sale of the oxen to the defendant, but which never became operative, and claimed that this tended to show that the plaintiff had no lien on the oxen, otherwise he would not have signed the deed. Held, that to rebut such inference, the plaintiff might show that at the time of signing he said he had a claim on the oxen for the price he sold them at, and that he looked to the defendant for the oxen; and that the deed did not include this claim, but referred to another claim against H. *Pollard v. Bates*, 45 Vt. 506.

205. **Declarations after the act.** The declarations of a party in his own favor are only admitted when concurrent with an act or transaction of his, and as a part of the act or transaction itself, and to characterize the act or transaction, which, alone and unexplained, might be equivocal in its character. If the act and the declaration are not concurrent, and the act is finished and past before the declaration is made, then it becomes a mere narrative of a past transaction, and is inadmissible, and the length of time that intervenes is not important. *Poland, C. J., in Worden v. Powers*, 37 Vt. 619.

206. As, where the defendant, "soon after" parting with the plaintiff, told a witness that

he had met the plaintiff and what had transpired between them;—*Held* inadmissible. *Id.*

207. The declarations of a party injured when no one was present, are not evidence to show the manner in which the injury occurred, however nearly contemporaneous with the occurrence. Such declarations do not tend to characterize the transaction, and are, by consequence, no part of it, and cannot be admitted as such. *State v. Davidson*, 30 Vt. 377.

208. Mother and son were riding together upon a highway, the son driving, when an accident happened by which the mother was thrown to the ground and injured. Immediately, as soon as witnesses could go about six rods, and while the mother yet lay upon the ground and the son stood holding the horse right near her, the son told what caused the accident. *Held*, in an action by the mother, that such declarations were mere hearsay, and not admissible against her as part of the *res gestæ*. *Downer v. Stratford*, 47 Vt. 579.

209. A statement made by the deceased, about two minutes after a shooting affray and some eleven rods distant from the scene of it, "He [the prisoner] shot me before I touched him," was *held* not admissible against the prisoner as a part of the *res gestæ*. *State v. Carlton*, 48 Vt. 636.

210. — **before the act.** The question being whether certain notes were in existence previous to the date of a certain mortgage, the declarations of a party, made the day previous to such date, that he had the notes in his possession and must secure them, &c., were *held* not admissible in his favor. *Holbrook v. Murray*, 20 Vt. 525.

211. — **not connected with the act.** The declarations of a party expressing the terms on which he was carrying on a certain farm, made while he was purchasing seed corn, and two miles distant from the farm, and like declarations, while four miles distant from the farm, made in connection with his saying that he had cut some good hay on the farm, &c., were *held* not admissible in his favor. *Elkins v. Hamilton*, 20 Vt. 627.

212. The question being, whether the plaintiff had paid the defendant certain bills included in an account before that time rendered by the plaintiff in the probate court, on settlement of his account, as guardian, with the estate of his ward;—*Held*, that the plaintiff's declarations and claims made to an agent assisting him in drawing up such guardian's account, that he had paid such bills, were no part of the *res gestæ* and were not evidence for him to prove the fact of payment. *Burrows v. Stevens*, 39 Vt. 378.

#### IX. OPINION; PURPOSE; INTENT.

213. **Opinion.** As a general rule, the opin-

ions of witnesses, not having some peculiar skill or professional knowledge, are not admissible as evidence, although derived from the witness's personal observation, and sought to be given in evidence in connection with the facts upon which they are founded and as derived from them. There are some exceptions—as questions of sanity, value, height, distance, size and appearance of objects, &c. *Crane v. Northfield*, 33 Vt. 124. *Oakes v. Weston*, 45 Vt. 430.

214. The general rule is, that a witness must state facts, and not opinion; but this is not a universal rule, nor are the exceptions to the rule confined to experts in matters of science, art or skill. Where the witness has had the means of personal observation, and the facts and circumstances which lead the mind of the witness to a conclusion, are incapable of being described so as to enable any one, but the observer himself, to form an intelligent conclusion from them, the witness is often allowed to add his opinion, or the conclusion of his own mind. *Peck, J. Cavendish v. Troy*, 41 Vt. 108.

215. Where the facts are of such a character as to be incapable of being presented, with their proper force, to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them, without the aid of the judgment or opinion of the witness who had the benefit of personal observation, he is allowed, to a certain extent, to add his conclusion, judgment, or opinion. Thus, a witness who had examined certain gullies in a highway was allowed to answer: "I should think that they had been there, from their appearance, for several days." *Bates v. Sharon*, 45 Vt. 474; and see *Redfield, J., in Smith v. Miles*, 15 Vt. 249.

216. After a witness has stated his means of personal observation and knowledge as to a disputed fact, it is not necessarily error to allow him to state, that it could not have occurred, or that he thinks it could not have occurred, without his observing or knowing it. *Cavendish v. Troy*, 41 Vt. 99.

217. A witness who had examined a highway at the place of an accident, and made some partial measurements of its width, after testifying to its width and the width of different kinds of carriages used on highways, was allowed to testify that, *in his opinion*, the road was not wide enough at that place to allow two team wagons to pass each other. *Held*, that this was simply the opinion of the witness as to the width of the highway, and not as to its sufficiency, and was admissible;—like opinion as to distance, size, height, value, velocity, &c. *Fulsome v. Concord*, 46 Vt. 135.

218. A witness, not a professional man, may give his opinion touching the insanity of a party, in connection with the facts upon which

it is founded and as derived from them; but not upon facts proved by other witnesses. *Morse v. Crawford*, 17 Vt. 499. 35 Vt. 415. *Crane v. Crane*, 33 Vt. 15.

219. Nor is such opinion rendered inadmissible by the fact that it was not formed at the time the observed facts occurred. *Hathaway v. National Life Ins. Co.*, 48 Vt. 335.

220. The opinion of a competent witness was allowed as evidence of the additional amount of work which a saw mill would have done between certain dates, if the wheels and gearing had been constructed in a workmanlike manner, as a basis for estimating damages in an action for not so repairing the mill. *Clifford v. Richardson*, 18 Vt. 620. 33 Vt. 531. 41 Vt. 108.

221. The opinions of witnesses who were acquainted with the business and running of a particular railroad under a lessee, and with its expenses both before and after it was put into the possession of a receiver, were held admissible to prove the value of such use to the lessee during the period that he was so deprived of possession. *Sturgis v. Knapp*, 33 Vt. 486.

222. A witness having specified and stated the value of all the property of A, real and personal, as far as he was able, and testified that he knew of no other property of A, was then asked: "From your knowledge of the property of A, what do you think he was worth?" Held, that as his answer would be but a summing up of his previous statements, it was in the discretion of the court to admit or exclude it, and that it was not error to exclude it. *Bank of Middlebury v. Rutland*, 33 Vt. 414.

223. It is not error to admit the opinions of witnesses in like cases. *Hard v. Brown*, 18 Vt. 87. *Sherman v. Blodgett*, 28 Vt. 149. *Richardson v. Hitchcock*, 28 Vt. 757.

224. A witness having testified that he could not describe the condition of a bridge at a particular date, was asked to compare its then condition with its condition three years afterwards. The court excluded the inquiry. Held, not error. *Stanton v. Proprietors of Haverhill Bridge*, 47 Vt. 172.

225. Where all the pertinent facts can be sufficiently detailed and described, and where the triers are supposed to be able to form correct conclusions without the aid of opinion, or judgment from others, no exception to the rule of excluding the opinion of the witness is allowed. *Royce, J.*, in *Clifford v. Richardson*, 18 Vt. 626.

226. The opinions of witnesses as to the sufficiency of a highway are not admissible. *Lester v. Pittsford*, 7 Vt. 158. *Crane v. Northfield*, 33 Vt. 124.

227. "Due course of business"—"in good faith"—these are matters of opinion or conclusions of the witness and not admissible. *Clough*

*v. Patrick*, 37 Vt. 421. *National Bank v. Isham*, 48 Vt. 590.

228. In an action for negligently setting fires to brush upon the defendant's land, which fires spread over the plaintiff's land, certain farmers, who were acquainted with the clearing of land by burning, and were present at the fires, were witnesses for the defendant, and described, as well as they could, the position of the fires and the direction and force of the wind. Held, that their opinions that it was a suitable and safe time for the setting of such fires, were not admissible in evidence. *Fraser v. Tupper*, 29 Vt. 409.

229. The question at issue was whether the words of an indorsement upon a note were twenty-five or seventy-five dollars. Held, that it was not competent to prove by a witness, not an expert, that upon taking a previous inventory of this and other notes, he called and read the indorsement as twenty-five dollars. This is but opinion. *Willard v. Goodenough*, 30 Vt. 393.

230. In case for injury to the plaintiff's horse, occasioned by the defendant's overloading and overtasking it in drawing a load of ashes with it and another horse from R to C, certain witnesses for the plaintiff testified that they drew ashes in company with the defendant that day; they testified to the weight of the defendant's load, the condition of the road, the horses, the wagon, and that they had been accustomed to teaming and had drawn ashes from the same place a few days before over the same road. The plaintiff then proposed to these witnesses the question: "Whether, in their opinion, the defendant's horses were unreasonably or improperly loaded, and what would be a reasonable load for that span of horses, with that wagon, and the condition of the going as it then was?" The court excluded the question. Held correct. *Oakes v. Weston*, 45 Vt. 430.

231. The opinion of a witness as to the future net profits from the running of a railroad, is too uncertain and remote to be received as evidence of the pecuniary responsibility of the company five years before. *Bank of Middlebury v. Rutland*, 33 Vt. 414.

232. Experts. Where mere opinion is required upon a given state of facts, not observed and testified to by the witness, that opinion is to be derived from professional men. *Lester v. Pittsford*, 7 Vt. 158. 35 Vt. 415. *Morse v. Crawford*, 17 Vt. 499.

233. Physicians and surgeons of practice and experience are experts, and their opinions are admissible in evidence upon questions that are strictly and legitimately embraced in their profession and practice; and it is not necessary that a witness of this class should have made the particular disease in question,—as insanity,

—a specialty, to make his testimony, as that of an expert, admissible. *Hathaway v. National Life Ins. Co.*, 48 Vt. 335.

234. An expert cannot be asked his opinion on a state of facts appearing upon the minutes of testimony taken by the counsel calling him, where he has not heard all the testimony. *Thayer v. Davis*, 38 Vt. 163.

235. A consulting physician testified, as an expert, that the testator was affected with a softening of the brain; that this opinion was founded upon a personal examination, and upon what he was told, not in the testator's presence, by the attending physician, since deceased—mainly upon the latter. *Held*, that it was error to admit the witness's opinion based upon such information of the attending physician. *Wetherbee v. Wetherbee*, 38 Vt. 454.

236. A medical witness, who has heard the testimony, may give his opinion as to the sanity or insanity of a party as indicated by any given state of facts, so long as such facts are warranted by the evidence and are not conflicting. But where the facts upon one side conflict with facts upon the other, they ought not to be incorporated in one question, but the attention of the witness should be called to their opposing tendencies, and if his skill and knowledge can furnish the explanation which harmonizes them, he is at liberty to state it. But he is not to decide upon the evidence, or settle in his mind disputed facts, or give his opinion as to the general merits of the case. *Fairchild v. Bascomb*, 35 Vt. 398.

237. Hypothetical questions may be put to an expert, where the hypothesis supposes a state of facts proved, or which may be fairly claimed to be proved by the evidence of other witnesses. *Id.* *Hathaway v. Nat. Life Ins. Co.*, 48 Vt. 335. *Thornton v. Thornton*, 39 Vt. 122.

238. A woman who had had experience as a nurse at child-births and, as such, had attended at premature births, was allowed to give her opinion, as an expert, that the birth of the child in the case in question, and where she was in attendance, was premature. *Held* correct. *Mason v. Fuller*, 45 Vt. 29.

239. A witness, familiar with the operation of the latch-needle in his knitting machine, was allowed to exhibit the working of his machine to the jury and by that means to explain why, in his opinion, a spring-needle could not take the place of the latch-needle, although he had no experience in the use of the spring-needle, or knowledge of its operation. *Held*, not error. *James v. Hodson*, 47 Vt. 127.

240. One having experience in floating logs in a certain stream and past a particular dam, was allowed to testify his opinion as to the proper manner of there floating them. *Held* correct. *Dean v. McLean*, 48 Vt. 412.

241. **Mutual purpose.** In an action against a steamboat company as common carriers for the loss of a package of bank bills delivered to the captain for carriage, the witness who delivered the package was inquired of by the party calling him, to whom he intended to give the credit; and answered, that he intrusted the money to the captain in his official capacity, and not in his private capacity. *Held*, that, although probably harmless, this testimony was not strictly admissible. *Farm. & Mech. Bank v. Champlain Tr. Co.*, 23 Vt. 186.

242. **Understanding.** An agent who had made a purchase for the defendant, testified to his own "understanding" of the contract as to a credit, and that he was confident the other party so "understood" it. *Held*, that the first part was admissible evidence, but that the second was not. *Linsley v. Lovely*, 26 Vt. 123.

243. **Intent.** Where the intent or mental purpose of a party is a fact material to be proved, and such party is a witness, he may testify directly what was his intent—as in case of domicile. *Hulett v. Hulett*, 37 Vt. 581;—intent to return to an inn as a guest. *McDaniels v. Robinson*, 26 Vt. 316.

244. In trover for a yoke of oxen, the plaintiff claimed title as conditional vendor thereof to one H, who sold them to the defendant. The defendant claimed that the plaintiff's sale to H was absolute. After the defendant's purchase H failed, owing the plaintiff a small sum besides the debt for the oxen. Many of the creditors of H sued him and attached his property, which the plaintiff knew, but he did not sue. *Held*, that, as tending to show that the plaintiff then supposed he had retained a lien upon the oxen, and that his conduct then was consistent with his claim on trial, it was competent for him to testify why he did not sue and attach with the other creditors,—as, that he forbore because he had such lien, and preferred to run his chance of getting his pay for the small debt to bringing a suit for it. *Pollard v. Bates*, 45 Vt. 506.

#### X. HANDWRITING—ATTESTING WITNESS.

245. The hearing of a letter read, purporting to have been written by A, is no evidence that A wrote it. *Johnson v. Bolton*, 43 Vt. 303.

246. **Competency of witness.** One who had never seen a party write, nor had corresponded with him, nor been in such business relations with him as to have knowledge of his signature, but had only seen what purported to be his signature, was *held* incompetent to testify to such signature. *National Union Bank v. Marsh*, 46 Vt. 443.

247. In order that one should be competent as a witness to prove the handwriting of a paper not produced, he should have had such knowl-

edge of the handwriting, at the time he saw the paper, as to have formed some opinion of its genuineness. *Guyette v. Bolton*, 46 Vt. 228.

**248. Comparison.** Proof of handwriting may be made by comparison of hands. *Gifford v. Ford*, 5 Vt. 532.

**249.** Documents proved to be genuine, though not in evidence except for the purpose of comparison, may go to the jury for this purpose. *Adams v. Field*, 21 Vt. 256. *State v. Ward*, 39 Vt. 225.

**250.** The genuineness of the document which goes to the jury for the purpose of comparing the contested document with it, must either be admitted, or else be established by clear, direct and positive testimony. Unless this is in the first instance done, the testimony should, for obvious reasons, be excluded. *Id.*

**251.** Although the court has decided that the writing offered as a standard of comparison is genuine, still it is the right and the duty of the jury to judge for themselves in respect to the proof of its genuineness; and they should weigh the testimony by the same rule, and require the same measure of proof that they would require in respect to any other essential point in the case. *State v. Ward*.

**252.** In order to prove the genuineness of the signature to a marriage certificate purporting to have been signed by Benjamin Jay, a justice of the peace of Scranton, Pennsylvania, the witness, not knowing any such person, wrote a letter directed to that address and received a reply, purporting to be signed by Benjamin Jay. *Held*, that there was no such proof, if any at all, that Benjamin Jay signed the letter, as to justify setting that signature up as a standard by which to judge, on a comparison of handwriting, of the genuineness of the signature of the certificate. By *Peck, J.*; The genuineness of the standard with which the disputed signature is to be compared, must be either admitted, or directly and very clearly proved. *State v. Horn*, 43 Vt. 20.

**253.** The only evidence to prove that the defendant signed the note in suit was that of the defendant himself, who, being called by the plaintiff, and shown the signature only, and asked if it was his writing, answered: "It might be and might not be. It looks some like my handwriting; it might be my writing, and it might be some imitation. It looks like my writing; I should think it was." On cross-examination, on being shown the whole note, he testified: "I never signed any such paper." *Held*, that it was not error for the court to refuse to direct a verdict for the plaintiff, and to leave the question to the jury. *National Union Bank v. Marsh*, 46 Vt. 443.

**254. Experts.** Experts may be called to testify to their opinions, whether different writings were written by the same hand. The court first

decides whether the witness has had sufficient experience in the examination and comparison of writings to testify as an expert; but the jury must determine from the testimony, whether the witness has sufficient skill and experience to render his opinion of any importance, and the weight which should be given to it. *State v. Ward*, 39 Vt. 225; and see *State v. Phair*, 48 Vt. 366.

**255.** Certain witnesses, offered as experts to determine the genuineness of handwriting by comparison, testified to their experience in such matters, but, not professing any peculiar skill, their opinions were excluded by the county court, on the ground that, admitting their testimony to be true, they were not *experts*, according to the true idea of the law. *Held*, not error;—for that so long as the evidence or facts do not constitute or conclusively show the fact of peculiar *skill*, which is the kernel of the matter, but such skill, as matter of fact, is left to be inferred from such evidence and special facts, the finding of the court is not revisable, whichever way it be. Comments on the value of the evidence of experts. *Wright v. Williams*, 47 Vt. 222.

**256.** Comments of the judge, depreciating the value of the testimony of experts in handwriting, but leaving the value of their opinions to the jury, were *held* not erroneous. *Pratt v. Rawson*, 40 Vt. 183.

**257. Witnessed writing.** Testimony of the admission of his signature by a party to a witnessed note was, under special circumstances, admitted (*Tyler, J.*, dissenting). *Adams v. Brownson*, 1 Tyl. 452.

**258.** The court refused proof of the execution of a witnessed writing by comparison of handwriting, where the subscribing witness was within the process of the court. *Pearl v. Allen*, 1 Tyl. 4.

**259.** So, where the subscribing witness lived without the State, but at a known place within reasonable distance of the place of trial, so that his deposition could have been procured. *Rich v. Trimble*, 2 Tyl. 349.

**260.** In order to prove that a subscribing witness to a note, signed by several parties, was in fact only a witness to the first signature, it is not necessary that the subscribing witness should be called. *Harding v. Cragie*, 8 Vt. 501.

**261.** The maker of a non-negotiable note promised to pay it to the assignee thereof. In an action on such promise;—*Held*, that the promise was evidence tending to prove the execution of the note, though not exhibited to the maker, and although the note was witnessed and the subscribing witness was not called. *Hodges v. Eastman*, 12 Vt. 358.

**262.** Where a written contract comes only incidentally in question, its execution may be proved otherwise than by the subscribing



witness. *Curtis v. Belknap*, 21 Vt. 493. *Chandler v. Caswell*, 17 Vt. 580.

263. In an action of ejectment founded upon title under a deed of the collector of a particular land tax, the plaintiff, in order to prove that the collector had given the necessary bond to the committee appointed to expend the tax, produced such bond. *Held*, that its execution might be proved by one of the committee, although the subscribing witnesses were then living in this State. *Chandler v. Caswell*.

264. Where the attestation of witnesses is not necessary to the operative effect of a written instrument, its execution may be proved without proof of the handwriting of the subscribing witness. *Sherman v. Champlain Transportation Co.*, 31 Vt. 162.

265. An attested deed was allowed to be proved by evidence of the handwriting of the grantor, where it purported to have been executed out of this State, and the witness testified that he did not know the attesting witnesses, and did not know of their being in this State. *Held*, not error. *Ib.*

#### XI. ORDINANCES; PRIVATE STATUTES; FOREIGN LAWS; JUDICIAL PROCEEDINGS.

266. **Private enactments.** City ordinances, like votes of towns, villages and other municipal corporations, are not public laws of which the court can take judicial notice, but are facts to be pleaded and proved. *State v. Soragan*, 40 Vt. 450.

267. The court will take judicial notice of the existence of places as incorporated towns within the State, but not of unincorporated villages, though popularly named and known. *Conn. & Pass. R. R. Co. v. Baxter*, 32 Vt. 805.

268. The court does not *ex officio* take notice of a private statute. It must be pleaded, or proved. *Pearl v. Allen*, 2 Tyl. 311.

269. **Foreign laws.** Foreign laws must be proved as facts. If written, they must be produced; if unwritten, they must be proved by witnesses conversant with them. *Woodbridge v. Austin*, 2 Tyl. 364. 19 Vt. 184.

270. The court may possess sufficient knowledge of the laws of another State authorizing a justice of the peace to take the acknowledgment of a deed, to admit a deed so acknowledged, without further proof on that point. *Middebury College v. Cheney*, 1 Vt. 336.

271. The statute books of other States have been "allowed" to be read in the supreme court, to show the authority of magistrates there to take depositions, though such books were not introduced in the county court. *Danforth v. Reynolds*, 1 Vt. 259. 18 Vt. 387. 19 Vt. 364.

272. The existence and provisions of the law of another or foreign State must be proved in the course of the trial of the cause, the same

as any other fact is proved. The law cannot be proved by the production of the statute in the supreme court; no facts can be there supplied, not even when proved by matter of record. *Adams v. Gay*, 19 Vt. 358. 25 Vt. 564, *note*.

273. Foreign statutes must be specially set forth in pleading them, and must be proved as facts;—as in pleading a bankrupt's discharge obtained in Canada. *Peck v. Hibbard*, 26 Vt. 698.

274. Our courts cannot take judicial notice of the laws of a sister State. They must be proved as facts. *Taylor v. Boardman*, 25 Vt. 581. *Pickering v. Fisk*, 6 Vt. 102. 25 Vt. 601. *Territt v. Woodruff*, 19 Vt. 182. *Adams v. Gay*, 19 Vt. 858.

275. The court will not act on the suggestion, without proof, that the laws of a sister State differ from our own. *Territt v. Woodruff*. *Adams v. Gay*.

276. Proof a foreign written law may be by some copy of the law, which a witness can swear was recognized in the foreign country as authoritative, and in force. *Spaulding v. Vincent*, 24 Vt. 501.

277. The statute books of any one of the United States, purporting to be published by the authority of such State, is competent proof of the statute law of such State, in this State. *State v. Stude*, 1 D. Chip. 303. *Patterson v. Patterson*. *Ib.* 200. *Danforth v. Reynolds*, 1 Vt. 265. *State v. Abbey*, 29 Vt. 60.

278. Legal proof of the statutes of another State is required, where they affect the merits of the trial—as, an authentication according to the act of congress; a sworn copy compared with the record of the statute in the secretary of State's office; or the authorized statute book of the State. This rule is relaxed in regard to depositions taken without the State. *Smith v. Potter*, 27 Vt. 304.

279. The statute laws of another State must be proved by the production of the statute. The statement of the presiding judge to the jury, that of his own knowledge, justices of the peace, by the laws of Pennsylvania, have authority to solemnize marriage, is not proof. *State v. Horn*, 43 Vt. 20. See *State v. Rood*, 12 Vt. 396.

280. **Proceedings of foreign courts.** The best proof of the proceedings of a foreign court is the original records. But that cannot ordinarily be produced. The testimony usually produced is a sworn copy by one who has compared it with the original, or else an exemplified copy certified by the clerk and the presiding judge and the seal of the court, with the broad seal of the province or kingdom to the appointment of the judge, with the proper certificate from the office of appointment. *Redfield, J. Spaulding v. Vincent*, 24 Vt. 501.

## XII. BEST AND SECONDARY.

**281. In general.** The rule which requires the best evidence applies to every case, and requires the production of the record, where a party would for any purpose prove the recovery of a judgment. *Graham v. Gordon*, 1 D. Chip. 115;—or other matter evidenced by the record. *Richards v. Pearl*. *Id.* 118;—or other original paper,—as a newspaper notice. *Rut. & Bur. R. Co. v. Thrall*, 35 Vt. 536.

**282.** That matter in abatement was pleaded before a justice can be proved only by his record. *Martin v. Blodget*, 1 Aik. 375.

**283. The original lost or destroyed.** The rendition of a judgment by confession was allowed to be proved by parol, so as to sustain a sale upon an execution reciting such judgment, where the record was lost. *Mazham v. Place*, 46 Vt. 484.

**284.** The existence and contents of papers lost or destroyed may be proved by parol;—as, the records of a village or town meeting. *Hutchinson v. Pratt*, 11 Vt. 402. *Slack v. Norwich*, 32 Vt. 818;—of a school district. *Sherwin v. Bugbee*, 16 Vt. 439;—the contents of a libellous paper. *Gates v. Bowker*, 18 Vt. 23;—of a grand list. *Spear v. Tilson*, 24 Vt. 420;—an attachment. *Brown v. Richmond*, 27 Vt. 583;—an execution. *Bliss v. Stevens*, 4 Vt. 88;—entries in books of account. *Tucker v. Bradley*, 33 Vt. 324;—contents of notices of sale posted. *Eddy v. Wilson*, 43 Vt. 362.

**285. Proof of loss.** Before secondary evidence of the contents of a writing, claimed to be lost, can be admitted, it must be shown that a search for it has been made, in good faith and with proper diligence, in the place where it was likely to be found, and that the party has, in good faith, reasonably exhausted all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him, and that such search has proved ineffectual. *Thrall v. Todd*, 84 Vt. 97. *Viles v. Moulton*, 11 Vt. 470. *S. C.*, 18 Vt. 510. *Royalton v. Turnpike Co.*, 14 Vt. 311. *Fletcher v. Jackson*, 28 Vt. 581.

**286.** Where a paper is by law committed to the custody of a particular person or officer, proof of search and that it cannot be found in his office or custody, is *prima facie* evidence of loss, sufficient to let in secondary evidence of its contents. *Braintree v. Battles*, 6 Vt. 395.

**287.** To prove the loss of a paper, so as to let in secondary evidence of contents, the evidence to the court was, that the paper had been left with one D, who, before the trial, had removed from the State; and that the defendant and another witness had called on D before his removal for the paper, and he, in their presence, made a thorough search of all the papers of his office and could not find it. *Held*,

that this was admissible to prove the loss, and that the judgment of the county court that the evidence was sufficient, was not open to revision in the supreme court. *Moore v. Beattie*, 33 Vt. 219.

**288.** A tax collector was allowed to testify to the contents of the notices of sale of the property distrained, at a trial held some 16 months after the posting of the notices, he first testifying that he did not know where they were, and had not seen them since he posted them. *Eddy v. Wilson*, 43 Vt. 362.

**289. How far decision is revisable.** The decision of the county court as to the loss of a paper, preliminary to the use of secondary evidence of its contents, is revisable when erroneous in matter of law. It is always a question of law, in a given case, whether the rule requiring proper search in the proper places has been followed; but if evidence has been given tending to show that the rule has been followed, the finding of the court on that evidence is not the subject of revision. *Durgin v. Danville*, 47 Vt. 95.

**290. Testimony of party to prove loss.** Before the statute allowing parties to be witnesses;—*Held*, that a party was not competent to testify to the loss of a bond, or note, with a view to the introduction of secondary evidence of contents. *Penfeld v. Cook*, 1 Aik. 96. *Wright v. Jacobs*, 1 Aik. 304.

**291. Telegrams.** Where telegraphic communications are relied on to establish a contract, dependent on the terms used, they must be proved, as other writings are, by production of the originals. If they cannot be produced, then the contents may be shown by the next best evidence, as copies, or otherwise. *Durkee v. Vt. Central R. Co.*, 29 Vt. 127.

**292.** Where the person to whom a telegram is sent is the employer of the telegraph, or takes the risk of its transmission, the original is the message delivered to the operator. But where the person sending the message takes the initiative, the telegraph is his agent, and the original is the message delivered at the end of the line, and is effective only in that form. *Id.*

**293. Letter.** Where the plaintiff offered in evidence a letter written to himself by a third party through whom the defendant claimed, and who was out of the State, or dead, which letter purported to be in reply to one previously written by the plaintiff;—*Held*, that it was admissible without the production or proof of loss and contents of the letter to which it was a reply. *Hayward Rubber Co. v. Duncklee*, 30 Vt. 29.

**294. Partnership articles.** In an action charging the defendants as partners, the plaintiff had given evidence, by deposition, of the partnership, and of the terms of the written

articles, the defendants having failed to produce the articles upon notice. *Held*, that the defendants could not, by another deposition of the same witness, taken in their behalf, prove the further or different contents of such articles, but must produce them. *Hastings v. Hopkinson*, 28 Vt. 108.

### XIII. DOCUMENTARY.

#### 1. Town clerk's records and certificates.

**295. Original deed.** An original deed, containing the statute requisites of witnessing, acknowledgment and recording, is admissible in evidence without other proof of execution, as well in the action of covenant upon the covenants in the deed, as in ejectment. *Williams v. Wetherbee*, 2 Aik. 329.

**296. Recital in deed.** The recital of a deed in a subsequent deed is evidence of the former against a party to the latter. So, a subsequent charter or grant of the government reciting a former grant, or surrender, is evidence of that fact as against the government, or party claiming under the last grant. *Lord v. Bigelow*, 8 Vt. 445; and see *Cross v. Martin*, 46 Vt. 14.

**297. Book of record.** The ancient record of a deed in a book in the town clerk's office kept for that purpose, and in the handwriting of the town clerk then in office, though not signed or certified by the town clerk, is admissible as a record, with the force which belongs to it as such. *Booge v. Parsons*, 2 Vt. 456. 20 Vt. 589. 22 Vt. 356.

**298.** The same is true of a like record of a marriage. *Northfield v. Plymouth*, 20 Vt. 582.

**299. Copies by town clerk.** Duly certified copies from the proper town clerk's office of deeds, not presumed to be in the possession of the party offering them, may be used in evidence instead of the originals, as well in covenant as in ejectment. *Williams v. Wetherbee*, 2 Aik. 329.

**300.** The official certificate of a town clerk is *prima facie* authentic, and it is not necessary, in this State, in order to render a record, or other paper certified by him, admissible in evidence, to show by other proof that he was either elected or sworn. *Lemington v. Blodgett*, 37 Vt. 210.

**301.** It is the settled law and practice in this State, that in making title to real estate, a party may prove the various links in his chain of title by certified copies of deeds from the records of deeds in the town clerk's office, without the production of the originals, except the deed to himself. *Pratt v. Battles*, 34 Vt. 891.

**302.** A copy of the record of a deed, made 49 years after the given date of the original, was properly admitted in evidence, without

production of the original or accounting for its non-production, although it was claimed upon the other side, and evidence had been given, that the deed was a forgery. *Ib.*

**303. Town clerk's certificate of record.** The certificate of a town clerk upon a deed or execution that he has recorded the same, though not expressly required by statute, has always been received as *prima facie* evidence of the fact stated. *Hutchinson, J.*, in *Hubbard v. Dewey*, 2 Aik. 816. *Benedict v. Heineberg*, 43 Vt. 236.

**304.** The customary certificate of a town clerk upon the back of a deed that he had received the deed for record, and had recorded it, was, before the statute directing that to be done, received as *prima facie* evidence of the fact recited. *Taylor v. Holcomb*, 2 Tyl. 344. *Morey v. McGuire*, 4 Vt. 327. 34 Vt. 262;—and such certificate was received, where only the first part was signed by the town clerk, but the last part was also evidently in his handwriting. *Morey v. McGuire*.

**305.** Where the law has made the time of recording an instrument in the town clerk's office material, his certificate of the time is evidence of that fact. *Paulet v. Sandgate*, 17 Vt. 619.

**306.** A town clerk's certificate of a record, or of the date of recording a deed, or of receiving it for record, is *prima facie* evidence of the fact, but only that, and may be rebutted, and the truth of the matter, whether certified or not, be shown by parol. *Taylor v. Holcomb*, 2 Tyl. 344. *Morey v. McGuire*, 4 Vt. 327. *Bartlett v. Boyd*, 34 Vt. 256. *Johnson v. Burden*, 40 Vt. 567.

**307.** The same is true of the certificates of justices of the peace, county clerks, and town clerks, of the fact of recording an execution and levy. *Hubbard v. Dewey*, 2 Aik. 812. *Myers v. Brownell*. *Ib.*, 407. *Morton v. Edwin*, 19 Vt. 77; and of the certificates of town clerks of the record of proceedings of land tax collectors. *Carpenter v. Sawyer*, 17 Vt. 121. *Chandler v. Spear*, 22 Vt. 388. *Kellogg, J.*, in *Bartlett v. Boyd*, 34 Vt. 262-8.

**308.** The record of a town clerk cannot be contradicted by parol evidence—as by proof of a mistake in the record. The only way is for the clerk to correct the record. *Hoag v. Durfey*, 1 Aik. 286.

**309.** A copy of the record of an execution and levy is *prima facie* proof that the paper has been correctly recorded, and at the time indicated. But the inaccuracy of the record may be shown—as by production of the original. *Perry v. Whipple*, 38 Vt. 278. See *Morton v. Edwin*, 19 Vt. 77.

**310.** A town clerk's records are presumed to be made from the original papers, the contrary not appearing. *Carbee v. Hopkins*, 41 Vt. 250.

311. The certification of a paper by a town clerk as "a true copy of a deed recorded," &c., where it appears from the copy that such a record existed in the office, will be intended as certified from the record, and is well enough. *Preston v. Robinson*, 24 Vt. 583.

312. A town clerk certified, on a certain date, that the paper so certified was a true copy of record, and that at a certain earlier date it was received for record. *Held*, in the absence of proof to the contrary, that the legal presumption was that the paper was in fact recorded when received for record. *Wing v. Hall*, 47 Vt. 182.

313. It being made by statute the official duty of a town clerk to record all births in the town, a duly authenticated copy of such record is admissible as evidence of the facts which it embodies, although the record was made upon the report of the parent long after the time of the births. The weight of the record as evidence is for the jury, under the circumstances. *Derby v. Salem*, 30 Vt. 722.

314. **Record of papers not required to be recorded.** A revocation of a power of attorney to convey lands not being required by law to be recorded, a copy of the record of such revocation is not admissible to prove the fact of revocation. *Bush v. Van Ness*, 12 Vt. 83.

315. A town clerk is not a certifying officer of a grand list, or other documents which are required by law to be deposited in his office, but which are not required to be recorded. Hence, neither his official certificate of what a grand list contains, nor a certified copy of such list, is legal evidence. *Barnet v. Woodbury*, 40 Vt. 266. (Changed by Stat. 1876, No. 55.)

316. An office copy of an instrument recorded in the town clerk's office, purporting to be a deed, but not sealed, however ancient, is not admissible as evidence of title, where no possession has followed it, and there is no other evidence of due execution. *Williams v. Bass*, 22 Vt. 352.

317. The record of a deed not entitled to registry is not of itself evidence of the existence of the deed, yet such record, in connection with long and undisputed possession consistent with the deed, and other circumstances which tend, as matter of fact, to show the probable execution and loss of the deed, is admissible as evidence from which the jury may find by presumption the existence and loss of the deed. *Townsend v. Downer*, 32 Vt. 183.

318. The record in the town clerk's office of a paper purporting to be a deed, but not sealed, was received as evidence of the existence of an original paper of like tenor, there being other evidence of the existence of an original, now lost. *Colchester v. Culver*, 29 Vt. 111.

319. So, of a deed defectively acknowledged. *Townsend v. Downer*, 32 Vt. 183.

320. **Certifying negatively.** The certificate of a town clerk that there is not on the record a conveyance of certain lands, is not admissible in evidence. It is not an authorized official act. *Hill v. Bellows*, 15 Vt. 727. 29 Vt. 328.

321. **Record of deed in another State.** The office copy of a deed recorded in another State, in order to be admissible, must be authenticated according to the act of Congress. *Brown v. Edson*, 23 Vt. 435.

322. **Proprietor's clerk.** Where a deed was certified as recorded by the proprietor's clerk;—*Held*, that his acting as such was sufficient proof of his official character, without proof of his appointment. *Brush v. Cook*, Brayt. 89.

323. The records, by proprietors' clerks, of deeds made and recorded before the act of Feby. 26, 1783, authorizing them to record deeds, are not evidence as records. *Hart v. Gage*, 6 Vt. 170.

324. **Entry on town treasurer's books.** Where the question was, whether a certain town order in favor of C, had been paid to apply on the plaintiff's execution against him;—*Held*, that an entry on the town treasurer's books of this order to the credit of the plaintiff, as town treasurer, did not tend to prove the negative. *Nye v. Kellam*, 18 Vt. 594.

## 2. Court records and files.

325. A copy attested by the clerk of a court, not only of records, technically so called, but also of all papers, files, rolls, &c., legally deposited in his office and there required to remain, is proper evidence of the original, affording as high a degree of certainty as sworn copies can furnish. *Mattocks v. Bellamy*, 8 Vt. 463.

326. The files of the county clerk in the cause, with his certificate of the judgment, were admitted in evidence in the supreme court, but with disapproval of the practice. *Allis v. Beadle*, 1 Tyl. 179.

327. **Dictum.** An exemplified copy of a judgment is the legal and proper evidence to prove the same. Neither the records themselves, nor minutes, should ever be received, where copies can be obtained. *Lovry v. Cady*, 4 Vt. 504.

328. A decree in chancery cannot be proved by docket minutes. The decree itself, or a copy of the record, if the decree has been enrolled, is the only legitimate evidence. *Austin v. Howe*, 17 Vt. 654.

329. A judgment rendered at a former term of the same court may be proved by the files and docket entries; but to make proof in one court of the proceedings in another, it must be by a record written out at length. *Armstrong v. Colby*, 47 Vt. 359.

330.. A certificate, signed by a register in bankruptcy, that the defendant was by him adjudged a bankrupt, &c., is not evidence. *Adams v. Wait*, 42 Vt. 16.

331. A certificate of the prothonotary of the court of King's Bench in Canada to a bill of fees and disbursements by an attorney in a suit in that court, was held not admissible as evidence here. *Pierson v. Boston*, 1 Aik. 54.

332. A paper simply certified by the clerk of a court of record, without seal attached, that it is a true copy of record, is not sufficiently authenticated to be received as proof of the record. *Parish v. Pearsons*, 27 Vt. 621.

333. A certified copy of record was held defective in substance, where the certifying clerk was clerk of both the county and the supreme court, and it did not appear in which court the record was; nor, except by supplying omissions by intendment, in what state or county the record was. *Id.*

334. The word "official" attached to a paper, and signed by a proper certifying officer, is no verification of it, as either an original, or a true copy. *Johnson v. Bolton*, 43 Vt. 308.

335. Probate records. Copies of probate records of the division of an estate among heirs are admissible, though certified to be extracts, if they contain all that need be recorded to make the division legal. *Robinson v. Gillman*, 3 Vt. 163.

336. Wills devising lands, and probate proceedings affecting the title to real estate, which are required by statute to be recorded, must be first recorded in the town clerk's office, where the estate is situate, or they cannot be used as evidence on the question of title. *Harrington v. Gage*, 6 Vt. 582. *Royce v. Hurd*, 24 Vt. 620. (Slade's Stat. c. 44, s. 86. G. S. c. 49, s. 87.) But if so recorded at any time before offered in evidence, this is sufficient. *Abbott v. Pratt*, 16 Vt. 626.

337. Copies of the records of the probate court of the assignment of dower, &c., in lands, although not recorded in the town clerk's office, were admitted in evidence for the purpose of giving locality to the lands specified in a deed, which referred to such records for a description merely. Held correct. *Pingry v. Watkins*, 17 Vt. 879.

338. Justice's record. If a justice's record as certified is imperfect, the only remedy is to allege diminution, supported by affidavits, and move for a mandamus upon the justice to certify more fully. *Martin v. Blodgett*, 1 Aik. 375. *Stone v. Proctor*, 2 D. Chip. 108.

339. The court will not go into proof by affidavits or statements of counsel and others, in regard to the correctness of a record of other courts. The proceeding must be taken by mandamus, or other proper writ. *Nixon v. Barber*, 27 Vt. 783. *Tufts v. Aiken*, 13 Vt. 490.

340. In an appealed case, after judgment and motion in arrest, another certified copy of the record, differing from the former, was presented as the true record. The supreme court continued the cause, that the justice might come into court with his record, and verify the copy on which the trial had been had, or correct it. *Tufts v. Aiken*.

341. Interpolation. In support of the issue that an administrator's bond was given on the 8th of May, the record of the probate court of that date was of an order that the plaintiff be appointed administrator, and that he give bonds, &c., and then recited that he had executed a bond agreeably to the order and was appointed administrator. Held, that an interpolation in the record on a subsequent day, viz: "which said bond was received and filed in in court May 26," &c., was no part of the record of May 8th, and did not contradict it. *Clark v. Tabor*, 22 Vt. 595.

342. Foreign judgments. Exemplifications of the record of judicial proceedings in a foreign country, must be considered as *prima facie* correct; if incorrect, the *onus probandi* lies on the opposite party. *Woodbridge v. Austin*, 2 Tyl. 364.

343. A certified copy of the record of a justice's judgment rendered in another State, is the appropriate evidence to prove such judgment. *Starkweather v. Loomis*, 2 Vt. 573 (overruling *Ingersoll v. Van Gilder*, 1 D. Chip. 59. *Blodgett v. Jordan*, 6 Vt. 580); though in such other State (as New York) a justice court is not regarded as a court of record, but is required to keep records. *Carpenter v. Pier*, 30 Vt. 81. *Martin v. Wells*, 43 Vt. 428. *Semble*, that in such case it should be shown, that the person certifying was a justice. *Id.*

344. Conclusiveness of record. A record of court imports absolute verity, not only when it comes collaterally in question, but also when the judgment of which it is evidence is sought to be enforced, or is made matter of defense; and even when the proceeding is upon a review of the judgment itself for error in law—as, upon writ of error, or *certiorari*—the truth of the record cannot be disputed. *Hall, J.*, in *Mosseaux v. Brigham*, 19 Vt. 460.

345. Justices' courts in this State are courts of record, and the record of a justice has the same conclusiveness between the parties as the record of any other court. *Stone v. Proctor*, 2 D. Chip. 118. *Martin v. Blodgett*, 1 Aik. 379. 30 Vt. 202.

346. The record of a court cannot be impeached or contradicted by proof of its falsity; and this applies to the records of justices of the peace; and the record is to be tried by the court upon inspection, and not by the jury. *Middleton v. Ames*, 7 Vt. 166. *Spaulding v. Chamberlin*, 12 Vt. 538. *Barnard v. Flanders*, *Id.*

657. *Pike v. Hill*, 15 Vt. 188. *Walker v. Briggs*, 11 Vt. 84. *Beech v. Rich*, 13 Vt. 595. *Eastman v. Waterman*, 26 Vt. 494. *Farr v. Ladd*, 37 Vt. 156.

347. In an action of trespass and false imprisonment;—*Held*, that it cannot be shown against the record, that the writ was not signed by the justice rendering the judgment, but by another justice, and that the defendant, after the service erased the name of the first justice and inserted that of the justice who rendered the judgment. *Spaulding v. Chamberlin*.

348. Nor, in debt on a recognizance, that the defendant never consented to have his name entered or to be recognized. *Beech v. Rich*, 13 Vt. 595.

349. Nor, in case of a confession of judgment where the objection was taken by a subsequent attaching creditor, that the defendant did not appear personally before the justice and give the confession. *Farr v. Ladd*, 37 Vt. 156.

350. So, in an *audita querela* to set aside a judgment for want of notice to the complainant, and the record showed notice, it was *held* conclusive. *Eastman v. Waterman*, 26 Vt. 494. 37 Vt. 160.

351. So, in an action against a justice for willfully and maliciously absenting himself from the trial, his record was *held* conclusive in his own behalf. *Barnard v. Flanders*, 12 Vt. 657. 26 Vt. 500. 37 Vt. 160.

352. To a writ of review founded upon a justice's record showing a continuance of the original suit for notice, a judgment by default and a recognizance for a review, the defendant pleaded that the plaintiff was not out of this State at the commencement of the original suit against him. *Held* ill, for that the justice's record showed a conclusive adjudication of that fact, and that the party had not had notice. *Davis v. Beebe*, 5 Vt. 560.

353. Where the record of a judgment shows that the defendant appeared either personally or by attorney, such fact cannot be traversed, nor will he be permitted to show that such attorney had no authority to so appear, and the judgment will effectually conclude him in an action thereon. *St. Albans v. Bush*, 4 Vt. 58. *Newcomb v. Peck*, 17 Vt. 302; and see 18 Vt. 214. *Hubbard v. Dubois*, 37 Vt. 96. *Blood v. Crandall*, 28 Vt. 396. *State v. Bradish*, 34 Vt. 425. *Abbott v. Dutton*, 44 Vt. 546.

354. Where a writ issued against two, and the return showed a service upon one and a *non est* as to the other, but the record of the judgment stated that the *defendants* appeared by attorney, that the *defendants* confessed, &c., and the court rendered judgment against the *defendants*—using the plural, but omitting the names;—*Held*, that the record was conclusive that both the defendants in the writ appeared, &c. *Blood v. Crandall*,

355. But where the record was of a writ against four and a service upon two only, and proceeded: "And at the same term come the said *defendants* by their attorney," naming him, and then stated the proceedings to a final judgment against the *defendants*, not naming them in the record after the recital or copy of the writ and return;—*Held*, that the record should be interpreted as stating an appearance only for those defendants upon whom service was made. *Hubbard v. Dubois*, 37 Vt. 94. *Held*, also, that the rule to the auditor, his citation and the return thereon and his report in that case, in which the parties upon whom the writ was served were alone named as defendants, might be considered in connection with the record produced, as aiding to explain the record itself, when doubtful or equivocal. *Id.*

356. Where a judgment appears by the record to be satisfied, as by the levy of the execution, this is conclusive, until corrected by proceedings brought directly for that purpose. *Baxter v. Tucker*, 1 D. Chip. 853. 21 Vt. 578. *Pratt v. Jones*, 22 Vt. 341. 26 Vt. 448.

357. *Where not conclusive.* A record, or return, is not conclusive in any authorized proceeding brought directly upon it, the purpose of which is to set it aside and vacate, or correct it; and in such case the record or return may be contradicted by parol;—as on petition to the supreme court to vacate an irregular levy of execution. *Briggs v. Green*, 33 Vt. 565;—on petition to the county court to vacate a justice's judgment. *Mosseaux v. Brigham*, 19 Vt. 457;—on *audita querela* to set aside judgments. *Paddleford v. Bancroft*, 22 Vt. 529, citing 1 Aik. 359. 9 Vt. 118. 11 Vt. 161. 12 Vt. 567. But see *Eastman v. Waterman*, 26 Vt. 494. 37 Vt. 160.

358. In *audita querela* to set aside a judgment, the record showed suit brought against the complainants "by attachment of their property, with notice." *Held*, that the record was not conclusive of service on the complainants or of notice to them of the suit, and that they might show want of notice in fact. *Godfrey v. Downer*, 47 Vt. 653.

### 3. Officers' returns.

359. The official return of a public officer, —as a sheriff,—is admissible evidence in his favor, as also to affect the rights of third persons. But it is only *prima facie* evidence for such purposes. It is open to contradiction collaterally as against himself, even by a party to the process; and by third persons because they were neither parties nor privies to the process. But as between the parties to the original suit, or as against himself, his return is conclusive. *Barrett v. Copeland*, 18 Vt. 67. 26 Vt. 750.

*Hathaway v. Goodrich*, 5 Vt. 65. *Stanton v. Hodges*, 6 Vt. 66.

360. An officer's return is not conclusive against him, as to mere inferences or presumptions upon which the return is silent. Thus, where his return upon an execution was, that he had sold the property to A;—*Held*, that he might prove by parol, the capacity in which A acted,—as that he was the agent of B. *Carney v. Dennison*, 15 Vt. 400.

361. A constable was sued for an assault and false imprisonment, and justified by virtue of process. *Held*, that his return was evidence in his favor, but only *prima facie* evidence, and was subject to contradiction. *Barrett v. Cope-land*, 18 Vt. 67.

362. In trespass for false imprisonment against a tax collector, where he had made full return of his doings upon the warrant, ending with the commitment of the plaintiff to jail;—*Held*, that the defendant could not show his proceedings by parol;—that the return was *prima facie* evidence in his favor, but subject to contradiction by the plaintiff; and that the defendant could rebut the plaintiff's evidence by evidence of like character. *Boardman v. Goldsmith*, 48 Vt. 403.

363. The return of an indifferent person, authorized to serve a writ, has the same force and effect as that of a regular public officer, and is no more subject to impeachment and contradiction. *Downer v. Back*, 25 Vt. 259.

364. An officer's return of sale upon execution, although made out of time, is *prima facie* evidence of the sale. *Gates v. Guines*, 10 Vt. 346.

365. The return of an officer levying an execution on land is conclusive on the parties, and all claiming under them. *Hathaway v. Phelps*, 2 Aik. 84. *Eastman v. Curtis*, 4 Vt. 616. 25 Vt. 260;—except in case of proceedings brought directly to set it aside. *Briggs v. Green*, 33 Vt. 565.

366. The return of a proper officer of his levy of an execution upon land is conclusive, as to all persons, of every act or thing stated therein which is within his official jurisdiction and duty, and it cannot be collaterally impeached or contradicted. *Swift v. Cobb*, 10 Vt. 282.

367. The statement in an officer's return of process served by copy left at the defendant's last and usual place of abode, that he, on the same day, gave the defendant personal notice of the suit and the time and place of trial, is no proper part of the return, and is not evidence for any purpose. *Johnson v. Murphy*, 42 Vt. 645.

368. Marriage certificate. A marriage certificate issued by an officiating minister, was *held* admissible to prove the marriage, accompanied by declarations of the party referring to it as evidence of the facts stated in it. *State v. Abbey*, 29 Vt. 60.

#### 4. Other official entries.

369. Patent office. The plaintiff, although he had no connection with the patent office, was permitted to testify to his examination at the patent office for evidence of the granting of a patent, or of an application therefor, and that nothing pertaining thereto could be found except a paper which he produced. *Held*, not error. *James v. Hodsdon*, 47 Vt. 127.

370. Municipal corporations. The action of municipal corporations in public meeting can be proved only by their records. *Cabot v. Britt*, 36 Vt. 349.

371. The records of the proceedings of municipal public corporations, such as towns and school districts, cannot be collaterally impeached;—as, by evidence that a recorded vote of a school district was passed by such as were not legal voters. *Eddy v. Wilson*, 43 Vt. 362.

372. Notaries. The entries and memoranda, made in the due course of business, by notaries, clerks and other persons, may be received in evidence after the death of the person who made them;—as, in this case, the memoranda and the formal protest, afterwards drawn up, of a deceased notary, of the demand of payment of a promissory note, and notice to the indorsers, were *held* evidence, not only of the demand, but of the notice also. *Austin v. Wilson*, 24 Vt. 630.

#### 5. Private documents.

373. Account books. Where the books of the parties are evidence, entries made by the clerk of one of the parties in due course of business, are admissible where the clerk has deceased. *Bacon v. Vaughn*, 34 Vt. 73.

374. So, although the clerk be in life, and although not produced as a witness. *Cummings v. Fullam*, 13 Vt. 434.

375. In assumpsit for goods sold and delivered, the books of account of the party, accompanied with evidence of their correctness, are admissible in evidence;—as, also, where it had been agreed that the defendant's account should be payment on a note. *Burnham v. Adams*, 5 Vt. 313.

376. But such books are not admissible without evidence to support them. *Chase v. Smith*, 5 Vt. 556.

377. The reputation of a party for fairness and correctness as a keeper of books of account, is not admissible by way of impeachment of his accounts. *Hitt v. Slocum*, 37 Vt. 524.

378. The fact that charges stand upon the plaintiff's account book, that they were made by him, and at the time they bear date, does not bind the triers, as matter of law, to allow such charges, though there be no evidence against them. The book is evidence, and the

triers may or may not find from it, that the charges upon it are in fact true. *Semble*, the same would be true as to the books of a deceased party. *Hunter v. Kittredge*, 41 Vt. 359.

379. A party's account books are not generally evidence of a negative character to rebut a presumption, but only evidence in regard to matters which do positively appear upon them, either of debt, or credit. *Mattocks v. Lyman*, 18 Vt. 98.

380. The plaintiff sued to recover for a quantity of cigars claimed to have been sold and delivered to the defendant and another party deceased, who were in partnership as hotel-keepers. The defense was that the cigars were not sold, but merely left with the firm on deposit. The plaintiff's salesman testified that he sold the cigars to the firm, and that the decedent directed J, the hotel clerk, to credit them to the plaintiff on the hotel books. J testified for the defense that no such order was given him. *Held*, that in connection with such testimony, and for the purpose of precluding a legitimate argument and inference against the defendant from the non-production of the books, the books, showing no entry of the cigars, were admissible in evidence. *Cross v. Willard*, 46 Vt. 73.

381. A commission merchant, to whom had been consigned certain butter for sale, testified in his deposition to the weights of the butter as derived from his books of entry and accounts of sales, but that he had no personal knowledge thereof. *Held*, that the deposition was not admissible to prove the weights; and that the error of admitting it was not cured by instructing the jury not to regard the testimony, if they should find that the witness had no personal knowledge of the weights, aside from such books and accounts. *Hibbard v. Mills*, 46 Vt. 243.

382. **Memoranda.** Private memoranda in a pass book, or elsewhere, are not admissible as independent evidence in favor of the party making them. *Lapham v. Kelly*, 35 Vt. 195. *Cross v. Bartholomew*, 42 Vt. 206. *Goddard v. Orcutt*, 44 Vt. 54.

383. A witness may testify from a memorandum made by him, where he has only a general recollection of the transaction, and states that the memorandum was correctly made at the time it was made. *Mattocks v. Lyman*, 16 Vt. 113.

384. If a witness testifies as to a memorandum, that the facts were within his knowledge and recollection at the time he made the entry, and is confident that he made it correctly about the time of the transaction, and still recollects the transaction generally, although not all the details of the entry, his evidence is received in connection with the memorandum, and both go to the jury; and the memorandum

is regarded as auxiliary to or confirmatory of the witness, and may also be used as evidence of the details to supply the present want of recollection, particularly as to names and dates. *Lapham v. Kelly*, 35 Vt. 195. *Cross v. Bartholomew*, 42 Vt. 206.

385. The plaintiff and defendant being at issue in their testimony as to a fact;—*Held*, that the plaintiff might introduce, as a contemporaneous memorandum to sustain his testimony, a letter written by himself upon the business, which contained a statement of such disputed fact. *Soules v. Burton*, 36 Vt. 652.

386. **Receipts.** A receipt not under seal, though not technically a release, and though subject to explanation or contradiction, is *prima facie* evidence of payment according to its terms. *Sparhawk v. Buell*, 9 Vt. 41.

387. A receipt, expressed to be in full of a demand named, is *prima facie* a full satisfaction of it, and casts upon the party claiming against it the burden of explaining it, or destroying its effect. *Guyette v. Bolton*, 46 Vt. 228. *Stephens v. Thompson*, 28 Vt. 77.

388. A receipt "in full of all demands, notes and accounts," was *held* not to embrace a suit then pending between the parties,—that not being apparently intended. *Learned v. Bellows*, 8 Vt. 79.

389. —of tax collector. A tax collector's receipt is proper evidence of the payment of the tax received, in behalf of the party paying the tax, as against a third person. *Randall v. Keasey*, 46 Vt. 158.

390. **Contemporaneous writings.** Where two instruments are made at the same time between substantially the same parties, and they are in fact parts of the same transaction, the one is admissible as explaining and qualifying the other, although on their face they do not refer to each other. *Rutland & Bur. R. Co. v. Crocker* (U. S. C. C.), 29 Vt. 540.

391. **Guaranty.** A written guaranty is, as against the guarantor, evidence of all the facts therein stated, and they require no further proof. *Peck v. Barney*, 12 Vt. 72.

392. **Writing not signed.** Whether an instrument, in the body of which is the name of the party to it, but not signed, is a complete and perfected instrument, is a question of fact depending upon the intention. *Brink v. Spaulding*, 41 Vt. 96.

393. **Affidavits.** *Ex parte* affidavits are neither legal nor competent evidence to prove any fact in issue before a court or jury. *Viles v. Moulton*, 13 Vt. 510. See *Id.* 141. 19 Vt. 141. 33 Vt. 565.

394. **Life tables.** In estimating the value of a life estate, Dr. Wigglesworth's Life Tables were allowed to be used by the jury. *Held* correct. *Mills v. Catlin*, 23 Vt. 98.



## XIV. PAROL EVIDENCE.

1. *In general.*

**395. Writing incidental.** Parol evidence is competent to prove satisfaction of a penal bond to reconvey land, as of any other bond. *Reynolds v. Scott*, Brayt. 75.

**396.** On trial of an indictment for a riot, and rescue from the custody of an officer of property attached by him;—*Held*, that the attachment might be proved by parol, although the return, by mistake, had omitted to mention such property. *State v. Daggett*, 2 Aik. 148. 27 Vt. 588.

**397.** The court will not presume that a deed of land has been recorded, so as to require an examination of the proper land records for the purpose of procuring a copy, before allowing oral evidence of its contents. *Matlocks v. Stearns*, 9 Vt. 326.

**398.** The plaintiff's claim in book account was to recover against a deceased person's estate for writing a memoir of the deceased, during his lifetime and at his request, the completion and intended publication of which was abandoned at his death. *Held*, that he might prove, otherwise than by the production of the manuscript of the memoir, though in his possession and demanded, the nature, extent and value of his services. *Houghton v. Paine*, 29 Vt. 57.

**399.** Whenever a written instrument is the foundation of an action, or is a necessary part of a title, it must be proved in the usual way; but where it comes in question incidentally, solely for the purpose of proving that such an instrument was executed, the production of the instrument, where it is not in the party's possession, is not necessary; nor, if produced, is the proof of it by the subscribing witnesses necessary. *Chandler v. Caswell*, 17 Vt. 580. *Hurd v. Tuttle*, 2 D. Chip. 43.

**400.** A written memorandum, not signed, becomes admissible as parol evidence, with evidence that the party conceded its correctness. *Hosford v. Foote*, 3 Vt. 391.

**401.** The proceedings of churches and of ecclesiastical bodies may be proved by parol,—the minutes of their scribes not being legal evidence. *Charleston v. Allen*, 6 Vt. 633. *Dow v. Hinesburgh*, 2 Aik. 18.

**402.** That a highway surveyor was sworn may be proved otherwise than by the record. *Andrews v. Chase*, 5 Vt. 409.

**403.** An application to the probate court to renew a commission, followed by no proceeding upon it, may be proved, as a fact, by parol. *Harrington v. Rich*, 6 Vt. 666.

**404.** Where there were apparently two perfect records of the proceedings of a town meeting;—*Held*, that parol evidence must of neces-

sity be resorted to, to determine which is the legitimate record. *Walter v. Belding*, 24 Vt. 658.

**405.** Where the deposition of a witness, apparently interested, was offered;—*Held*, that the party offering it might prove by parol, that, with the application for taking the deposition, he sent by mail, in the same packet, a written discharge of the witness's interest. *Oaks v. Weller*, 16 Vt. 63.

**406.** In an action by one surety against another for contribution, where the plaintiff's claim was for money paid on an execution against both;—*Held*, that such payment could be proved by parol, without production of the execution, and without proof that such payment was indorsed upon the execution. *Hayden v. Rice*, 18 Vt. 353.

**407. Date.** The true date of the execution of a written instrument, having a false date, may be proved by parol;—also, such facts as show that the instrument never had any legal existence, or binding force. *Hopkins v. School District*, 27 Vt. 281.

**408. Delivery of execution, &c.** The minute required to be made by an officer, upon an execution, of the time when he received it for service, is not the exclusive or conclusive evidence of the time, but the true time may be proved by parol. *Lowry v. Walker*, 4 Vt. 76. *S. C.*, 5 Vt. 181. *Fletcher v. Pratt*, 4 Vt. 182.

**409.** So, as to the delivery of a rate-bill and warrant to a tax collector. *Goodwin v. Perkins*, 39 Vt. 598.

**410. Subject matter of litigation.** The identity of the subject matter of litigation—as, of a former action—generally rests in parol; and this applies as well to lands as other matters. *Parks v. Moore*, 13 Vt. 183. *Chase v. School District*, 47 Vt. 524. *Gray v. Pingry*, 17 Vt. 419.

**411.** Where it does not appear by the record that new counts to a declaration are for the same identical cause of action as the old, and there is judgment on the new counts, the law presumes that they embraced new causes of action; but this may be rebutted by proof to the contrary, and for this purpose parol evidence is admissible. *Austin v. Burlington*, 34 506.

**412.** Where the record of a judgment does not show of what it was made up, this may be shown by evidence *abundant*,—as parol. *Gilbert v. Earl*, 47 Vt. 9. *Post v. Smilie*, 48 Vt. 185.

2. *To vary a writing;—to give it application.*

**413. Proprietors' and town clerks' records.** Parol evidence is not admissible to reconcile, explain, or add to, proprietors' records. *Britton v. Lawrence*, 1 D. Chip. 103;

or to contradict town clerks' records. *Hoag v. Dufsey*, 1 Aik. 286.

**414. Officer's return.** An officer's return on a writ cannot be contradicted nor explained by extraneous evidence; not even by the copy left by the officer,—which is no part of the return. *White River Bank v. Downer*, 29 Vt. 332.

**415. Contracts.** Once held (*Tyler, J.*, dissenting), that a written contract for the payment of so many dollars could be explained by a contemporaneous parol agreement that the payment might be made in U. S. bank bills. *Morton v. Wells*, 1 Tyl. 381. *Sed quare.*

**416.** Where a note was made payable in "good custom cow-hide boots at \$4 per pair," parol evidence was admitted to show the agreement and understanding of the parties in relation to the kind, quality and worth of the boots intended. *Wait v. Fairbanks*, Brayt. 77. *Sed quare.*

**417.** In an action upon a promissory note given in satisfaction of damages claimed for a slander, the defendant was allowed to show in defense and as a satisfaction of the note, that, at the time of giving the note, the plaintiff verbally agreed, that if the defendant would satisfy him that the defendant did not originate the slanderous reports, the plaintiff would give up the note; and that the plaintiff had acknowledged himself satisfied. *Sanders v. Howe*, 1 D. Chip. 363. (Erroneously cited 29 Vt. 30.) But see *infra*.

**418.** Held, by a divided court, that a parol agreement at the time of executing a note that it might be paid in a different mode than as expressed in the note was admissible in evidence. *Farnham v. Ingham*, 5 Vt. 514. (Overruled in *Isaacs v. Elkins*, 11 Vt. 679, citing *Reed v. Wood*, 9 Vt. 285.)

**419.** It is a principle of universal application, that if there is an ambiguity on the face of a written instrument, it cannot be explained by parol proof of intention. The intention of the parties must be derived from the instrument itself. *Pingry v. Watkins*, 17 Vt. 379.

**420.** A written contract cannot be enlarged, varied, or contradicted by parol testimony. *Morse v. Low*, 44 Vt. 561.

**421.** The extent of the operation of a written agreement cannot be enlarged, abridged, varied or contradicted by parol. *Hakes v. Hotchkiss*, 23 Vt. 281;—especially one by deed. *Abbott v. Choate*, 47 Vt. 53.

**422.** Oral testimony can no more be received to rebut or contradict the legal intentment of a written instrument, than to contradict its express terms. *Rich v. Elliot*, 10 Vt. 211. *Norton v. Douner*, 81 Vt. 407. *Brown v. Hitchcock*, 28 Vt. 452. *Brandon Mfg. Co. v. Morse*, 48 Vt. 322.

**423.** Where a particular description, follow-

ing a general description in a deed, did not embrace the demanded premises;—Held, that the particular description controlled the general, and that parol evidence of situation, surroundings and appellations, to bring the premises within the general description, was not admissible. *Fletcher v. Clark*, 48 Vt. 211.

**424.** Where land is conveyed by deed, parol evidence is not admissible to prove a warranty as to quantity. *Cabot v. Christie*, 42 Vt. 121; and see *Dyer v. Graves*, 39 Vt. 369.

**425.** Where a note for goods sold was written for \$200, the court refused to receive parol evidence that the price of the goods sold was a less sum, for the purpose of showing a mistake in the drawing of the note, where no fraud was alleged. *Douens v. Webster*, Brayt. 79.

**426.** In an action upon a promissory note;—Held, that the defendant could not give parol evidence of what was in fact a mere mistake in writing the note; nor do this under the pretense that it amounts to a fraud. *Bradley v. Anderson*, 5 Vt. 152. *McDuffie v. Magoon*, 26 Vt. 518.

**427.** Nor, that a note purporting to be absolute, was verbally agreed to be payable only on condition. *Farnham v. Ingham*, 5 Vt. 514. *Hatch v. Hyde*, 14 Vt. 25. *Gillett v. Ballou*, 29 Vt. 296.

**428.** Nor, that the note might be paid in a mode different from the terms of the note—as, by a return of the property for which it was given. *Bradley v. Bentley*, 8 Vt. 243. *Isaacs v. Elkins*, 11 Vt. 679. 29 Vt. 298.

**429.** Nor, that no installments should be called for upon a premium insurance note, given for a gross sum payable in such sums and at such times as might be assessed. *Farmers' M. F. Ins. Co. v. Marshall*, 29 Vt. 23.

**430.** A note was given for a certain sum with a proviso added, that if that sum was not "legally due" upon certain other notes specified, then this note was not to be paid, otherwise, it was to be paid. In an action thereon;—Held, that the condition was in the nature of a defeasance for the benefit of the maker, and the burthen of proof was upon him to show that it was not "legally due;" and that parol evidence was not admissible to prove that by a mistake, not apparent on the papers, the notes specified were made for too large a sum. *McDuffie v. Magoon*, 26 Vt. 518.

**431.** A note payable in "good well-finished plows," cannot be controlled by parol evidence of a further agreement, that if there should be any improvement made by the maker of the note in the pattern of his plow, the payee should have the improved kind in payment of the note. *Gilman v. Moore*, 14 Vt. 457.

**432.** Parol agreements made at the time of subscribing for stock, inconsistent with the terms of the written subscription, are inopera-

tive and not admissible in evidence. *Conn. & Pass. R. R. Co. v. Bailey*, 24 Vt. 465. *Blodgett v. Morrill*, 20 Vt. 509.

433. Oral evidence of conversations between the parties previous to the execution of a deed cannot, in a court of law, be allowed to control the deed. *Vt. Central R. Co. v. Hills*, 28 Vt. 681.

434. In a written contract for finishing a stone house, whose walls were already built, but so unevenly as to require lathing, there was a provision for doing the furring "for the whole house, except the basement." *Held*, that parol evidence was not admissible to prove that the partitions only, and not the walls, were intended to be furred. *Herrick v. Noble*, 27 Vt. 1.

435. Where a bill of sale was in terms absolute, and the vendee, upon the credit of it, had treated the property as his own, and third persons had so treated it by purchase and attachment;—*Held*, that parol evidence was not admissible to prove the sale conditional. *Sanborn v. Chittenden*, 27 Vt. 171.

436. A bill of sale absolute on its face cannot be made conditional by parol testimony. *Davis v. Bradley*, 24 Vt. 55.

437. So, parol proof of a warranty not expressed in a bill of sale is excluded. *Reed v. Wood*, 9 Vt. 285. *Bond v. Clark*, 35 Vt. 577.

438. To a bill of sale absolute in terms, the fact that it was a conveyance by way of security for a debt may be shown by parol, and a verbal agreement of defeasance. *Wills v. Barriester*, 36 Vt. 220.

439. Where the plaintiff delivered property to the defendant and took his written receipt and contract for its manufacture, or return, which was construed to be a bailment;—*Held*, in an action for negligence in the care of the property, that parol testimony was not admissible to prove that the plaintiff agreed that the property was to remain at his risk. *Brown v. Hitchcock*, 28 Vt. 452.

440. Where there was a written contract between the parties;—*Held*, that it could not be shown that, at the time of its execution, it was agreed and understood to be a sham, designed only to deceive the creditors of one of the parties; nor, by oral evidence, that the real agreement was different from that expressed in the writing. *Conner v. Carpenter*, 28 Vt. 237.

441. In an action on the covenants in a lease for quiet enjoyment, where the premises were described as bounded on a town line;—*Held*, that it could not be shown by parol that the parties intended, designated, or recognized a different line as the boundary, though claimed to be the true town line, and thus extend the operation of the covenant to premises which were beyond the actual line named in the lease. *Knapp v. Marlboro*, 29 Vt. 282.

442. As to the interpretation of letters and

the character of a contract concluded, or recognized thereby, it was *held* that the law will presume that the party meant what his language, by its terms and under the circumstances in which it was used, would fairly be understood to mean, and this presumption is not to be rebutted by proof that he intended something more or different, which he made no attempt to express, and which the other party neither understood, nor had reason to understand. *Clark v. Lillie*, 39 Vt. 405.

443. Where a written assignment was made to three persons, "to secure them for having signed and become liable for me on my paper;"—*Held*, that parol evidence was not admissible to prove that it was understood, when the assignment was made, that it was to operate in behalf of one of the assignees only in respect to one particular note signed by him. *Fuller v. Hapgood*, 39 Vt. 617.

444. Assumpsit to recover \$295. In support of the claim the plaintiff introduced the following instrument: "Due Mr. Harvey Groot two hundred and ninety-five dollars, in part payment for a piano. Said piano to be selected by Mr. Groot." *Held*, that the paper constituted a written contract, and was not a mere receipt; that, as such, it was susceptible of a definite legal construction without extrinsic aid; and that parol evidence was not admissible to explain, enlarge or vary it. *Groot v. Story*, 44 Vt. 200. *Redfield, J.*, dissenting.

445. The words of a written contract were: "The said S, for the consideration of \$650 paid to him by the said W, *it being all his personal property*, consisting of one horse, one cow, and notes to the above value, hath agreed, &c." *Held*, that parol evidence was not admissible to prove that it was intended and agreed that other personal property of W, in addition to the articles specified, should pass by the contract. *Wood v. Shurtleff*, 46 Vt. 325.

446. Rule may be waived. The rule which excludes evidence which should be in writing in order to be admissible, is a rule which a party may waive, and which is waived if not insisted on. *Noyes v. Evans*, 6 Vt. 638. 8 Vt. 245. 37 Vt. 134. *Hartland v. Henry*, 44 Vt. 593.

447. The rule as to the non-admissibility of parol evidence to vary or add to written agreements does not touch the validity of the agreement sought to be proved, but only the kind of evidence by which the party may be compelled to prove it. If the agreement is admitted by the pleadings, or on the trial, or is proved without objection by parol evidence, this is a waiver of the rule, and leaves the agreement as fully operative as if it had been proved by a writing. *Davis v. Goodrich*, 45 Vt. 56.

448. Receipts. A general receipt in full of all demands cannot be explained, or im-

peached by parol testimony, except for mistake or fraud. *Sessions v. Gilbert*, Brayt. 75. *Dictum of Hutchinson, J.*, in *Raymond v. Roberts*, 2 Aik. 208. (These cases not followed. See *Giddings v. Munson*, 4 Vt. 312, and *post*.)

449. Simple receipts not under seal are always open to explanation, and even to contradiction, by parol evidence. They are not contracts, so as to be the exclusive evidence of the intention of the parties. *Hitt v. Slocum*, 87 Vt. 524. *Murdock v. Matthews*, Brayt. 100. *Dodge v. Billings*, 2 D. Chip. 26. *Raymond v. Roberts*, 2 Aik. 204. *Burnap v. Partridge*, 8 Vt. 144. *Giddings v. Munson*, 4 Vt. 308. *Sparhawk v. Buell*, 9 Vt. 41. *Nye v. Kellam*, 18 Vt. 594. *McDaniels v. Lapham*, 21 Vt. 222. *Randall v. Kelsey*, 46 Vt. 158.

450. A contract evidenced by several writings, although one is a receipt, cannot be varied or contradicted by parol in a point wherein the writings, taken together, are specific. *Raymond v. Roberts*.

451. A simple receipt, not constituting or importing a contract, does not preclude other and parol evidence of the purpose for which it was given, nor parol evidence of a contract made at the time of its execution, and as part of the same transaction. *Randall v. Kelsey*, 46 Vt. 158.

452. The plaintiff gave the defendant a writing, not sealed, as follows: "Received of H C [a sum named], and in consideration thereof I hereby release and discharge him from" [a certain claim specified]. *Held*, that this was but a receipt and not conclusive as evidence, and that the defendant could prove by parol, that the payment made was in satisfaction also of a claim not named in the writing. *Winn v. Chamberlin*, 32 Vt. 318.

453. Certain papers construed as receipts in full, or an acknowledgment of satisfaction, and so explainable by parol. *Giddings v. Munson*, 4 Vt. 308.

454. A receipt given by the payee to the maker of a note, certifying what was the consideration of the note, is not conclusive upon the maker; and he may show, by parol, a different consideration. *Sowles v. Sowles*, 11 Vt. 146.

455. Indorsement of payment. Parol evidence is admissible to prove the consideration of an indorsement upon a contract—as, "by agreement of parties this contract is satisfied"—and thus to limit the effect of the indorsement. *Hall v. Mott*, Brayt. 81.

456. An indorsement of payment made upon a note is no part of the note, but only an admission or evidence of payment, and, like a receipt, is subject to parol explanation, or contradiction—as, that it was so made by mistake. *McDaniels v. Lapham*, 21 Vt. 222; and see *State v. McLeran*, 1 Aik. 311. *Kimball v. Lamson*, 2 Vt. 188.

457. Thus, in an action of ejectment by the mortgagee against the grantee of the mortgagor;—*Held*, that the plaintiff, upon the inquiry as to the sum due, could show that such indorsement was erroneous, where it did not appear that the defendant, in making his purchase, was misled thereby. *McDaniels v. Lapham*.

458. Recital of consideration of deed and payment. It is not contradicting the essential import of a deed, to show the agreed price of the land; and this may always be shown by parol, although it may contradict the recitals in the deed. *Holbrook v. Holbrook*, 30 Vt. 432. *Beach v. Packard*, 10 Vt. 96. *Lazell v. Lazell*, 12 Vt. 443. *White v. Miller*, 22 Vt. 380. *Thayer v. Viles*, 23 Vt. 494.

459. Such recital of the receipt of the consideration is only *prima facie* evidence of the amount paid, or that in fact anything had been paid. *White v. Miller*.

460. It may be proved by parol, that the consideration named in a deed was paid as well for the discharge of a debt due the grantor, as for the conveyance. *Harwood v. Harwood*, 22 Vt. 507.

461. That the grantee in a deed agreed, as part of the consideration of the purchase, to pay the taxes to be thereafter assessed upon the property on an existing list, may be proved by parol evidence, unless the deed professes to set out specifically the terms of the trade, and just what the consideration consisted in. *Pierce v. Brew*, 43 Vt. 292.

462. Agreement collateral to deed. The plaintiff offered to show that the defendant, in the sale of a mill, agreed to provide a new wheel for the mill provided the old one should prove to be unsuitable. The conveyance of the mill was by a deed which contained no stipulation on this subject. *Held*, that the contract could be proved by parol. *Buzell v. Willard*, 44 Vt. 44.

463. The defendant conveyed land by deed to the plaintiff, but remained in possession and cultivated it. In an action of trespass therefor and for removal of the crops;—*Held*, that, in addition to other evidence of occupation by license, the defendant might prove that before and at the time of the conveyance it was verbally understood and agreed, that the defendant was to have the use of the land and the crops for the current year. *Merrill v. Blodgett*, 34 Vt. 490.

464. As to third party. A executed to B, his son, a deed of lands for the expressed consideration of \$3,000, and took back a bond and mortgage conditioned for the support of himself and wife, and the payment of specified sums to his daughters, amounting to \$500. In an action by C against B to recover for the debt of A assumed by B in this trade, as claimed;—

*Held*, that the plaintiff, not being a party to the papers, was not precluded from proving an additional and supplementary agreement by parol, that as part of the consideration of the deed (\$3,000) the defendant agreed to pay the plaintiff said debt of A. *Wait v. Wait*, 28 Vt. 350.

465. Where the indorsee of a promissory note, after the same had fallen due, took of the maker a mortgage to secure the payment of the note in the terms of it;—*Held*, in an action against the indorser, that he could prove a previous parol agreement between the parties to the mortgage to extend the time of payment, in consideration of the giving of the mortgage, though variant from the terms of the mortgage; and could use such agreement in defense as a release of his liability as indorser. *Morse v. Huntington*, 40 Vt. 488.

466. **Collateral agreement.** While the plaintiff, a physician, was attending upon the father and mother of the defendant, under a contract with the father that if there was no cure there should be no pay, the defendant gave the plaintiff a writing by which he agreed that he would "be holden" to the plaintiff "for the payment of his bill for medicine and attendance" upon the father and mother. *Held*, that this undertaking was collateral to the contract of the father, and that this contract could be proved by parol; and that, having failed to "cure," the plaintiff could not recover on the guaranty. *Smith v. Hyde*, 19 Vt. 54.

467. **Bill of sale.** A quantity of scrap iron had been contracted, by parol, to be sold by the plaintiff's agent to the defendant, by weight. The iron was afterwards weighed off for delivery by the plaintiff in the absence of the agent. The plaintiff claimed that the iron should be computed at net weight—the defendant, at gross weight;—and the defendant represented that such was the special contract with the agent, and agreed that if this was not right he would make it right when they could see the agent. The plaintiff thereupon executed a bill of sale of the iron, computing it therein at gross weight. *Held*, in an action for the price, that the plaintiff was not concluded by the bill of sale, but could prove by parol evidence, that by the contract with the agent the iron was to be computed at net weight. *Edwards v. Golding*, 20 Vt. 30. 27 Vt. 175.

468. The defendant purchased goods and took a bill of them, as: "A. B.—Bought of C. D.—Six per cent. off for cash." Then followed a list of the articles and prices. *Held*, that this bill of sale did not import a contract; that it was given, not to express a contract, but in consequence of one having been previously made; that it was simply declaratory of a fact, and out of this, with other things, the contract must be made; and that the defendant was not precluded by it, from proving that

the purchase was made on a six month's credit. *Linsley v. Lovely*, 26 Vt. 128.

469. Where a bill of sale, or invoice, accompanies the delivery of goods, it may nevertheless be shown by parol that the goods were delivered and received by way of consignment. *Hayward Rubber Co. v. Duncklee*, 30 Vt. 29.

470. The plaintiff purchased butter of the defendant, and the following paper was made on the occasion, and was signed by the defendant: "Stamford, Jany. 10, 1860. Elias K. Carpenter. Bill of butter; 72½ lbs. @ \* \* \* 603 lbs. gross. Tare, each 11 lbs., making. Received payment for the above butter, as weighed at Weld's store. Elias K. Carpenter." *Held*, that the paper imported no contract of sale, there being in it no words of sale, nor name of purchaser, nor of the defendant as a seller, but was a mere memorandum of weight of butter, and that the defendant had received payment of some one not named; and that the plaintiff was not prevented by it from proving, by parol, the contract of sale, and a warranty of the quality of the butter. *Houghton v. Carpenter*, 40 Vt. 588.

471. **Order.** The plaintiff gave the defendant an order, as follows: "H. H. Spafford: Please pay S. Merrill the extra pay due me from the State of Vermont, after paying yourself what may be due you, until further notice. Hy. Allen." *Held*, to be a mere direction as to the appropriation of the money, and, beyond the sum then due the defendant, does not create or fix a debt on the plaintiff to the defendant or Merrill; and that the consideration and object and purpose of the parties are open to parol evidence on both sides. *Allen v. Spafford*, 42 Vt. 116; and see *Perkins v. Adams*, 30 Vt. 230.

472. **Part of contract not intended to be in the writing.** Where it is satisfactorily shown that, for any reason, the parties to a written contract did not intend to reduce the whole contract to writing, and the portion omitted is consistent with the writing, such omitted part may be proved by parol evidence. *Winn v. Chamberlin*, 32 Vt. 318.

473. So, where the writing by its terms contemplates a subsequent supplemental agreement, such subsequent agreement by parol may be proved. *Field v. Mann*, 42 Vt. 61.

474. **Consideration.** The consideration of a written contract may be proved by parol. *Smith v. Ide*, 3 Vt. 290. *Phelps v. Stewart*, 12 Vt. 256. *Patchin v. Swift*, 21 Vt. 292. *Troy Academy v. Nelson*, 24 Vt. 189. *Gregory v. Gleed*, 33 Vt. 405.

475. In an action upon a written contract, expressing a mere naked promise and requiring parol proof of consideration, the plaintiff's evidence may be met by parol proof of the real consideration; and proving that may prove the contract, "taking into consideration the un-

written as well as the written part of it." *Perkins v. Adams*, 80 Vt. 280. *Allen v. Spafford*, 42 Vt. 116.

**476. Ambiguity from extrinsic matters.** To ascertain the intent of the parties in entering into any contract or agreement, in a case where that intent upon the face of the instrument is doubtful, or the language used will admit of more than one interpretation, the court will look at the situation and motives of the parties, the subject matter of the contract or agreement, and the object to be attained by it, and will allow these circumstances to be shown by parol evidence, notwithstanding the contract itself is in writing. *Kellogg, J.*, in *Wing v. Cooper*, 37 Vt. 178. *Lowry v. Adams*, 22 Vt. 160.

**477.** Whenever any ambiguity in the language of a written contract arises from extrinsic matters, or when, from the language used, the object or extent of the contract cannot be determined, parol evidence is admissible to remove that ambiguity, and ascertain the object upon which the contract was designed to operate. *Isham, J.*, in *Noyes v. Canfield*, 27 Vt. 85. *Rugg v. Hale*, 40 Vt. 144.

**478.** Where the words of a written agreement were open to either one of two constructions;—*Held*, that the intent might be shown by extrinsic and parol evidence. (What that evidence was, does not appear in the report.) *Wing v. Gray*, 36 Vt. 261.

**479.** An order drawn by A on B was in this form: "Please to let C have \$30, and that will be your discharge from me in full of our accounts." Whether this was an assignment of the debt to C, or created a mere agency to receive and hold for A's benefit, was properly left to the jury to be found, in connection with the circumstances proved. *Harrington v. Rich*, 6 Vt. 666.

**480. Terms—Phrases.** In order to determine the force of terms used in a written contract, we must frequently resort to proof of the circumstances attending the transaction, although not specified in the writing;—as, in a contract to "convey" land, that both parties understood that the premises were leasehold, and that only a leasehold title could be obtained. *Lawrence v. Dole*, 11 Vt. 549; and see *Conn. & Pass. R. R. Co.*, 32 Vt. 805.

**481.** Where a letter was directed to "J W," evidence was *held* admissible to prove it intended for E W, and the letter was received in evidence against the writer. *Wilkins v. Burton*, 5 Vt. 76.

**482.** Parol evidence is admissible to show that by certain marks or characters appended to his name by the cashier of a bank, the word *cashier* was intended. *Farm. & Mech. Bank v. Day*, 13 Vt. 36.

**483.** Where a letter of credit was directed

to A B, "President, Detroit, Michigan";—*Held*, that it might be shown by extraneous evidence for whom the letter was intended, by showing that A B was president of the plaintiff bank, and thus authorize a suit thereon in the name of such bank. *Michigan State Bank v. Pecks*, 28 Vt. 200.

**484.** The grantor in a deed reserved all the *free stones* on the land, with the privilege of carrying off said stones. The question being whether this extended to the stone of a ledge under ground;—*Held*, that parol evidence was admissible to show the situation of the property at the date of the deed, as that there were 80 to 100 tons of free stones then lying on the land, disconnected from any fixed ledge, and that this ledge was not then known; and this being proved,—*held*, that the reservation did not embrace the stone in the ledge. *Putnam v. Smith*, 4 Vt. 622. 44 Vt. 207.

**485.** Parol evidence is admissible to give an application of a written contract to its subject matter, in cases in which the thing, as expressed, is applicable indifferently to more than one subject. *Hart v. Hammett*, 18 Vt. 127.

**486.** In an action for the non-delivery of oil, equal to a sample, purchased under a written contract calling for "winter-strained lamp oil," evidence of the meaning of these words as generally used by dealers in oil was properly introduced, from which it appeared that they applied indifferently to winter-strained *sperm* lamp oil, and to winter-strained *whale* lamp oil, and that the latter was inferior in quality to the former. The latter was delivered under the contract. *Held*, that the defendant was properly allowed to prove, that at the time the written contract was executed, the defendant informed the plaintiff that the sample and the oil he was selling was *not* sperm oil. *Id.*—Approved, 40 Vt. 466.

**487.** The defendant, a forwarder, contracted with the plaintiffs in writing to transport "their freight," during the navigable season, at a stated price per ton, "wool excepted, except at special rates." In an action for a refusal to transport pressed hay under the contract;—*Held*, that, for the interpretation of this general term "freight," as understood by the parties, parol testimony was admissible in defense, to prove the situation of the parties at the time of making the contract, and the nature, extent and character of the plaintiffs' freighting for several years previous,—as, that the defendant had been familiar with the plaintiffs' freighting business and had done it for them under similar contracts; that the plaintiffs had never before dealt in hay to be freighted, and that hay could not be transported at less than double the rates named in the contract, &c. *Noyes v. Canfield*, 27 Vt. 79.

**488.** The conditions of a railroad subscription

required the extension of the road to *Derby Line*. *Held*, that the court would take judicial notice that there was such an incorporated town as Derby, and as the railroad charter, a public act, fixed the north line of Derby as the terminus, the term, *Derby Line*, upon the face of the contract, must be construed to mean the north line of the town. But evidence was admitted that on the north line of the town was a village, universally known and called "Derby Line." *Held*, that an ambiguity was thereby raised as to the place intended by that term, which presented a question of fact to be determined by the jury upon proper evidence. *Conn. & Pass. R. R. Co. v. Baxter*, 82 Vt. 805.

489. Parol evidence, not conflicting with nor changing the sense of a written agreement, but only showing to what it was intended to apply—explaining and identifying the subject matter of it by attending circumstances—is admissible. [This applied to the case of what was named in the writing as "contracts" for cloth boards.] *Bradley v. Pike*, 34 Vt. 215.

490. Where two parcels of land were covered by the same mortgage, and one of them was sold "subject to the mortgage," as expressed in the advertisement and deed;—*Held*, that this phrase is of doubtful meaning and susceptible of two interpretations, viz: subject to the payment of the whole mortgage debt, or subject to contribute its just proportion with the other parcel; and that parol evidence was admissible to show the sense in which the language was used. [This evidence included declarations made on the occasion of the sale.] *Merrill v. Cooper* (chancery appeal), 36 Vt. 314.

491. In the sale of a farm, stock, and farm property, a memorandum of the sale was executed by the seller, in which, after enumerating sundry articles and farming tools, was added: "Meaning all the farming tools, &c., now owned by me, and on said farm." The question being whether certain milk pans, used in the management of the farm as a dairy farm and not specifically named in the memorandum, passed by the sale;—*Held*, that the term "farming tools, &c.," was susceptible of divers meanings, and that parol evidence of extrinsic circumstances and facts was admissible for the purpose of ascertaining to what specific property these words were intended to, and did, apply—as, that the pans were purchased in connection with the farm, which the purchaser contemplated carrying on as a dairy farm, and was so understood by the parties. *Rugg v. Hale*, 40 Vt. 188.

492. But *held*, that parol evidence was not admissible to prove that certain grain, raised upon another farm, was included in the purchase and intended to be conveyed. *Id.*

493. The plaintiff made a written contract with the defendant to cut and fit all the stone

work for the fronts and wing walls of a railroad tunnel, at a set price per superficial foot, to be measured in the walls after laid, "all the face of the work that shows to be measured, and none else." In the proper performance of the contract the plaintiff cut, dressed and finished not only the drop, or perpendicular face of the wall, but also the horizontal surfaces of the trend, or slope of the walls which receded by steps, and of the coping stones, and claimed payment for such horizontal surface work under the contract. *Held*, that parol evidence of the meaning of the words, "face of the work," as used in the trade was proper; but, the meaning of the words being thus ascertained, that evidence of what was said by the parties during the negotiations before the execution of the written contract, as to how the measurement should be made, or what face measurement meant, was properly excluded. *St. Martin v. Thrasher*, 40 Vt. 460. See 18 Vt. 127. 27 Vt. 79. 40 Vt. 188.

494. To identify subject matter. The identity of the subject matter of a deed, or grant, rests in parol. *Patch v. Keeler*, 27 Vt. 252.

495. —by concurrent act. Where, in a written description of land, an uncertainty arises, not from the terms used but from their application to the subject matter in its nature and situation, oral evidence is admissible in explanation—as, of the survey actually made and monuments erected. *Patch v. Keeler*, 28 Vt. 332.

496. Thus, where the setting out of dower by commissioners was of "three rows of apple trees on the west side of the orchard, running north and south in the centre between the third and fourth rows," and the question was whether two trees, the westernmost standing in a line, should be counted as a row or not;—*Held*, that such evidence was admissible. *Id.*

As to evidence in particular actions, see the appropriate titles,—as ASSUMPSIT; COVENANT; TRESPASS, &c.;—in particular transactions, see CONTRACT; DEDICATION; FRAUD, &c.;—as affected by the pleadings, see PLEADINGS.

## EXCEPTIONS.

- I. TAKING, SIGNING AND FILING.
- II. REQUISITES OF BILL AS TO REFERENCE AND STATEMENT.
- III. ENTRY IN SUPREME COURT; EFFECT; DISCONTINUANCE.
- IV. CONSTRUCTION OF BILL OF EXCEPTIONS.
- V. CASE STANDS AS UPON WRIT OF ERROR.

### I. TAKING, SIGNING AND FILING.

1. When exceptions lie, in general. Exceptions lie to every decision of the court

upon a question of law, as well where the issue of fact is to the court, as where it is to the jury. *Nash v. Harrington*, 1 Aik. 39.

2. **Rule as to time of taking exceptions.** Exceptions to a charge must be taken at the close of the charge, and before the jury retire. *State v. Clark*, 37 Vt. 471.

3. **Rule of county court.** Where a rule of the county court required all exceptions to be taken and noted, and the judge certified in the exceptions other points than those;—*Held*, that although the judge was not bound to certify any other points than those noted, yet he might properly do so, if satisfied that the matter merited further consideration. *Steele v. Bates*, 2 Aik. 338.

4. The rule of the county court requiring exceptions to the charge to be taken before the jury retire, is one of practice merely, and cannot be regarded in the supreme court; and when any question arises on the charge, and the court below allows exceptions and spreads the charge upon the record, the supreme court is bound to revise all questions made in regard to such charge, although not excepted to at the time, and application to allow exceptions was only made after the jury had rendered their verdict. *Buck v. Squiers*, 23 Vt. 498.

5. It is not error for the county court, after verdict, to allow an exception not before taken, that upon the evidence the plaintiff was not entitled to recover. *Williams v. Heywood*, 41 Vt. 279.

6. **Exception to entire charge.** The county court may and ought to refuse an exception to the entire charge to the jury; and counsel should always be required to specify the particular points in the charge, or in the omission to charge, to which they take exceptions, and they should do this before the jury leave their seats. *Goodwin v. Perkins*, 39 Vt. 598.

7. Where an exception is to the judgment of the court upon the evidence detailed, and the evidence does not warrant the judgment, the respondent has the benefit of the defect under this exception, although not particularly alluded to before the case was submitted. *State v. Gilbert*, 36 Vt. 145.

8. **Signing.** A bill of exceptions signed by the assistant county judges, instead of the presiding judge, was dismissed on motion. *Small v. Haskins*, 29 Vt. 187. (G. S. c. 30, s. 57.)

9. A writ of error based upon a bill so signed, was dismissed, for that it was no part of the record. *Small v. Haskins*, 30 Vt. 172.

10. The judge who presided at the trial may correct a bill of exceptions, *nunc pro tunc*, after his time of office has expired. *Lyons v. Rood*, 11 Vt. 165. *Contra*, *Phelps v. Conant*, 30 Vt. 277. (Now allowed by G. S. c. 30, s. 58.)

11. **Filing.** If exceptions taken in the county court are not in fact filed in the clerk's

office within 30 days after the rising of the court (G. S. c. 30, s. 57), they cannot afterwards be filed *nunc pro tunc*, and cannot be considered in the supreme court. *Higbee v. Sutton*, 14 Vt. 555. *Nixon v. Phelps*, 29 Vt. 198.

12. Nor will a writ of error lie thereon, they not being part of the record. *Small v. Haskins*, 30 Vt. 172.

13. Where a declaration on book was filed in offset, and to a judgment on the report of the auditor exceptions were duly filed by the defendant;—*Held*, that such exceptions could be entertained so far as the judgment of the county court for the ultimate balance was affected thereby; but that they did not uphold exceptions taken upon trial of the other branch of the case [the original action], which last exceptions were not seasonably filed. *Nixon v. Phelps*, 29 Vt. 198.

14. The statute requiring exceptions to be filed with the clerk within thirty days after the rising of the court, has reference only to that term of the court at which final judgment in the case is rendered, and not to some previous term when some interlocutory judgment was rendered. *Thetford v. Hubbard*, 22 Vt. 440.

## II. REQUISITES OF BILL AS TO REFERENCE AND STATEMENT.

15. The judge, in drawing up a bill of exceptions, certified that his charge upon a certain point was the same as in another case named. *Held*, well enough; it was but making a copy of the charge in the other case a part of this. *St. Johnsbury v. Waterford*, 15 Vt. 692.

16. Where two bills of exceptions were placed upon the record, and they were contradictory;—*Held*, that, neutralizing each other, this was equivalent to a refusal to charge, and the judgment was reversed. (*Redfield, J., contra*, thinking that the bill last allowed superseded the first.) *Briggs v. Georgia*, 12 Vt. 60.

17. Depositions or papers filed as evidence in the court below are no part of the record, and cannot be regarded as such in the supreme court, except as the facts therein are stated in the exceptions or the case agreed. *Sargeant v. Leland*, 2 Vt. 277.

18. All papers in a case belonging to the files in the county court, as the record, writ, service, pleadings, &c., are always treated as part of the case in the supreme court on exceptions, though not specially referred to in the exceptions as part of the case. *Frost v. Bates*, 16 Vt. 145. *Wheelock v. Sears*, 19 Vt. 559. Other documents and writings, used on the trial as matters of evidence, must be specially referred to and made a part of the case, or they will not be noticed. *Wheelock v. Sears*. *Sargeant v. Leland*.



19. Copies of all papers referred to in a bill of exceptions, not belonging to the files in court, should, properly, be attached to the bill of exceptions before signing it. Unless attached to the case, the excepting party must see that such copies are furnished, or he cannot be heard in support of his exceptions, and the judgment below must be affirmed. *Frost v. Bates*, 16 Vt. 145. *Fish v. Field*, 19 Vt. 141.

20. The party who tenders a bill of exceptions must, at his peril, place so much there as shows that the county court did err. This must be made to appear affirmatively, either by stating definite law points arising and decided, or by stating the whole evidence, the legal import of which is embraced in the decision, and, in such case, it must appear to be the whole;—for the presumption is that the judgment below is correct until the contrary appears. *Richardson v. Denison*, 1 Aik. 210. *Eaton v. Houghton*, 1 Aik. 380. *Adams v. Ellis*, 1 Aik. 24. *Stearns v. Warner*, 2 Aik. 26. *Green v. Donaldson*, 16 Vt. 162.

21. An objection to a tax sale and proceedings "for other defects on the face of the papers, apparent of record," is too indefinite and vague for consideration. *Wing v. Hall*, 47 Vt. 182.

### III. ENTRY IN SUPREME COURT; EFFECT; DISCONTINUANCE.

22. **After final judgment below.** Exceptions are not to be entered in the supreme court, until the next term after a motion for a new trial in the county court has been there disposed of. *Stimpson v. Cummings*, 15 Vt. 787.

23. Before a case can properly come into the supreme court on exceptions, there should be a full and perfect judgment in the county court. *Probate Court v. Chapin*, 31 Vt. 373.

24. On an issue of fact joined in the county court, the court found and stated the facts in a bill of exceptions, with a judgment in the alternative,—that if the supreme court should be of opinion that the plaintiff was entitled to recover the full sum claimed, then the defendant consents that such judgment shall be entered; but, otherwise, for a less sum. *Held*, that the supreme court could not enforce such rule; and they declined hearing the case, until the exceptions should show an absolute judgment rendered for one of the parties. *Day v. Essex Co. Bank*, 13 Vt. 115.

25. A case may properly pass to the supreme court on exceptions, whenever it is so far ended in the county court that, if no exceptions were taken, it would go out of court. *Hayes v. Stewart*, 23 Vt. 622.

26. In a trustee suit in the county court, where there is judgment for the defendant, the

case may at once pass on exceptions to the supreme court, without any judgment rendered as to the trustee. *Id.*

27. No civil cause can pass to the supreme court until after final judgment in the county court. Exceptions taken on the trial—as to an interlocutory ruling or judgment—must be filed, and lie to await the final judgment. If brought into the supreme court before final judgment, the case will be treated as a mis-entry, and be erased from the docket. *Gage v. Ladd*, 6 Vt. 174. *Fisk v. Herrick*, 10 Vt. 67. *Finney v. Hill*, 10 Vt. 264.

*Note.*—Since Rev. Stats. 1840, corresponding with G. S. c. 30, s. 56, this ruling has been departed from;—as, in *Moseaux v. Brigham*, 19 Vt. 457, where exceptions were taken to allowing a justice suit to be entered on petition, and before trial or judgment the exceptions were heard and the decision affirmed, and the case remanded to be proceeded with to trial; but this objection was not there taken; so in *McDaniels v. McDaniels*, where a verdict for the plaintiff was set aside for misconduct of the jury and exceptions taken thereto [principal case reported, 40 Vt. 863]. This was heard and argued January T., 1867, on defendant's motion to strike off the case as a mis-entry, because the case was not ended in the county court. The motion was denied, and the exceptions were heard at General Term, 1867,—the court treating the question as one of discretion. See *In re Cooper*, 32 Vt. 254. *Tarbell v. Downer*, 29 Vt. 339. *Probate Court v. Brainard*, 48 Vt. 620.

28. **Effect as to the judgment.** An action lies upon a judgment of the county court, although exceptions thereto were taken, but without stay of execution, and they are pending in the supreme court. *Tarbell v. Downer*.

29. The plaintiff recovered judgment below; the defendant excepted, but execution was not stayed, and the defendant neglected to prosecute the case on his exceptions. *Held*, that the judgment should be affirmed with costs to the plaintiff, unless he had been notified in writing before the term that the suit would be abandoned. *Kelly v. Haskell*, 19 Vt. 602.

30. In like case;—*Held*, that such notice in writing must be given at least twelve days before the term, in order to avoid an affirmance with costs; but that the defendant might elect to be heard on his exceptions. *Allen v. Hard*, 19 Vt. 606.

31. **Discontinuance.** Where exceptions are allowed by the county court, with stay of execution, and the exceptions are actually filed, the excepting party cannot abandon them, so as to prevent an affirmance of the judgment in the supreme court. *Batchelder v. Tenney*, 27 Vt. 784.

32. The death of a party pending exceptions in the supreme court, and representation of

insolvency, do not work a discontinuance, but the exceptions must be disposed of, as on a writ of error. *Walker v. King*, 2 Aik. 204.

#### IV. CONSTRUCTION OF BILL OF EXCEPTIONS.

**33. Favorable presumptions.** All reasonable presumptions will be made, in the supreme court, in favor of the regularity of the proceedings and decisions of the county court, and unless it appears affirmatively upon the bill of exceptions that error has intervened, the judgment will be affirmed. *Poultney v. Glover*, 28 Vt. 328. *Bradley v. Pratt*, 28 Vt. 378. *Green v. Donaldson*, 16 Vt. 162. *Oaks v. Oaks*, 27 Vt. 410. *Beard v. Murphy*, 87 Vt. 99.

**34.** Where only the *substance* of the charge is professed to be stated in the bill of exceptions, the supreme court will treat the bill as a memorandum of a charge that was full, developing into all needful detail of explanation, illustration and application. *Dean v. McLean*, 48 Vt. 412.

**35. Error must be shown affirmatively.** Evidence offered must be taken to have been properly rejected, unless it appears affirmatively that it was material. *Isham v. Eggleston*, 2 Vt. 270.

**36.** A case must be decided from what appears in the bill of exceptions, and, in order to a reversal, error must be shown affirmatively. Where the question is as to the pertinency of testimony admitted, if such testimony had any legal tendency to prove the issue, in any reasonably supposable state of the evidence as detailed in the bill of exceptions, it is impossible for the supreme court to say that it was improperly received. *Green v. Donaldson*, 16 Vt. 162.

**37.** In a hearing on exceptions after verdict, all averments on the side of the successful party which were involved in the issue tried, will be taken to have been duly proved, or admitted, unless something is placed on the record to show the contrary. *Gates v. Bowker*, 18 Vt. 28.

**38.** Where the court, "upon the facts found by the referee," adjudged, *pro forma*, that the cause of action arose from the willful and malicious act of the defendant;—*Held*, that the conclusive presumption from the granting of the certificate was, that the court found the malice from the facts reported, and that the judgment was *pro forma* only as to the law arising upon the finding. *Patee v. Pelton*, 48 Vt. 162.

**39.** Where, on a trial by the court, the judgment rendered involves the finding of a fact,—as, a demand before suit, or a conversion in trover,—it will be taken that such fact was found, and upon legal evidence, unless the bill of exceptions shows the contrary. *Harriman*

*v. School District*, 35 Vt. 818. *Seward v. Heflin*, 20 Vt. 144.

**40.** A bill of exceptions does not stand upon the footing of pleadings, where no intentment is to be made in favor of the party thus setting up his right, but is to be understood in the usual and ordinary sense of common communication, as a plain statement of the facts for both parties. Thus, in a pauper case, where a certain relationship was stated in the exceptions, it was *held* to be understood as a *legitimate* relationship. *Westford v. Essex*, 81 Vt. 459.

**41.** If the interpretation of a bill of exceptions is reasonably doubtful, nothing should be presumed against its statements with a view to predicate error, but all fair and just constructions and intentments should be made in favor of the decision below. *Crane v. Crane*, 33 Vt. 15. *McCann v. Hallock*, 30 Vt. 233.

**42.** An agreed case was aided, to establish the fact of citizenship of a party, by the writ and execution made part of the case, wherein he was described as a resident citizen. *Sawyer v. Vilas*, 19 Vt. 43.

**43.** Where an exception appears in terms to have been taken in the county court, it must be regarded as rightly before the supreme court, unless other parts of the bill show, not only that it may not have been passed upon by that court, but, also, to the reasonable satisfaction of the supreme court, that it was not. *Rut. & Bur. R. Co. v. Thrall*, 35 Vt. 536.

**44. It "appeared."** Where a bill of exceptions states that certain *facts appeared*, it must be taken that of these facts there was no dispute, or that it was so conceded; otherwise, the statement should be that the testimony *tended to prove* such facts. *Beach v. Packard*, 10 Vt. 96.

**45. Verdict directed.** Where the court directs a verdict, the excepting party has a right to the most favorable view of his case;—that is, he may consider every thing as found in the case, which the testimony had any legal tendency to establish. *Knapp v. Winchester*, 11 Vt. 351.

**46. Presumed waiver.** An objection *not appearing* to have been taken in the county court, will be presumed to have been waived. *Brigham v. Hutchins*, 27 Vt. 569.

**47. Reports of auditors, and referees.** In actions of book account, or cases referred, passing to the supreme court upon exceptions, no questions can be there revised, except questions of law arising either upon the facts reported by the auditor or referee, or found and placed upon the record by the county court. *Putnam v. Dutton*, 8 Vt. 396. *Clark v. Whipple*, 12 Vt. 433. *McDaniels v. McDaniels*, 40 Vt. 343.

**48.** Where referees point out to the court a

question of law, the final determination of which they refer to the court, although they themselves decide it provisionally, it is not necessary to file exceptions to the report, in order to raise the question upon such decision. *Sargeant v. Sargeant*, 18 Vt. 380.

49. Where the questions made and decided by the county court, upon the report of auditors, were incorporated into the bill of exceptions, they were held to be regularly before the supreme court for revision, although they did not appear to have been made by the exceptions filed to the report. *Vilas v. Downer*, 21 Vt. 419.

#### V. CASE STANDS AS UPON WRIT OF ERROR.

50. All cases passing to the supreme court on exceptions are to be viewed strictly as matters *in error*. They cannot be treated as motions or petitions for new trials, nor as calling for the exercise of judicial discretion; nor can there be any revision of questions of fact settled below, whether by jury, court, or consent of parties. *Way v. Wakefield*, 7 Vt. 223.

51. A case brought to the supreme court on exceptions stands as upon a writ of error, and the court has no discretion, if error has intervened as disclosed by the record, but to reverse the judgment. *Penniman v. Patchin*, 5 Vt. 346. *Irish v. Cloyes*, 8 Vt. 30. *Blodgett v. Adams*, 24 Vt. 23.

52. Though the case be of such trifling importance as that a new trial would be refused upon motion or petition, the judgment must be reversed if error have intervened. *Fullam v. Cummings*, 16 Vt. 697.

53. In our practice, under the statutes upon that subject, the proceedings to revise a judgment of the county court upon exceptions taken there and passed to the supreme court, are similar to the proceedings upon a writ of error, and are not like the proceedings upon exceptions in the English practice, which are heard before a full bench of the same court, and are treated like motions for a new trial. Here, upon a bill of exceptions, although the whole testimony used in the county court may be referred to and may pass to the supreme court as part of the exceptions, the finding of the county court in matters of fact cannot be revised, however erroneous in the opinion of the supreme court that finding might be. *Pomfret v. Barnard*, 44 Vt. 527. *Card v. Sargeant*, 15 Vt. 398.

54. Facts, as distinguished from evidence. The supreme court cannot try a question on exceptions, that is to be ascertained by weighing evidence, or drawing inferences therefrom. The facts must be first found and reported. *Bartlett v. Churchill*, 24 Vt. 218.

55. The supreme court cannot treat as a fact

in the case, what is not reported by the county court in a trial by the court as a fact found, although the evidence and special facts reported tended to prove such fact, unless it appears from what was shown, that the county court was bound as matter of law to find that fact. *Brattleboro E. Society v. Reed*, 42 Vt. 76.

See ERROR; PRACTICE IN SUPREME COURT.

### EXECUTION.

- I. ISSUING OF EXECUTION.
- II. FORM AND REQUISITES.
- III. EFFECT.
- IV. RELIEF AGAINST ERRONEOUS EXECUTION.
- V. PROCEEDINGS UNDER EXECUTION.
  - 1. *In general.*
  - 2. *Levy upon personal property.*
  - 3. *Levy on real estate.*
- VI. VACATING INFORMAL LEVIES.

#### I. ISSUING OF EXECUTION.

1. An award of execution follows final judgment, as of course. Hence, the want of such entry on the record does not vitiate; the clerk may add it at any time. *Little v. Cook*, 1 Aik. 363.

2. It is no part of the official duty of the clerk to issue an execution, till it is called for by the party entitled to it. *Smith v. Howard*, 41 Vt. 74.

3. *Renewing.* An execution cannot be legally renewed by any indorsement made by the magistrate upon it; but upon return of the execution unsatisfied, he may issue another, making a suitable minute on his record. *State v. Campbell*, 2 Tyl. 177.

4. An execution *renewed* by the justice who issued it by carrying the date forward, although so done after it has been delivered to an officer for collection but before any service made, is not so far void as that it may be set aside by *audita querela*. Such practice should be discouraged. *Sawyer v. Doane*, 19 Vt. 598.

5. *Time for issuing.* When a judgment is rendered at a term of court ending on Saturday, the next Monday is the earliest date on which the plaintiff, without leave of the court, can take out execution. *Allen v. Carty*, 19 Vt. 65. (G. S. c. 33, s. 92.)

6. In an action against A and B upon a joint contract, A suffered a default, but B entered a review. Judgment was entered up against A, and execution issued against him, on which he was committed and gave a jail bond. To an action on the bond the defendant pleaded, that there was no such record of judgment

against A. *Held*, by a majority, that the execution issued prematurely and was erroneous; that the review by B vacated the judgment as to both, since there could be but a single assessment of damages; and the plea was sustained. *Downer v. Dana*, 23 Vt. 22, and see *Jones v. Spear*, 21 Vt. 426, 431.

7. The county court at its Nov. Term 1857, on the 7th Dec. took a recess, and the following entry was made on the docket: "The court for the purpose of completing the business of its session was adjourned to the 21st Dec. 1857;" and at the same time made an order as follows: "Executions on judgments in trials completed may issue as of date Dec. 8, 1857." The court reassembled on the 21st, and finally adjourned on the 24th Dec. *Held*, that an execution issued within 30 days after Dec. 25, although upon a judgment completed before the recess, was regular and sufficient to charge the attached property;—that the reassembling of the court was not at an "adjourned term." (G. S. c. 38, s. 92; c. 30, s. 38.) *Paul v. Burton*, 32 Vt. 148.

8. **Prematurely issued.** In like case, where the cause was tried before the recess, with judgment for the plaintiff, he took exceptions with an order of stay of execution. During the recess, the clerk, by his direction—no exceptions having been filed—erased the docket entry and issued execution. *Held*, that the party could not waive the court's order of stay of execution, and that the execution issued prematurely. (G. S. c. 30, s. 57.) *Howard v. Burlington*, 35 Vt. 491.

9. An execution issued prematurely—as, against the principal debtor before the determination of the case as to the trustee—is not void, but valid for all purposes, until set aside. *Spring v. Ayer*, 23 Vt. 516. *Haggood v. Goddard*, 26 Vt. 401. *Passumpsic Bank v. Beattie*, 32 Vt. 315.

10. In order to set aside an execution, because issued prematurely and so far irregularly, the moving party must show two things—diligence, and danger of being unjustly affected by the execution. He must apply in a reasonable time, which is the earliest convenient time. If nothing has been done under the execution but what ought to have been done, although prematurely done, it will not be set aside. *Haggood v. Goddard*.

11. **Within what time must be issued.** An *alias* execution, issued more than a year after the return of a prior one, and then levied upon land, was *held* irregular, and not evidence of title in ejectment. *Anon.* Brayt. 66.

12. An execution must be issued within a year and a day after the date of the judgment; and successive executions must be issued, each within a year and a day after the issuing of the previous one. An execution otherwise issued,

and the proceedings under it, are erroneous, but not for that cause void. They cannot be attacked collaterally, but remain valid until set aside by some proceeding brought directly for that purpose. *Willard v. Whipple*, 40 Vt. 219. *Fletcher v. Mott*, 1 Aik. 339. *Allen v. Carpenter*, 7 Vt. 397. *Porter v. Vaughn*, 24 Vt. 217.

13. But if any legal reason exist why the party could not take execution, as if a stay of execution was ordered by the court, or was procured by a writ of injunction, or writ of error, or there be other legal impediment, then the execution may regularly issue within the ordinary time after the removal of such impediment. *Poland, C. J.*, in *Catlin v. Merchants' Bank*, 36 Vt. 577. *Fletcher v. Mott*. *Porter v. Vaughn*.

14. If a judgment be with *cesset executio* by agreement until such a time, there need be no *scire facias* until a year and a day after the time agreed, though such *cesset* is not entered on the roll. *Isham, J.*, in *Porter v. Vaughn*, 24 Vt. 217. *Quare*, as to this, by *Poland, C. J.*, in *Catlin v. Merchants' Bank*.

15. An execution issued more than a year and a day after the date of the judgment is erroneous, notwithstanding the property attached upon the writ was and remains subject to a lien created by a previous attachment, not yet perfected. *Catlin v. Merchants' Bank*, 36 Vt. 572.

16. Under G. S. c. 31, s. 74, authorizing the county clerk to issue executions upon a justice judgment in case of the death or removal of the justice, "in the same manner as the justice might do if *in office*;"—*Held*, that an execution so issued by the county clerk, two years after the death of the justice, was to be treated the same as if the justice had been then alive and had issued it, and though erroneous, it was not void. *Willard v. Whipple*, 40 Vt. 219.

## II. FORM AND REQUISITES.

17. **Must follow the judgment.** An execution reciting the judgment as of one term, is not sustained by the record of a judgment rendered at a different term. *Rider v. Alexander*, 1 D. Chip. 267.

18. An execution which misdescribed the judgment as to the sum of damages recovered [a difference of 67 cents], was set aside on *audita querela*. *Semble*, such execution is void, as respects the creditor. *Wilson v. Fleming*, 16 Vt. 649. 38 Vt. 332.

19. The county clerk, as authorized by statute, issued an execution upon the judgment of a deceased justice, by signing it "Justice of the Peace." *Held*, that such execution was not sufficient to sustain a levy upon lands, since the record of it in the town clerk's office would show a judgment by one justice, and an execu-

tion issued upon it by another justice. *Perry v. Whipple*, 38 Vt. 278.

**20. Legal identity.** An execution on a judgment by confession recited truly the damages and the costs confessed, but omitted the statement in the record—"and twenty-five cents more for taking and recording said confession," &c. *Held*, that the apparent and legal identity of the judgment shown by the record and that recited in the execution, was not destroyed by such omission, and that the execution was sufficient to sustain a levy of it upon lands. *Id.*

**21. Immaterial error.** A mistake in an execution in the name of the town in which the jail is situated, does not render the execution void, nor imprisonment under it unlawful. *Lewis v. Avery*, 8 Vt. 387. *Avery v. Lewis*, 10 Vt. 332.

**22.** Where it was recited in the body of an execution that the judgment was rendered by a justice for the county of R, and it was dated at a town in that county;—*Held*, that this was not controlled by the venue in the margin being of a different county, and that the validity of the execution, or of a jail bond, was not affected thereby. *Avery v. Lewis*.

**23.** A judgment was rendered against O as defendant, and H and M as his trustees. The execution described the judgment as "against O, and H, and M, trustees of O, debtors," and the precept was to levy it of the goods, &c., "of the debtors." *Held*, on *audita querela*, that the execution should be construed as if the word *against* was inserted before the name H in the description of the judgment, and that the word "debtors," in the precept, meant H and M only, and was sufficient. *Hamilton v. Wilder*, 31 Vt. 695.

**24. — or omission.** An execution was committed to an officer for service, in which the usual direction to the officer to dispose of the goods as the law directs, was omitted. *Held*, that he could not for this cause refuse or neglect to serve it. *Chase v. Plymouth*, 20 Vt. 469.

**25. Return day.** Where a justice judgment is rendered on confession, under the Statute of 1797, the execution must run 60 days only; it is only where the confession is under the Act of 1821, that the execution can run 120 days. *Hatch, ex parte*, 2 Aik. 28.

**26. Judgment paid in part.** Although part of a judgment has been paid, yet if this does not appear by the record, an execution for the full sum is not *irregularly* issued. *Perry v. Ward*, 20 Vt. 92.

**27. First execution satisfied in part.** Where an execution has been satisfied in part, an *alias* that states that execution of the whole judgment remains to be done, and commands the officer to collect the whole, is irregular,

although the amount satisfied on the first execution is indorsed on the *alias*. So *held*, as to an *alias* execution levied on lands. *Fairbanks v. Devereaux*, 48 Vt. 550.

**28. Against the body.** In an action of tort, the execution may run against the body, although the original writ did not. *Hunt v. Burdick*, 42 Vt. 610.

**29. — following the original writ.** *Prima facie*, an execution should follow the original writ; as a *capias* execution—after a *capias* writ. If new facts arise before execution, entitling the debtor to freedom from arrest, he may pursue his right on *habeas corpus*, and perhaps in other modes. *Wright v. Hazen*, 24 Vt. 148.

**30.** A new affidavit is not necessary to warrant an execution against the body, where the original was so issued and served upon proper affidavit filed. *Davis v. Dorr*, 30 Vt. 97. *Converse v. Washburn*, 48 Vt. 129. (G. S. c. 88, s. 76.)

**31. Jan'y. 1, 1839.** Where different contracts are embraced in the same declaration, some of which were made before Jan'y. 1, 1839, and some after; or, in an action on book, where part of the demand accrued after that date, and there is one judgment, the plaintiff cannot, under the statute abolishing imprisonment for debt upon contracts made after that date, have an execution against the body of the debtor. *Witt v. Marsh*, 14 Vt. 303.

**32. Certificate — "Willful and malicious."** Under the Act of 1797, it was the form of the action which determined whether a certificate of "willful and malicious" could be properly allowed upon an execution. *Fisher v. Commissioners, &c.*, 3 Vt. 328.

**33.** A certificate of "*willful and malicious*," cannot be granted in an action of trover upon an officer's receipt for property attached. The receipt is substantially a contract, and a failure to meet the obligation of it must be regarded merely as a breach of contract, and not a tort, although, rather by a legal fiction, the officer is allowed to maintain trover upon it. *Soule v. Austin*, 35 Vt. 515.

**34.** A certificate indorsed upon an execution issued upon a judgment rendered in an action of tort, in order to be sufficient, should be, not that the cause of action arose from the willful and malicious act or neglect of the defendant, but that, *at the time of rendering such judgment it was adjudged by the court*, that the cause of action arose, &c. Such a defective certificate was vacated on *habeas corpus*. *In re Wheelock*, 13 Vt. 875. (G. S. c. 121, s. 28.)

**35.** A close jail execution under G. S. c. 121, s. 24, is based on the judgment of the court that the cause of action arose from the willful and malicious act or neglect of the defendant, &c.; and the mode of service of the

original process is immaterial. *Adams v. Wait*, 43 Vt. 16.

36. In an action on the case, the court denied the defendant's motion for a continuance and rendered judgment for the plaintiff, and on his motion, against the defendant's objection, the court, without the introduction of any testimony, adjudged that the cause of action arose from the willful and malicious act of the defendant, and granted a certified execution. *Held*, that the awarding of the certificate, without evidence, was error. *Stowe v. Powell*, 46 Vt. 471.

37. Where the facts are spread upon the record by the findings of the county court, or the report of an auditor or referee, it is a question of law, revisable by the supreme court on exceptions, whether such facts entitle the plaintiff to a certificate of "willful and malicious." *Styles v. Shanks*, 46 Vt. 612. See *Robinson v. Wilson*, 22 Vt. 35. *Soule v. Austin*, 35 Vt. 515. *Whiting v. Dow*, 42 Vt. 262.

38. Where the parties entered into a contract which made them co-partners, practically, and in an action of account, judgment passed against the defendant, and it did not appear affirmatively from what cause the defendant's deficiency arose;—*Held*, that the county court properly refused a certified execution. *Styles v. Shanks*.

39. The plaintiff consigned flour to the defendant, a merchant, to be sold on commission, and he mingled with his own funds the avails of the flour so sold, making payments from time to time, and receiving from time to time other consignments. After judgment for the balance, upon a motion for a certified execution, the court found that the defendant had failed to pay the plaintiff on account of misfortunes in business with which the plaintiff had no connection, and adjudged that the cause of action arose from the willful and malicious act of the defendant, and ordered a close jail certificate. *Held*, that the certificate was properly granted. *Langdon v. Bowen*, 46 Vt. 512.

40. The county court has power to grant a close jail certificate in an action for seducing the plaintiff's minor daughter and getting her with child, though there was nothing in the evidence to show that the cause of action was willful and malicious, except such facts as were necessary to entitle the plaintiff to recover. *Whiting v. Dow*, 42 Vt. 262.

41. After judgment in an action under Stat. 1869, No. 4, s. 3, a certified execution is proper against the defendant who unlawfully furnished the liquor. *Smith v. Wilcox*, 47 Vt. 537.

42. Vacating certificate. Under G. S. c. 121, a judge of the supreme court has jurisdiction to vacate a close jail certificate, granted where the recovery was for money held in a fiduciary capacity, as in other cases, *Vt. Life Ins. Co. v. Dodge*, 48 Vt. 156.

### III. EFFECT.

43. **Void.** An execution made returnable in 60 days, when required by law to be returnable in 120 days, is irregular and void for all purposes. *Bond v. Wilder*, 16 Vt. 398. *Hatch, ex parte*, 2 Aik. 28. *Tichout v. Cilley*, 3 Vt. 415. *Jameson v. Paddock*, 14 Vt. 491. *Henry v. Niles*, 26 Vt. 541. *Fifield v. Richardson*, 34 Vt. 410. *Perry v. Whipple*, 38 Vt. 283.

44. In assumpsit by a sheriff upon a receipt for property attached, the declaration averred a demand of the property that it might be levied upon to satisfy the execution mentioned in the declaration. Such execution, as described, was irregular,—being a justice's execution returnable in 60 days, whereas it should have been 120 days. *Held*, that the plaintiff showed no title, and the declaration was adjudged ill on demurrer. *Jameson v. Paddock*.

45. All proceedings under a void execution,—as, a levy and return of satisfaction by the officer,—are void, and the judgment remains in full force. *Fifield v. Richardson*, 34 Vt. 410.

46. **Voidable.** An execution not void, but merely voidable, is a justification in trespass of every act done under it, according to its precept. *Wood v. Kineman*, 5 Vt. 588. 8 Vt. 512. 28 Vt. 17.

47. **Effect as a bar.** An execution in life, and in the hands of an officer for collection, is no bar to an action upon the judgment. *White River Bank v. Downer*, 29 Vt. 332.

48. Not even if the execution has been levied upon property, unless such levy has produced satisfaction. *Tarbell v. Downer*, 29 Vt. 339.

49. **Interest.** Where twelve per cent interest has been allowed on an execution for delay occasioned by an *audita querela*, the court "inclined to the opinion" that this was a satisfaction of all other interest during the period of such allowance. *Perry v. Ward*, 20 Vt. 92. *S. C.*, 18 Vt. 120.

50. **Stay as affecting lien.** An order for stay of execution, obtained by the plaintiff after judgment by default, would not prolong the lien created by the attachment, unless made for good reason arising from the situation or condition of the property itself in respect to title or claim upon it, so as to require the aid of a court of equity to remove the doubt or difficulty in pursuing the legal remedy. But *held*, under such circumstances, that the lien was preserved. *Rowan v. Union Arms Co.*, 36 Vt. 124.

51. **Presumed satisfaction.** An execution issued upon a judgment will be presumed satisfied, unless it be produced, or its loss shown, or the presumption of payment be otherwise rebutted. *Peck v. Barney*, 13 Vt. 72. 29 Vt. 342. 2 Tyl. 207.

## IV. RELIEF AGAINST ERRONEOUS EXECUTION.

**52. Mode.** An execution, irregularly issued, may be set aside on motion, or petition, or by *audita querela*. *Porter v. Vaughn*, 24 Vt. 211. *Fletcher v. Mott*, 1 Aik. 339. *Allen v. Carpenter*, 7 Vt. 397. *Matlocks v. Judson*, 9 Vt. 343. *Vandakin v. Soper*, 2 Aik. 248. *Williams, J.*, in *Hurlbut v. Mayo*, 1 D. Chip. 391. *Stanley v. McClure*, 17 Vt. 258. *Hapgood v. Goddard*, 26 Vt. 401. *Catlin v. Merchants Bank*, 36 Vt. 572.

**53.** Whether the refusal of the county court to set aside an execution, upon motion, for having been issued more than a year and a day after the judgment, is a proper subject of exception to the supreme court, doubted by *Poland, C. J.*, in *Catlin v. Merchants Bank*, but allowed; as, also, in *Allen v. Carpenter*, and *Hapgood v. Goddard*.

**54. Waiver of error.** If an execution be issued more than a year and a day after the judgment, the error may be waived by any positive act of the debtor indicating an acquiescence,—as by being present at the levying of the execution and participating in choosing appraisers, knowing, or having the means of knowing, of the error. *Catlin v. Merchants Bank*. *Willard v. Whipple*, 40 Vt. 219.

**55. Burden of proof.** In an *audita querela* to set aside an execution against the body, in a case of contract;—*Held*, that it was for the defendant, in justification, to show affirmatively that the proper affidavit was filed. *Sawyer v. Vilas*, 19 Vt. 43.

## V. PROCEEDINGS UNDER EXECUTION.

## 1. In general.

**56. Indorsement of date of receipt.** An officer is not liable for an omission to indorse upon an execution the date when he receives it, although this is made his legal duty by G. S. c. 47, s. 1, without proof of actual damage from such neglect. In an action for such neglect, the necessity of calling a witness to prove such date, is not such damage. *Abbott v. Edgerton*, 30 Vt. 208.

**57. Demand of payment.** In case of an execution against a town, a levy without previous demand of the treasurer would not subject the officer to an action of trespass, but only to an action on the case to recover any damages occasioned by his omission to make such demand. *Walter v. Denison*, 24 Vt. 551.

**58.** A demand of payment of an execution against a town made of the person who is treasurer, though not made upon him as treasurer, but as an officer of the town (selectman), and his refusal to pay, were *held* a sufficient demand and refusal to warrant a levy. *Id.*

**59.** The provision of the statute requiring an officer to make demand of payment of the debtor before a levy of the execution, is directory merely, and a levy is not invalidated by an omission to make such demand. *Eastman v. Curtis*, 4 Vt. 616. *Dow v. Smith*, 6 Vt. 519. *Warner v. Stockwell*, 9 Vt. 9. *Collins v. Perkins*, 31 Vt. 624.

**60.** For a violation of his duty in this particular, the officer is liable,—as, where he commits the debtor in disregard of his right, without apparent necessity, and from motives of oppression, or malice,—and not otherwise. *Id.*

**61. Levy must be within life.** An execution cannot be levied after the return day thereof; but if levied before, the sale and return may be made afterwards. The return must show the fact. *Barnard v. Stevens*, 2 Aik. 429.

**62.** Judgment by default in an action on jail bond was set aside by writ of error, where the declaration showed that the debtor was committed after the return day of the execution. *Roberts v. Wells*, Brayt. 87.

**63. Return.** Where an execution was levied upon the body of the debtor on the last day of its life, but was not returned into the office from which it issued until afterwards;—*Held*, that the service was good, and that the officer was not liable to the creditor, without proof of actual damage from neglect to make seasonable return. *Fletcher v. Bradley*, 12 Vt. 22.

**64.** The commitment of a debtor on execution is legal, and operates effectually for the creditor's benefit, although the execution is not returned. *Watkinson v. Bennington*, 12 Vt. 404.

**65.** An informal return of *non est* upon an execution was adjudged sufficient, being so in substance. *Orvis v. Isle La Motte*, 12 Vt. 195.

**66. Time of delivery.** No action lies for the escape of a debtor committed to jail on *mesne* process, unless the execution be delivered to an officer for service within fifteen days from the time of rendering final judgment, although the debtor escaped from jail before judgment, and has gone to parts unknown. *Weeks v. Martin*, 16 Vt. 237.

## 2. Levy upon personal property.

**67. Taking in execution.** An officer's return of a levy of execution upon hay, stated that he lodged a true and attested copy of the original execution in the town clerk's office, &c., but omitted any statement of his return of levy thereon being so left. *Held*, that although this would not create a valid lien on the property as a constructive notice of the levy, it was a sufficient taking of the property in execution to support the officer's subsequent proceedings of adver-

tisement and sale. *Jewett v. Guyer*, 38 Vt. 209.

**68. Place of advertising and sale.** The term "public place," as used in the statute designating the place for the posting of notifications of sales upon execution (G. S. c. 47, s. 4), and for taxes (G. S. c. 84, s. 11), means a place where the advertisement would be likely to attract general attention, so that its contents might reasonably be expected to become a matter of notoriety in the vicinity. If answering this condition, it might be a private dwelling, a barn, a shed or other out-building, or even a rock, tree, or fountain. It need not be a place which people are accustomed to resort to, or to stop at, to transact business. *Austin v. Soule*, 36 Vt. 645. *Alger v. Curry*, 40 Vt. 487.

**69.** The place named in an officer's return upon an execution, as the place of advertisement and sale, will be presumed to be a "public place," in the absence of proof to the contrary. *Drake v. Mooney*, 31 Vt. 617. *Alger v. Curry*.

**70.** In sales upon execution, where the character and situation of the property and the interests of the parties require, the officer may in his sound discretion, and in good faith, advertise and sell at several places. A return of advertisement and sale at three different places, was held good on its face. *Drake v. Mooney*.

**71.** Where property was attached in the town where the debtor resided, and was removed by the officer into another town, and there kept until execution issued, and was there levied upon, but the advertisement and sale were in the town first named;—*Held*, that this was a compliance with the meaning and spirit of G. S. c. 47, s. 4. *Collins v. Perkins*, 31 Vt. 624.

**72. —must be the same.** The advertisement at one place, for sale at another, of property taken in execution, other than hay, grain, &c., makes the officer a trespasser *ab initio* and liable for its full value, although he may have applied the proceeds of the sale upon the execution. *Everts v. Burgess*, 48 Vt. 205. *Hall v. Ray*, 40 Vt. 576.

**73. Adjournment of sale.** Although no power is expressly given an officer by statute to adjourn an advertised sale on execution, such power is implied as matter of necessity; and in the exercise of a sound and reasonable discretion he may not only adjourn the time but may change the place of sale; provided the place is such as he might have appointed in the first instance. *Jewett v. Guyer*, 38 Vt. 209. *Wood v. Doane*, 20 Vt. 612.

**74. Return—Presumption.** In favor of an officer's proceedings on execution, the court will presume, the contrary not appearing, that

the sale was had at the time and place appointed in the advertisement. *Beattie v. Robin*, 2 Vt. 181.

**75.** So, that the place of posting was the same as the place at which, by the advertisement, it was to be and was sold. *Drake v. Mooney*, 31 Vt. 617.

**76.** So, that the levy was made in the town where the property was advertised and sold. *Jewett v. Guyer*, 38 Vt. 209.

**77.** The statement in an officer's return upon an execution was, that he "advertised the property to be sold" at a place named. *Held*, that this was a sufficient statement that the advertisement was set up at the same place. *Collins v. Perkins*, 31 Vt. 624.

**78. Inequality in sale.** Trover will not lie in favor of an execution debtor against the execution creditor, for property bid off by the creditor on the execution sale, because of an irregularity of the officer in the sale. *Hale v. Miller*, 15 Vt. 211.

**79. Execution not returned.** It is no objection to an officer's maintaining trespass for taking from his possession property taken on execution, that the execution was not returned. *Sewell v. Harrington*, 11 Vt. 141.

### 3. Levy on real estate.

**80. Sale.** Lands taken on execution in favor of the Vermont State Bank may be sold on the execution, and the execution need not be recorded. (Slade's Stat. 214, ss. 18-15.) *Vt. State Bank v. Clark*, Brayt. 286.

**81. What may be set off on levy.** It is no objection to a levy upon land attached, that the debtor had sold and conveyed those premises subsequent to the attachment, and that he had other lands sufficient to satisfy the execution, which might have been levied upon. *Young v. Judd*, Brayt. 151. Nor, that the appraisers had appraised other land to an amount larger than the execution, and that the creditor then abandoned that property and levied upon the land in question. *Id.*

**82.** The death of a defendant after judgment does not prevent the levy of an execution upon the real estate attached and held upon the original writ. *Passumpsic Bank v. Strong*, 42 Vt. 295; and see *Downer v. Brackett*, 21 Vt. 605-6.

**83.** The sheriff having two executions in favor of one creditor against one debtor, levied them together upon the same parcel of land, as a whole, in satisfaction of both executions. *Held* good. *Baldwin v. Foot*, 1 Tyl. 14.

**84.** Where the legal title to lands is of record in A, but the equitable title and ownership is in B, notice of B's title, received by an attaching creditor of A before levy of execution upon the land, though after the attachment, will protect



the title of B against the levy. *Hackett v. Callender*, 32 Vt. 97.

85. The levy will not hold the equitable title in such case, even though the creditor have no notice of the trust. *Hart v. Farm. & Mech. Bank*, 33 Vt. 252. *Abell v. Howe*, 43 Vt. 409.

86. **Interest set off must be designated.** A levy upon "all the right, title and interest of the debtor, in and to" certain lands, without further designation of the interest levied upon, is void. *Paine v. Webster*, 1 Vt. 101. *Arms v. Burt*, 1 Vt. 803.

87. **Alteration of return on the attachment.** A levy of execution is not affected by a subsequent unauthorized alteration of the officer's return upon the attachment. *Gilman v. Thompson*, 11 Vt. 643.

88. **Statute requisites—Conditions.** The levy of an execution upon lands is a proceeding *in invitum*. Hence, all the statute requisites to the passing of the title must be complied with. They are in the nature of conditions precedent. *Bennett, J., in Morton v. Edwin*, 19 Vt. 80.

89. **Mode of levy—Estate of husband.** The mode of levying upon a husband's estate in the land of his wife, after issue born alive, is by metes and bounds, and upon his entire interest to that extent. *Matlocks v. Stearns*, 9 Vt. 326.

90. **—of tenant in common.** The levy upon part of the interest of a tenant in common should be upon an aliquot proportion of his entire interest. If made upon his entire interest in a part of the land, as by metes and bounds, it is void. *Smith v. Benson*, 9 Vt. 138. *Gahusha v. Sinclear*, 3 Vt. 399; *arguendo*, 11 Vt. 325.

91. A levy must be upon the whole estate which the debtor has in the land. If a less estate be carved out, leaving a reversion in the debtor, such levy is void as against the debtor, and no title passes. *Howe v. Blanden*, 21 Vt. 315.

92. A levy upon an undivided moiety of a given portion of the land held by the debtor in common with another, instead of upon an undivided portion of the whole, is not absolutely void, but only voidable at the election of the other tenant; it is well enough as to the debtor, and he cannot object to it. *Ib.*

93. **Equity of redemption.** A levy upon a fractional or undivided portion of the debtor's land, instead of in severalty by metes and bounds, is wholly ineffectual to transfer the title, unless the statute reasons therefor, as adjudicated by the appraisers, are stated in the officer's return—and this, although the land was in fact subject to a mortgage. (G. S. c. 47, ss. 33-34.) *Morgan v. Armington*, 33 Vt. 13. *Sleeper v. Newbury Seminary*, 19 Vt. 451. *Edwards v. Allen*, 27 Vt. 381.

94. The levy upon a portion of an equity of redemption less than the whole, must be upon an aliquot proportion of the whole; and if made upon a part by metes and bounds, it is absolutely void. *Swift v. De-n*, 11 Vt. 323. *Collins v. Gibson*, 5 Vt. 243.

95. A levy upon mortgaged premises was objected to, because it purported to be not a levy upon the land but upon the debtor's equity of redemption in the land. *Held good. Ib.*

96. In levying upon an equity of redemption, the creditor is not bound to levy upon the entire interest of the debtor in the premises, although the execution exceeds the appraised value of the equity; but he may levy for a portion of his debt upon an undivided part of the debtor's entire interest; and this, although another creditor, at the same time, makes a like levy of his execution, thus making such creditors tenants in common of the equity. *Kimball v. Smith*, 21 Vt. 449.

97. A mortgage of a leasehold estate, although by metes and bounds, seems to be only an assignment of the rents. And where such mortgage covered also two other parcels of land held in fee, it was held that in a levy of execution upon the equity of redemption, the leasehold estate might be disregarded. *Hulett v. Soullard*, 26 Vt. 295.

98. The levy of an execution without noticing a mortgage chargeable upon the land, or by estimating the mortgage at too small a sum, is not a defect of which the debtor, or those claiming under him, can complain. It is the creditor in such case, and not the debtor, who is injured. *Perrin v. Reed*, 35 Vt. 2. *Slocum v. Catlin*, 22 Vt. 137. See *Paine v. Webster*, 1 Vt. 101, 129 131.

99. In setting off lands upon execution, the value of the interest set off must be ascertained,—as, if the lands are incumbered, the value of the equity of redemption. *Fairbanks v. Devereaux*, 48 Vt. 550.

100. **Homestead.** If the lands are subject to the homestead right, the homestead must be first set out. A set-off of the land subject to the homestead right is irregular. *Ib.*

101. **Equitable title.** Land was conveyed by absolute deed, but with a secret defeasance. A judgment creditor of the grantor, proposing to levy his execution upon the land, applied to the parties for information as to the character of the transaction, and, if in trust, to state the amount of the claims upon it, and they refused to inform him. He then levied his execution upon enough of the land, in fee, to satisfy it, and brought his bill against both parties to have the conveyance set aside as fraudulent. It appearing on hearing, that the deed was in effect a security, and that the land not levied upon was amply sufficient to satisfy the just claims of the grantee, the court ordered a decree that

the defendants, at their election, pay the orator's execution, he relinquishing all his title under the levy, or else that they quit-claim to him all their right in the part levied upon, and, in either case, that they pay all costs. *Smith v. Onion*, 19 Vt. 427.

**102. Appointment of appraisers—Notice.** It is the duty of an officer making a levy upon lands, to notify the debtor to choose an appraiser. If he do not, the levy may be set aside. *Briggs v. Green*, 33 Vt. 565.

**103.** No notice need be given to the debtor to appoint appraisers when he is out of the State, nor to his attorney in the suit, unless he be a known agent or attorney legally authorized to act in the premises. *Galusha v. Sinclear*, 3 Vt. 394. *Gilman v. Thompson*, 11 Vt. 643.

**104.** An attorney for the debtor, although his name is indorsed as such upon an execution, is not, without special appointment, an agent for receiving notice for the appointment of appraisers, although the debtor may be without the State. *Dodge v. Prince*, 4 Vt. 191. *Galusha v. Sinclear*.

**105.** Where the execution creditor chose one of the appraisers, and a justice, on his application, appointed the other two, and the debtor had no notice to appoint;—*Held*, that the levy was void. *Stanton v. Bannister*, 2 Vt. 464,—overruling *Young v. Judd*, Brayt. 151.

**106. "Disinterested."** Appraisers on the levy of an execution should stand in no such relation to either party, as would disqualify them for the execution of judicial power between the parties. The word *disinterested*, as used in the statute expression, "judicious and disinterested freeholders," means something more than being devoid of pecuniary interest. *Blodget v. Brinsmaid*, 9 Vt. 27, 30.

**107.** Unfriendly feelings of appraisers towards an execution debtor,—as, that they were his "personal enemies and were in litigation with him,"—constitute no legal disqualification, like interest or relationship, to their action as such in the setting off of the debtor's lands upon execution. The justice in making the appointment acts judicially, and is sole judge of their suitableness and fitness. *Briggs v. Green*, 33 Vt. 565.

**108. "Agreed upon."** In the return of a levy of execution upon land, a statement that the appraisers were "mutually appointed," or "agreed upon," by the parties, complies with the statute. *Eastman v. Curtis*, 4 Vt. 616. *Aldis v. Burdick*, 8 Vt. 21.

**109. Appraisal.** A levy and set-off which is made on the basis of an appraisal by two of the appraisers, the third not concurring but appraising the land at a less sum, will not be vacated by *audita querela* at the instance of the debtor. He has not been injured. *Hopkins v. Haywood*, 36 Vt. 318.

**110. Officer's return—Form.** The transfer of title to land by levy of execution is a matter *stricti juris*, and all the material facts necessary to show that the law has been complied with, should appear by the officer's return, and not rest in parol. *Sleeper v. Newbury Seminary*, 19 Vt. 451. *Morgan v. Armington*, 33 Vt. 18.

**111.** A levy made according to the form given by Chief Justice Chipman (N. C. 264), has uniformly been supported, though it wants that particularity which would be required in a new case having no such foundation in forms or in practice. *Cleaveland v. Allen*, 4 Vt. 176. *Dodge v. Prince*, 4 Vt. 191. *Seymour v. Beach*, 4 Vt. 498. *Chase v. Bowen*, 7 Vt. 431. *Aldis v. Burdick*, 8 Vt. 21. *Day v. Roberts*, 8 Vt. 413.

**112.** "Good and lawful freeholders of the vicinity," as used in Judge Chipman's form of the levy of an execution, imports *disinterested*, and also that the appraisers were *residents in the town* where the land was situate, as used in the statute,—and in this respect such return is sufficient. *Day v. Roberts*. *Seymour v. Beach*. *Chase v. Bowen*.

**113.** But not so, where the word "judicious" was used, instead of *disinterested*. *White v. Fox*, cited in 8 Vt. 418.

**114.** Where appraisers are appointed by a justice, the return must certify that he was one who by law might judge between the parties in civil causes, or the levy will be invalid;—unless the return has adopted the more general and approved form of Judge Chipman. *Dodge v. Prince*, 4 Vt. 191. 8 Vt. 417.

**115.** Sundry objections taken to a levy of execution considered, and *held* not material, viz.: irregularity of proceedings before judgment; omission to state demand of payment; mere statement that the appraisers were "mutually appointed" by the parties; that they were "judicious *disinterested*" (instead of *disinterested*) "freeholders"; that "they appraised the same," without saying in what way they ascertained the value, as by view of the premises, &c.; that no certificate of the appraisers accompanied the return; that the form of oath administered was not given, except in the statement "I have sworn them as the law directs"; that the bill of fees was too large; that the return was signed as *deputy sheriff*; that it was not sealed. *Eastman v. Curtis*, 4 Vt. 616.

**116. Description of premises.** The levy is sufficient, as to the description, by reference to former deeds upon record, such as to fix the identity of the property with certainty. *Mack v. Sinclear*, 10 Vt. 103. *Gilman v. Thompson*, 11 Vt. 643. 19 Vt. 388. *Galusha v. Sinclear*, 3 Vt. 394. *Hyde v. Barney*, 17 Vt. 280.

**117.** A levy which is good against the debtor, is good against everybody,—as, subsequent levy.

ing creditors—the question being, whether the levy sufficiently described the land; and, as to this, the same rule is to be applied to a levy as is applicable to a deed. *Barnard v. Russell*, 19 Vt. 334.

118. A levy and set-off of a specified number of acres “off of the east end” of a lot, the lot being in rectangular form, was held to be a sufficient description by “metes and bounds,” and should be intended to be cut off by a line parallel with the lot line. *Clark v. Fuller*, 9 Vt. 356. 10 Vt. 213. 27 Vt. 256. *Id.*, 748.

119. A defective description of some lots in a levy, though they are all appraised together at a gross sum, does not vitiate the levy as to such lots as are well described, unless in some proceeding to set aside the levy. *Cleveland v. Allen*, 4 Vt. 176. *Paine v. Webster*, 1 Vt. 101, 129.

120. In a levy, the description began at a notch in the fence “on the east side of the road,” &c., and thence around, by specific courses and distances, “to the road”; and thence “on the line of the road,” &c., and thence by specific course and distance “to the place of beginning.” Held, that no part of the highway was included. *Cole v. Haynes*, 22 Vt. 588.

121. **Record in town clerk's office, return to court and record there.** In order to the validity of a levy of execution upon lands so as to pass the title, it is necessary that the execution, with the officer's return thereon, should be recorded in the proper town clerk's office, and should be returned into the office of the court from which it issued, all within the life of the execution. *Russell v. Brooks*, 27 Vt. 640. *Hubbard v. Dewey*, 2 Aik. 312. *Hall v. Hall*, 5 Vt. 304. *Downer v. Hazen*, 10 Vt. 418. *Morton v. Edwin*, 19 Vt. 77. *Perrin v. Reed*, 33 Vt. 62. *Little v. Sleeper*, 37 Vt. 105. *Willard v. Whipple*, 40 Vt. 219.

122. It is not necessary that it should be recorded in the office from which it issued, within its life. *Perrin v. Reed*.

123. But it must be recorded in such office before the suit is brought by which the title under it is to be tested. *Morton v. Edwin*, 19 Vt. 77.

124. An execution and return of levy upon lands was duly returned to the county clerk's office and filed by him for record, and he commenced recording it, but, before completing the record, went out of office. The execution was inadvertently and by mistake taken from the office and remained lost for three years, when, on being found, it and the return of levy were recorded by the then county clerk. Held, that, as between the levying creditor and the debtor, this was sufficient to pass the title of the debtor under the levy. *Perrin v. Reed*, 33 Vt. 62.

125. The creditor cannot sustain ejectment against the debtor, founded upon the levy of

execution, unless the execution and return have been recorded at length in the town clerk's office, and also in the office of the court from which the execution issued, prior to the commencement of the action. Both are essential to the passing of title by the levy. *Morton v. Edwin*, 19 Vt. 77.

126. It is not necessary to the validity of a levy, that the officer making it should state in his return, that the levy was actually recorded in the town clerk's office, since the recording is not his act; but where his return is, that he left the execution and levy in the proper town clerk's office “together with seventy-five cents for recording the same, to be recorded in the records of lands in said town,” and there is a certificate of the town clerk of the same date indorsed, that he recorded the same, this, in connection with the return, is *prima facie* evidence that the execution and return were properly and seasonably recorded, and is a sufficient compliance with the statute in this respect. *Willard v. Whipple*, 40 Vt. 219.

127. **Record as notice.** A levy takes effect, as notice, from the time when the execution and return are recorded in the town clerk's office, and if returned to the court from which the execution issued and there recorded within the life of the execution, such levy will prevail over an attachment made after such record in the town clerk's office, though before the return to and record in such court. *Willard v. Lull*, 20 Vt. 373.

128. — **as connecting levy with attachment.** Whether, in order to preserve a priority of lien created by the attachment of lands, the execution, with the officer's return of the levy and set-off, must not only be recorded in the proper town clerk's office, but be also returned into the office of the court from which it issued within the five months after the judgment—*quære*. *Id.* *Willard v. Whipple*, 40 Vt. 219–228.

129. The levy of an execution upon lands originally attached, and a set-off, made within five months from the judgment, but not recorded in the town clerk's office until after the five months have expired, is not seasonable to connect it with the attachment lien, so as to prevail against an intervening conveyance or incumbrance. *Ellison v. Wilson*, 36 Vt. 60.

130. **Record from copy.** A duly certified copy of an execution and levy from the town clerk's records, was held sufficient *prima facie* evidence of the recording of the original, although the officer in his return had certified that he had delivered to such clerk a true and attested copy of such execution, &c. *Hubbard v. Dewey*, 2 Aik. 312.

131. The record in the town clerk's office of the levy of an execution, made from a copy of the execution and officer's return, is sufficient

if it substantially agrees with the original. *Skinner v. McDaniel*, 4 Vt. 421. *Williams, J.*, dissenting.

**132. Town clerk's record controls as notice.** Where the record of the levy in the town clerk's office showed a void levy,—as, that it was for more than the sum required by the execution to be levied,—although it was correct in the original;—*Held*, that the execution and return were not so recorded as to convey a title;—that the record was notice only of a defective levy, and might be so treated by creditors and purchasers. *Skinner v. McDaniel*, 5 Vt. 539. *Baylies, J.*, dissenting.

**133.** Notice of a levy upon lands, which is defective, does not affect a party acquiring title against it. *Ellison v. Wilson*, 36 Vt. 60.

**134. Evidence of fact of record.** *Held*, that a copy of an execution and levy from the town clerk's office, and a copy of the same from the county clerk's office, were evidence that the execution and levy had been duly recorded in both offices. *Hubbard v. Dewey*, 2 Aik. 312.

**135.** A duly certified copy of record, from the county clerk's office, of a county court execution and the levy thereof upon lands, which record embraces a certificate of the town clerk that he had duly recorded the execution and levy in his office, and embraces also the sheriff's return stating the same fact, is *prima facie* evidence that the execution and levy were duly recorded in the town clerk's office. *Benedict v. Heineberg*, 48 Vt. 281.

**136. — of time of record.** Where a town clerk's certificate disagrees with the officer's return, as to the date when the levy of an execution was recorded in his office, such certificate will prevail over the return. *Ellison v. Wilson*, 36 Vt. 60.

**137. Who may impeach levy.** Where the plaintiff in ejectment made title by levy of execution;—*Held*, that it could not be impeached for fraud in the judgment by a defendant whose own levy was defective and void, so that he had not acquired the legal interest of the judgment debtor. *Cleveland v. Deming*, 2 Vt. 534.

**138.** Where, in ejectment, the plaintiff claimed title by virtue of a levy so defective as to render it void;—*Held*, that the defendant in possession, though without title and not a party to the judgment and levy, could object to the levy as a defect in the plaintiff's title. *Perry v. Whipple*, 38 Vt. 278.

**139.** But otherwise, as to a stranger to the title of the execution debtor, where the defect is not in the judgment, execution or levy, but in a matter entirely collateral—as, for failure to execute a proper recognizance before taking out execution, such execution being good against all persons until set aside for irregu-

larity. *Phelps v. Parks*, 4 Vt. 488. 38 Vt. 285.

**140. Redemption from levy.** By neglect to redeem the levy of an execution according to the terms of the statute (G. S. c. 47, s. 25), the title of the levying creditor becomes absolute. A tender to the creditor personally, but not accepted, has no effect to defeat or redeem the levy. *Chandler v. Sawtell*, 22 Vt. 318.

**141. Debtor a tenant.** Where the debtor, or his tenant, remains in possession of the land levied upon, after the six months given for redemption, and without redemption, he holds as tenant of the creditor, and cannot set up an adverse possession. *Aldis v. Burdick*, 8 Vt. 21.

**142.** An execution debtor who remains in possession of land levied upon, after, the six months given for redemption, is liable in ejectment. *Matlocks v. Stearns*, 9 Vt. 326.

**143.** In case on the statute to recover the mesne profits of land levied upon, the defendant may show that he had no title or interest in the land, and has had no possession since the levy. *Bowne v. Graham*, 2 Tyl. 418.

#### VI. VACATING INFORMAL LEVIES.

**144.** The power of the supreme court, on petition, under G. S. c. 48, s. 46, to vacate a levy of execution upon lands for defects in the levy, is not confined to defects apparent upon the face of the levy. *Briggs v. Green*, 33 Vt. 565. *Hyde v. Taylor*, 19 Vt. 599. 22 Vt. 845.

**145.** Upon petition to the supreme court to vacate a levy, for want of notice to the debtor to choose an appraiser, the fact may be proved by parol, in contradiction of the officer's return. *Briggs v. Green*.

**146. Cured by lapse of time—two years.** In a levy of an execution upon the whole undivided interest of an heir in the lands of his ancestor, the proportionate share, or amount of such interest, was not stated. *Held*, that this was, at most, a mere defect of form, and was cured by the lapse of two years without the action of either party to correct it under the statute. (G. S. c. 47, s. 49.) *Hyde v. Barney*, 17 Vt. 280.

**147.** Whether G. S. c. 47, s. 22, applies to the levy of an execution on separate parcels of land in two different towns—*quare*; but if so, and the appraisers are appointed partly from both towns, and no injustice has been done, an acquiescence for two years cures the defect, under s. 49. *Perrin v. Reed*, 35 Vt. 2.

**148. —20 years.** A petition to vacate the levy of an execution, and for a new execution, was *refused* after a lapse of more than twenty years;—the presumption of law being that the debt was satisfied, nothing appearing to rebut such presumption. *Tudor v. Taylor*, 26 Vt. 444.

149. **Levy defective in substance.** G. S. c. 47, s. 49, was intended to apply to formal defects, and not to cure, by lapse of time, a levy of execution defective in substance as to the subject matter of the levy, by taking too much of the debtor's land to satisfy the execution. Such levy is and remains invalid. *Hopkins v. Haywood*, 84 Vt. 474; and see *Bell v. Roberts*, 13 Vt. 582.

## EXECUTORS AND ADMINISTRATORS.

- I. APPOINTMENT, AND REVOCATION.
- II. RIGHTS, AUTHORITY AND DUTY.
- III. LIABILITY.
- IV. ACCOUNTING.
- V. ACTIONS BY.

### I. APPOINTMENT AND REVOCATION.

1. **Appointment.** The appointment of an administrator *de bonis non* by the probate court of a district other than the one of original appointment, but to which the town where the deceased resided had been attached by a later statute, was held not void, but only voidable on appeal. *Clapp v. Bearasley*, 1 Vt. 151.

2. The appointment of an administrator rests exclusively within the jurisdiction of the probate court, and its legality cannot be inquired into in any other court, nor be collaterally questioned in any way. *McFarland v. Stone*, 17 Vt. 165.

3. A decree of the probate court appointing an administrator, not appealed from, is conclusive as to all matters then existing and involved in the appointment. *Lawrence v. Englesby*, 24 Vt. 42. *Steen v. Bennett*, 24 Vt. 303.

4. **Revocation.** The marriage of a female guardian, executrix or administratrix, determines her authority at once by force of the statute, without any order or decree of the probate court for that purpose. (G. S. c. 72, s. 54. *Id.*, c. 51, s. 18.) *Field v. Torrey*, 7 Vt. 372. *Lyman v. Albee*, 7 Vt. 508.

5. The supreme court, on appeal, reversed a decree of the probate court removing an administrator who resided out of the State, where he so resided when he was appointed, and was the executor under the will, and where he had a suit pending in this State, as administrator, against the party who sought to have him removed, &c. *Wiley v. Brainerd*, 11 Vt. 107.

6. The removal of an administrator for any cause within the law, is matter of discretion, merely, of the probate court, or of the county court on appeal, and cannot be revised in the supreme court. *Holmes v. Holmes*, 26 Vt. 536.

### II. RIGHTS, AUTHORITY, AND DUTY.

7. **In respect to proof of will.** An executor has no authority under a will, without a judgment or decree of the probate court approving or allowing the will. *Tucker v. Starks*, Brayt. 99.

8. **—giving of bonds.** Where several are named executors, and only one has given bonds, he is sole executor. So, where several are named trustees, and only one accepts and acts, he is sole trustee, and may sue alone. *Trask v. Donoghue*, 1 Aik. 870.

9. The acts of executors and administrators done after their appointment, although before they have given bonds, are valid—the statute requiring bonds being regarded as merely directory. *Probate Court v. Niles*, 32 Vt. 775. *Clark v. Tabor*, 22 Vt. 595.

10. **—representation of insolvency.** There is a vast difference between the system of settling estates in this State and in England. Here, the administrator must either represent the estate insolvent, or be taken to have sufficient estate to satisfy all the creditors in money. He must inventory and sell the real estate when necessary for the payment of the debts, and cannot require a creditor to levy his execution upon lands of the estate. In such case he cannot plead *plene administravit*. *Bates v. Kimball*, 1 Aik. 95. (1826.) (Since changed by statute, so that all estates are to be settled as if insolvent, without representation as such.)

11. The representation of the insolvency of an estate, without the appointment of commissioners, does not prevent a creditor from sustaining an action against the administrator. *Blodget v. Brinsmaid*, 7 Vt. 9.

12. **—making inventory.** An inventory and appraisal of the *choses in action* of an estate is seldom made in the probate court, and, whether done or not, is of no importance. *Adams v. Adams*, 22 Vt. 50. *Boyden v. Ward*, 38 Vt. 636.

13. **Powers.** An administrator may submit to arbitration any personal claim concerning the estate, so as to bind him, without the consent of the judge of probate. *Dickinson v. Dutcher*, Brayt. 104.

14. Where goods under attachment were wrongfully taken from the officer, and he died before action brought;—*Held*, that his administrator could maintain trover for the goods, for the benefit of the attaching creditor, although the intestate had paid nothing, and no claim had been presented against his estate. *Hall v. Walbridge*, 2 Aik. 215. 2 Vt. 520.

15. An executor's power over the estate is exclusive; and creditors or legatees cannot follow the assets, and make the executor and debtor parties to a bill in equity to enforce their claims, except in some special case, such

as collusion or insolvency. *Robinson v. Swift*, 8 Vt. 377.

16. Whether an administrator *de bonis non* has a right to represent the creditors of the estate in the prosecution of their rights under an order of distribution,—as, by a prosecution of the bond of the principal administrator for non-payment of the debts under the order of distribution,—*quære*. *Sargent v. Kimball*, 87 Vt. 320.

17. He is not responsible for the sum found in the former administrator's hands and ordered to be paid to the creditors, nor is he entitled to the possession or control of it. *Poland, C. J. Ib.* 323.

18. Joint executors, &c. In case of joint executors or administrators, the authority of each is entire, and the act of one is equally effectual as the joint act of all,—as, to give a release. *Gleason v. Lillie*, 1 Aik. 28.

19. Where one of two joint administrators discharged a claim due the estate, in consideration of a new promise to him;—*Held*, that such promise was his private and individual right, which his co-administrator could not control or release. *Ib.*

20. The plaintiff and two others were executors of a will. The testator had placed in the hands of the plaintiff a note against the defendant, for collection. After the testator's death, the defendant gave a new note for the old one, payable to the plaintiff or bearer, upon which the plaintiff brought suit in his own name, as bearer. After this, the defendant paid the note to the other two executors, upon their agreement to indemnify him against the suit. *Held*, a good payment. *Grinwood v. Clark*, 28 Vt. 661.

21. The claim of a surviving administrator against the estate of his co-administrator, for property in his hands in trust to account for, was *held* properly presentable, on an appeal from commissioners, in a declaration in account; and that questions as to final distribution were foreign to the accounting before the auditor. *Adams v. Corbin*, 3 Vt. 372.

22. Where lands were devised to A, and he was made executor jointly with B;—*Held*, under the probate act of 1797 and without the aid of the act of 1821, that whenever all debts due at the decease of the testator with charges of administration, &c., and all specific legacies have been paid, A holds the lands as devisee, and no longer as executor. *Nason v. Smalley*, 8 Vt. 118.

23. In respect to real estate. It is the duty of an administrator to redeem the mortgaged estate with any property of the deceased, for the benefit of the creditors and heirs; and he cannot take an assignment to himself and set up such title against the estate, unless it appear that he purchased with his own funds, and

when there were no assets of the estate where-with the purchase could be made. *Clapp v. Beardsley*, 1 Aik. 168. *S. C.*, 1 Vt. 151, 167.

24. In administering an estate mortgaged, the administrator should sell, either the whole or the equity, and dispose of the proceeds in payment of the mortgage debt in such way as that the mortgagee can claim a dividend only upon the balance; and his return of sales and account should so exhibit the manner of the transaction;—otherwise, it should be rejected. *Duncan v. Fish*, 1 Aik. 281.

25. An administrator *de bonis non* may recover in ejectment against one who obtained his title from the first administrator through collusion, and in fraud of creditors and heirs. *Clapp v. Beardsley*, 1 Aik. 168.

26. A final recovery of lands in ejectment by an administrator, as such, is *prima facie* evidence of assets, which is not rebutted simply by evidence of a quit-claim deed of earlier date, executed by the intestate to the administrator, of all his right to lands in the same town. *Blodget v. Brinsmaid*, 7 Vt. 9.

27. An executor or administrator may satisfy his execution upon the real estate of the debtor; and it must be set off to him, being creditor, and not to the heirs of the estate he represents. *Hathaway v. Phelps*, 2 Aik. 84. *Eastman v. Curtis*, 4 Vt. 616.

28. An administrator who is out of possession of land, whether he is disseized or has surrendered the possession to the heir, cannot maintain an action in behalf of the heir, for an act which is a damage to the inheritance. *Lyman v. Webber*, 17 Vt. 489.

29. An administrator has no authority to execute a deed to the party filing a declaration for betterments in ejectment. *Tracy v. Spear*, 10 Vt. 490. (Changed by G. S. c. 40, s. 29.)

30. An administrator cannot mortgage one part of the lands of the intestate, to pay a charge upon another part. *Green v. Sargeant*, 23 Vt. 466.

31. A title which one holds only as executor, or administrator, may be transferred by a conveyance of "all his interest," &c., where the intent to transfer the interest which he has as executor, or administrator, appears from the whole instrument. *Pierce v. Brown*, 24 Vt. 165; and see *Stewart v. Thompson*, 3 Vt. 255.

32. Where an administrator took a lease of lands from an outside party for the purpose of strengthening the right of his intestate, and after his death his administrators went into possession, and a recovery in ejectment was had against them by the present defendant;—*Held*, that such recovery did not affect the right of the original intestate, in an action by his administrator *de bonis non*, because the administrators of the first administrator did not represent the right of the original intestate, and they

became trespassers by their entry. *Perkins v. Blood*, 86 Vt. 278.

33. Where an administrator by order of the probate court sold lands of the intestate and took back a mortgage of the same land to himself, as administrator, to secure part of the purchase money;—*Held*, that upon foreclosure of such mortgage the title became absolute in him in his individual capacity; that his subsequent conveyance of the land to the same party was not void, but conveyed such title as he had acquired by the mortgage, although in his deed he described himself as administrator, and professed to convey and to covenant in that capacity; and that such covenants bound him personally. *Higley v. Smith*, 1 D. Chip. 409.

34. An assignment, or conveyance, to one as administrator, vests the property in the estate represented by him, and it becomes subject to the orders of the probate court, as the property of the estate. *Shaw v. Partridge*, 17 Vt. 636.

35. A license granted by the probate court to an executor or administrator to sell real estate, does not authorize him to incur the land; but the word "sell," in the license and the statute, is the operative word, and imports that the whole title is to be parted with for an equivalent in money. This authority cannot be enlarged, by his action under it, beyond its legal effect. Where the executor under a license to sell so much of the real estate of the deceased as would be sufficient to raise a certain sum, sold and conveyed one parcel, and with it the privilege of a foot pass to it over another parcel;—*Held*, that the conveyance of the foot pass was unauthorized, and created no incumbrance upon the second parcel. *Brown v. Van Duzee*, 44 Vt. 539.

36. The deed of an administrator need not recite the authority for executing it. It is sufficient if the authority exists, and he conveys as administrator. *Langdon v. Strong*, 2 Vt. 234. 24 Vt. 173.

37. An order or license of the probate court to an administrator to sell real estate, where neither the order nor the records recited such facts found as warranted the order, but only that it appeared to the judge that a sale of the whole would best subserve the interests of all concerned, was *held* not sufficient to support a deed from the administrator under such sale. *Clapp v. Beardsley*, 1 Aik. 168. *S. C.*, 1 Vt. 151. 2 Aik. 397. 2 Vt. 255.

38. The acquiescence of an administrator, or guardian, in a mistaken boundary line for the true line, does not bind minor heirs or wards. *Burnell v. Malony*, 86 Vt. 636.

39. An administrator cannot purchase in, for his own benefit, an outstanding title to land of which his intestate died seized in fact, claiming title; and a title so acquired, or ac-

quired by possession, will enure to the benefit of the estate. *North v. Barnum*, 10 Vt. 220. *S. C.*, 12 Vt. 205. *Perkins v. Blood*, 86 Vt. 288.

40. An administrator has no right to become a purchaser of the estate upon which he administers, even when he is solvent and pays the full price. If he do so, those interested may compel a re-sale, or they may, at their election, treat him as purchaser. *Green v. Sargeant*, 23 Vt. 466.

41. **Estate in foreign jurisdiction.** Choses in action belonging to a deceased person have their *situs* in the place of residence of the debtors. They become local by the death of the creditor, and are *bona notabilia* or assets in the place of the debtor's residence, and (by *Redfield*, C. J.), according to our decisions, no one but an administrator of the State of the debtor's residence can collect, release or properly administer them. It is held in some states, that they may be remitted to the administrator of the place of domicile of the deceased, but this is no discharge here, I think. *Abbott v. Coburn*, 28 Vt. 663. 5 Vt. 337.

42. Thus, an administrator in this State has no control over choses in action, where the debtor resides in another State. *Bullock v. Rogers*, 16 Vt. 294.

43. Where the domicile of the deceased was in another State;—*Held*, that an administrator, appointed in this State, could not maintain an action to collect a debt due the deceased from a debtor residing in another State. *Abbott v. Coburn*, 28 Vt. 663.

44. The owner of a bond for the payment of money, given by a debtor resident in New York, died possessed of it in this State. After his decease, the defendant took away the bond into New York. The plaintiff, being afterwards appointed administrator in this State, demanded of the defendant in New York a surrender of the bond, and he refused. In an action of trover for the conversion of the bond;—*Held*, that the paper contract (the bond) was a chattel in possession, the title to which vested in the plaintiff, as administrator, from the decease of the intestate, although the debt evidenced thereby belonged to the foreign administrator; and that the plaintiff was entitled to recover the value of the bond. *Bullock v. Rogers*, 16 Vt. 294.

45. **Foreign administrator.** An administrator, appointed in another State only, acquires no interest in property of the deceased situate in this State, nor in the debts due from resident citizens of this State. *Dodge v. Wetmore*, Brayt. 92. *Lee v. Havens*, Brayt. 93. *Vaughan v. Barret*, 5 Vt. 383.

46. Such administrator cannot indorse a note against a resident of this State, so as to convey any right to the indorsee. *Lee v. Havens*.

47. Nor discharge such debt, so as to bar a suit thereon by an administrator appointed in this State. *Vaughan v. Barret*, 5 Vt. 333.

48. Nor maintain ejectment for lands in this State. *Anon*, Brayt. 103.

49. Nor convey lands of the intestate situate in this State, under an order of sale obtained in such other State. *Brown v. Edson*, 23 Vt. 435.

50. **Administrator of executor, &c.** An executor died, pending an appeal from a decision of the probate court granting license to sell land of the testator for payment of debts. *Held*, that the administrator of the executor had no such interest in the proceeding as to justify his prosecuting the application in the county court. The administrator of an executor would seem to have no further interest in the first estate, than to close the account of the executor in the probate court. *Nason v. Smith*, 18 Vt. 170.

### III. LIABILITY.

51. **Personal contract.** A promise by an administrator, where he had assets, to pay a debt against the estate, whereby it was not presented to the commissioners for allowance, was *held* binding. *Willard v. Brewster*, Brayt. 104.

52. A special promise of an executor to pay to an assignee a debt allowed against the testator's estate, in consideration of such assignment and of sufficient assets in the hands of the executor, is valid, and he is liable thereon in his own right. *Moar v. Wright*, 1 Vt. 57. 6 Vt. 675.

53. An administrator is individually liable on his personal contracts, though made for the benefit of the estate. *Lowell v. Field*, 5 Vt. 218.

54. **Administration bond.** Where an executor or administrator is solvent, it is his duty to inventory and account for any notes or obligations which the deceased may hold against him, and which are due and payable; and a neglect to do so is a breach of his bond. *Probate Court v. Merriam*, 8 Vt. 234.

55. The neglect of an administrator *de bonis non* to return an inventory of the estate is a breach of the condition of his administration bond, for which an action lies. *Wilson v. Keeler*, 2 D. Chip. 16. So also, for neglect to render his account, according to the condition of his bond. *Ib. Matthews v. Page*, Brayt. 106.

56. The failure of an administrator, or of a guardian, to render his account in the probate court according to the condition of the bond and the order of the court, entitles the prosecutor to recover nominal damages, but no more. *Probate Court v. Chapin*, 31 Vt. 373. *Probate Court v. Slason*, 23 Vt. 306.

57. **Preliminary decree of probate court.** Executors and administrators are not person-

ally liable, nor are the sureties upon their probate bonds, for non-payment of the debts of the estates which they represent, until after the probate court has made an order or decree for the payment of the debts. *Bank of Orange Co. v. Kidder* 20 Vt. 519. *Probate Court v. Vanduzer*, 18 Vt. 135. *Probate Court v. Chapin*, 31 Vt. 373. *Boyden v. Ward*, 28 Vt. 638. Nor is an executor liable for non-payment of a legacy, until after a probate decree of payment. *Probate Court v. Kimball*, 42 Vt. 320.

58. The same rule applies to the bonds of guardians and their accounts. *Probate Court v. Slason*, 23 Vt. 306.

59. An action upon an administrator's or executor's bond is merely a means of enforcing a judgment of the probate court; a mode of obtaining an execution upon its decree. *Benton v. Fletcher*, 31 Vt. 433. *Bank of Orange Co. v. Kidder*, 20 Vt. 519.

60. A declaration upon an administrator's bond, assigning as a breach the non-payment of debts, but not averring that the administrator had sufficient assets to pay all the debts, nor alleging any decree of the probate court for the payment of the debts, was *held* ill, on demurrer to the defendant's plea. *Probate Court v. Saxton*, 17 Vt. 633.

61. An heir cannot maintain an action against the administrator to recover his distributive share, until the probate court has first ascertained and determined his right. *Adams v. Adams*, 16 Vt. 238.

62. **Payment to former administrator.** In an action upon an administrator's bond, assigning as a breach the non-payment to the prosecutor of a dividend struck in the probate court, receipts given to a former administrator for payments made by him on account of the claim, were *held* properly admitted under the plea of payment. *Gordon v. Clapp*, 5 Vt. 129.

63. After judgment against an administrator for the penalty in a probate bond for not accounting for land sold, the defendant was allowed, in mitigation of damages, such part of the proceeds of the sale as came to the hands of the administrator *de bonis non*, for which he had accounted. *Probate Court v. Bates*, 10 Vt. 285.

64. **Legacy—Interest.** As to the charge of interest against an executor upon legacies payable to infants, and those of full age, see *Sparhawk v. Buell*, 9 Vt. 41.

65. **Liability for costs.** Under the statutes of this State (G. S. c. 54, s. 13), executors and administrators are placed on the same ground with other suitors, as respects their liability for costs; and execution therefor issues against them personally, though the damages recovered in cases appealed must be certified to the probate court. *O'Hear v. Skeeles*, 23 Vt. 153.

66. **Illegal fees.** The statute against tak-



ing illegal fees (G. S. c. 125, s. 17), is not applicable to administrators, whose compensation is fixed by the probate court. *Hubbell v. Olmstead*, 36 Vt. 619.

**67. Joint executors, &c.** One executor is not liable for the *devastavit* of another joint executor, as to goods which were never under his control; but if he permits the funds, once in his hands, to go into the possession of his co-executor, who squanders them, he is liable. *Sparhawk v. Buell*, 9 Vt. 41.

**68.** If executors give a joint bond for faithful administration, each is liable for the acts of the others. *Ib. Marsh v. Harrington*, 18 Vt. 150.

**69.** If one of two executors fraudulently consents to a judgment against both, the other executor will be relieved in equity; and if the judgment operates as a fraud upon the estate, it will be enjoined absolutely,—and this, although the judgment creditor was not privy to the fraud, if he is a trustee merely for the party to the fraudulent agreement. *Nason v. Smalley*, 8 Vt. 118.

**70. Recording foreign will.** An executor who records a foreign will is not holden upon his bond, thereupon given in this State, for effects received in the State where the deceased had his domicile, and where was the principal administration. *Probate Court v. Matthews*, 6 Vt. 269.

**71. Executor de son tort.** The statute (C. S. c. 50, s. 12), authorizing an administrator to recover of any person embezzling or alienating any of the effects of a deceased person before the granting of administration, double the value, and that he "shall in no other way be liable therefor," was held only to take away the right of a creditor, at common law, to sue such person as executor *de son tort*; and not to take away the common law right of the administrator to sue in trespass or trover. *Roy v. Roy*, 13 Vt. 543.

**72.** Where one wrongfully disposes of the effects of a deceased person, either before or after letters testamentary or of administration, he is liable to an action therefor by the executor or administrator when appointed; and this extends to such acts as would make him, at common law, an executor *de son tort*,—as, defraying funeral expenses out of such effects. *Shaw v. Hallihan*, 46 Vt. 389.

**73.** An executor in his own wrong must be sued as executor generally. *Buckminster v. Ingham*, Brayt. 116.

#### IV. ACCOUNTING.

**74. In general.** It is a good accounting for an administrator, that he has paid the funds in his hands for distribution over to the parties entitled, though without an order of the probate court. *Scott's Account*, 36 Vt. 297.

**75.** Where the administrator of an estate is also guardian of an heir entitled to the funds on distribution, he may charge himself, as guardian, with the funds, and this will be a good accounting as administrator, though without an order of the probate court, and this will bind his surety upon his guardian's bond. *Ib.*

**76. In equity.** The passing of an administrator's account in the probate court, or an allowance in his favor by commissioners, is not conclusive in equity, inasmuch as the proceeding is in effect *ex parte*, the administrator representing both sides. *Adams v. Adams*, 22 Vt. 50. 24 Vt. 408, note; 28 Vt. 720. *Green v. Sargeant*, 23 Vt. 466.

**77.** Where an administrator claimed against the estate title to lands by virtue of deeds from the intestate to himself, and it appeared to the court of chancery that those deeds were false and fabricated, or were obtained out of the usual course, and not in good faith, the court enjoined him from asserting title under such deeds, and required him to account therefor, with the proceeds, as the property of the estate. *Adams v. Adams*.

**78. Claims of administrator against the decedent.** It seems, that an administrator having claims against the estate which he represents may, at his election, present them to the commissioners—which is the more convenient practice—or bring them in on his final accounting in the probate court. *Redfield, J.*, in *French v. Winsor*, 24 Vt. 408, note.

**79. Administrator of an administrator.** Where an appeal is taken from the allowance of an administrator's account, and, pending the appeal, the administrator dies, the administrator of such administrator cannot, under section 61 of the probate act of 1821 (Slade's Stat. 345), be cited before the court in which the appeal is pending to pursue the appeal and settle the account. By such death all previous proceedings, not perfected by a decree, are vacated. *Wentworth v. Wentworth*, 12 Vt. 244.

**80. Charges.** Where an administrator has inventoried property as belonging to the estate, a decree charging him with it will be affirmed, unless it appears clearly that it was not assets; a doubtful right will not avail. *Briggs, ex parte*, Brayt. 103.

**81.** An administrator was made chargeable with loss on the sale of real estate, for lack of prudent and proper management, and where he was interested in the bid. *James Estate*, 4 Vt. 256.

**82.** Where the principal administration was in this State, the administrator was made chargeable, in the first instance, with the effects received by him as administrator in another State,—he having rendered no account there, and there not appearing to be any creditors there, and there having been great delay in his

settlement of the estate. He was also made chargeable with interest, where interest was, or ought to have been, received. *Ib.*

83. Whether an administrator should be charged with interest, on the settlement of his account, will depend on considerations arising from the facts and circumstances of each particular case. It is difficult to lay down any general rule. *Phelps v. Slade*, 10 Vt. 192.

84. An administrator, wanting in due diligence in collecting the funds of an estate and endeavoring to protect himself by a bond of indemnity from certain heirs, was made chargeable for the loss, on the settlement of his account, in behalf of a creditor. *Holmes v. Bridgeman*, 37 Vt. 28.

85. An administrator who acts with due judgment and discretion, and in good faith, in the sale of the personal property of the estate, is not liable for losses, whether he sells at public or private sale, and although he so sells without an order of the probate court, if entitled thereto. *Mead v. Byington*, 10 Vt. 116.

86. An administrator is not required to account to the estate for the avails of property of which the equitable title is not in the estate, but in a third person. *Sherman v. Dodge*, 28 Vt. 26.

87. Allowances—for payments. In the settlement of an administrator's account;—*Held*, that there should be allowed to him what he had paid to extinguish a claim allowed by the commissioners against the estate which was "fictitious, unfounded and illegal," and was allowed with the assent and connivance of the administrator,—it not appearing that he had derived any benefit from it, and no appeal having been taken by heirs, creditors or other person. *Reynolds v. McGregor*, 16 Vt. 191.

88. An administrator, being surviving partner of the intestate, inventoried the interest of the intestate in the partnership property at half the value of the whole, and himself paid the partnership debts after the commission of claims had expired, although such debts were not presented to nor allowed by the commissioners. *Held*, that he was entitled, on the settlement of his administration account, to be allowed such payments. *Mead v. Byington*, 10 Vt. 116. 21 Vt. 494.

89. Where a claim against an estate was duly presented and actually allowed by the commissioners, who certified their allowance upon the claim presented, but, by oversight, the claim was not entered upon their report returned to the probate court, and the administrator paid the claim;—*Held*, that he should be allowed therefor in his administration account. *Clark v. Clark*, 21 Vt. 490.

90. *Quære*, whether, in any supposable case an administrator can be, allowed in his account for the payment of claims, not preferred, which

were not allowed by the commissioners. *French v. Winsor*, 24 Vt. 402.

91. In the settlement of an administrator's account, he is entitled to be allowed for the payment of any claim which might have been enforced against him, either at law or in equity. *Richardson v. Merrill*, 32 Vt. 27.

92. —for services and expenses. Under the probate act of 1821, an administrator was not allowed in his account for the support of children of the deceased, who were over seven years of age. *Mead v. Byington*, 10 Vt. 116.

93. By needless delay in the settlement of an estate, an executor does not forfeit all compensation for actual services, faithfully performed, and necessary expenditures, but this may be considered in fixing the date from which interest should be cast against him. *Hapgood v. Jennison*, 2 Vt. 294.

94. The fact that an administrator charges a gross sum for his services, furnishes no legal reason for disallowing the charge, but it should be examined and allowed with great caution, in a case where the items could well have been kept. *Everts v. Nason*, 11 Vt. 122. *Ib.* 319. *Hapgood v. Jennison*.

95. An executor may be allowed in his account a reasonable percentage upon payments collectable and paid only in cattle, grain, &c., and converted by him into cash, though he never kept any exact account of the expenses and loss in the same;—but such uncertainty should not operate in his favor, but rather the reverse. *Ib.*

96. An administrator who advances money, in good faith, for the estate, and is not guilty of neglect nor of unreasonable delay in converting the effects into money, will be allowed interest on his advances. *Rix v. Smith*, 8 Vt. 365.

97. An executor was allowed in his account for time and expenses in procuring an injunction against a judgment obtained against him and his co-executor through the fraud of his co-executor. *Everts v. Nason*, 11 Vt. 122.

98. An administrator will be allowed his account for expenditures in a law suit in which he fails, where he acts in good faith and with reasonable prudence—as where he acts under the advice of suitable counsel, believing that he has the right of the case. *Allowed in Holmes v. Holmes*, 28 Vt. 765. But he may press on a suit with so little prudence, and so little prospect of recovery, that he ought not to be allowed his costs. *Disallowed in Eames v. Creditors*, 4 Vt. 256.

99. An administrator is entitled to an allowance against the estate for his time and services in taking care of the property of the estate, so long as it remains under his management as administrator, and he is accountable for it as such; although the use of the property was bequeathed to another, who during all the

time has had the income of it. *Richardson v. True*, 28 Vt. 876.

#### V. ACTION BY.

100. **Right to sue.** The plaintiff, being administrator of an estate of which he and the defendant were heirs at law, delivered certain goods of the estate to the defendant, valued at a certain sum, taking therefor his receipt to account for on the settlement of the estate. In assumption on the receipt;—*Held*, that the plaintiff must show a settlement of the estate in the probate court, and such as to show the propriety of withdrawing the goods from the defendant. *Curtis v. Hubbel*, 2 D. Chip. 9.

101. After the assignment by the probate court to the heirs or devisees of the lands of an estate, the executor or administrator cannot maintain ejectment therefor. *Stone v. Griffin*, 3 Vt. 400.

102. Where a suit is brought in the name of an administrator, in respect to any property of the estate, courts presume it rightful, unless it is shown that the property has been distributed to the heirs, or has gone into their actual possession and control. *Perrin v. Granger*, 33 Vt. 106. *McFarland v. Stone*, 17 Vt. 165.

103. The right of an administrator to maintain an action of ejectment to the use of the heirs of an estate, must depend upon the continuing right of the heir. If the rights of some of the heirs are lost, as by the statute of limitations, the recovery will be restricted to those shares only which are not so lost. *McFarland v. Stone*.

104. An administrator may maintain an action of ejectment until after a decree of assignment or distribution of the estate by the probate court, whether under the statute of 1797, or of 1821. *Id.*; or under G. S. c. 52, s. 9, 10. *Austin v. Downer*, 27 Vt. 636. *Bunell v. Malony*, 36 Vt. 636; and see *Roberts v. Morgan*, 30 Vt. 319.

105. The plaintiff took out letters of administration of an estate more than 15 years after the death, and brought ejectment against an heir in possession. *Held*, that by lapse of time there was a legal presumption that there were no debts existing which the land was necessary to satisfy; and, there being no evidence that there was any other heir, that the plaintiff could not recover. *Roberts v. Morgan*. See *Cushman v. Jordan*, 18 Vt. 597. *Hubbard v. Ricart*, 3 Vt. 207. *Abbott v. Pratt*, 16 Vt. 626. *Buck v. Squiers*, 22 Vt. 484. *Coz v. Inglestone*, 30 Vt. 258.

106. An executor, though a residuary legatee prosecuting the suit for his own benefit, can, at any time before a final settlement and order of distribution in the probate court, maintain an action, as executor, upon a promissory note made to the testator. *Ewing v. Griswold*, 48 Vt. 400.

*sory note made to the testator. Ewing v. Griswold*, 48 Vt. 400.

107. T G, by will, bequeathed one-fourth of his estate to remain in the hands of his executor, with powers of management, for the benefit of the testator's son. After the death of the executor, J H was appointed administrator *de bonis non*, with the will annexed, of T G. He perverted the trust funds, and was removed by the probate court, never having rendered his account, nor filed any bonds as trustee. *Held*, that his successor in the administration could maintain his bill in chancery, as administrator *de bonis non* of T G, against J H and others, to recover the funds so perverted. *Abell v. Howe*, 43 Vt. 403. See *Sherman v. Abell*, 46 Vt. 547.

108. **Form of declaring.** A note to A, administrator of B, may be sued in the name of A's executor. *Bottam v. Morton*, Brayt. 108.

109. An executor may join a count for money had and received, to the use of the testator, with a like count to his use, as executor. *Flowers v. Kent*, Brayt. 134.

110. An executor or administrator need not sue *as such*, for an injury to property of the estate in his possession. *Trask v. Donoghue*, 1 Aik. 370. 33 Vt. 106.

111. Only where it is necessary for an executor or administrator to show his representative character, or, in other words, to make *proof* of his letters, need he sue in that character. Thus, in debt on judgment recovered by him as executor, he need not describe himself as such. *Adams v. Campbell*, 4 Vt. 447.

112. An administrator, suing in trover, may always declare in his representative capacity, where the property belongs to the estate. He must so declare, where the conversion relied upon was during the life of the intestate. But he may declare in his own name, as an individual, counting upon his own possession, where he ever had such possession in fact. *Manwell v. Briggs*, 17 Vt. 176. 33 Vt. 106. 46 Vt. 394.

113. Where an administrator parts with the property or money of the estate and takes a note for the same, though running to himself as administrator, he may treat himself as the debtor of the estate, and the note as his own, and sue thereon in his own name, or he may sue as administrator. *Rix v. Nevins*, 26 Vt. 384.

114. Where one sues as administrator, he may join causes of action accrued during the life of the intestate and since his decease, if both are assets in the administrator's hands. *Pope v. Stacy*, 28 Vt. 96.

115. Where it appears from the writ and declaration that the plaintiff sues as administrator, an express averment that he sues as administrator is not necessary, and a conclusion, in such a declaration, to the damage "of the plaintiff" is sufficient. *Id.*

116. An administrator may sue to recover the price of property belonging to the estate of his intestate and sold by himself personally, without naming himself as administrator, or joining his co-administrator. *Aiken v. Bridgman*, 37 Vt. 249.

117. Executors and administrators who contract for the sale of their testator's or intestate's effects, or make other agreements in their representative capacity, are not obliged to sue in that capacity, but may so sue; or may sue in their individual right without naming their representative character; in which last case, they may join other causes of action for which they are obliged to declare in their own right. *Haskell v. Bowen*, 44 Vt. 579.

118. When he must prove his appointment. That the plaintiff is not administrator must be pleaded in abatement, and cannot be urged under the general issue, where he declares

upon the seisin of his intestate; but if he declares upon his own seisin, he must show his letters as part of his title. *Clapp v. Beardsley*, 1 Vt. 151.

119. Where an executor or administrator in ejectment declares upon his own seisin, he must, even under the general issue, prove his appointment as part of his title. It is otherwise, under the general issue, where he declares and relies upon the seisin of his testator or intestate. *Aldis v. Burdick*, 8 Vt. 21. 33 Vt. 106. *Austin v. Downer*, 25 Vt. 558.

120. Thus, where no seisin accrued to the intestate, and the disseisin arose after the death of the intestate;—*Held*, that the plaintiff's appointment must be shown as part of the proof of his title, under the general issue. *Austin v. Downer*.

See PROBATE COURT; ACTION.

## F.

### FACTOR—COMMISSION MERCHANT.

1. **Sale on credit.** The undertaking of a factor authorized to sell goods on credit, is merely to answer for the solvency of the buyer, or rather to guarantee to the principal the payment of the debt due from the buyer,—to pay to the principal the purchase money, if the buyer fails to pay it when it becomes due. *Bradley v. Richardson* (U. S. C. C.), 23 Vt. 720.

FRAUDS, STATUTE OF, 14.

2. Where a factor had sold his principal's goods upon credit;—*Held*, that he could not bind his principal by the presentation of the claim and the allowance thereof in insolvency proceedings, although he had a lien upon the claim for his commissions, without at least giving notice of his lien and an opportunity to discharge it. *Blackman v. Green*, 24 Vt. 17.

3. **Sale for cash.** Where a commission merchant is directed to sell "for cash," he is accountable to his employer if he delivers the articles sold without receiving the pay therefor;—any custom among such merchants to treat sales upon a few days' indulgence as "cash sales," to the contrary notwithstanding. *Biss v. Arnold*, 8 Vt. 252. *Catlin v. Smith*, 24 Vt. 85. *Chapman v. Deseroux*, 32 Vt. 616. See *Jackson v. Bissonette*, 24 Vt. 611.

4. **Lien.** To give a factor a lien upon goods consigned to him, but not received, the consignment must be in terms to the factor; and in order to the conclusiveness of such lien against creditors of the consignor, or subsequent pur-

chasers, the consignee must have made advances, or acceptances, upon the faith of those particular assignments. *Davis v. Bradley*, 28 Vt. 118.

5. Where goods were shipped and consigned to a factor, the proceeds to be applied on general account and for advances previously made, and no advances had been made on the faith of this particular consignment, and no bill of lading, shipping list or receipt had been delivered to the consignee;—*Held*, that the consignee had acquired no lien upon the goods in the hands of the carrier, as against an attachment by a creditor of the consignor. *Elliott v. Bradley*, 23 Vt. 217.

6. Where goods are consigned to a factor and the bill of lading, or shipper's receipt, showing such consignment, is forwarded to the consignee, and he makes advances or acceptances on the strength of it;—*Held*, that he thereby acquires a lien upon the goods in the hands of the carrier, and his title thereto is perfected to the extent of his lien. *Davis v. Bradley*, 24 Vt. 55. *S. C.*, 28 Vt. 118. 45 Vt. 198.

7. **Commissions.** Where the defendant contracted to consign certain goods to the plaintiffs as commission merchants for sale, upon the usual commission of 5 per cent for sale and guaranty, and the defendant failed to consign a portion of the goods and sold them himself;—*Held*, that the plaintiffs could not recover for commissions on the goods not consigned, (1), because the commissions were not earned by a sale and guaranty; (2) because such damages

are contingent and too remote. *Corlies v. Estes*, 31 Vt 658.

8. **Other matters.** The plaintiff made advances for the defendant and received from him a draft by way of reimbursement, as also a bill of sale of certain butter and cheese, with an agreement that if the draft was not duly paid the plaintiff might consign the butter and cheese to H, a commission merchant in Boston, to be sold for reimbursement. The draft not being paid, the plaintiff so consigned the property, and H sold it for less than the amount due the plaintiff, who brought this suit to recover the balance. *Held*, that the plaintiff's right to recover did not depend upon whether the defendant had a remedy against H for his unfaithfulness, and such inquiry was unimportant; but that the court committed no error in replying to such inquiries by the jury, that the defendant had such remedy against H in the name of the plaintiff, or in his own name, if he was the general owner of the property. *Langdon v. Burrill*, 21 Vt. 466.

9. Where a factor brought suit against his principal for an unpaid balance due him for advances made beyond the amount agreed to be advanced, and was at the same time liable upon notes and acceptances for the principal not yet matured, and had previously sold goods for his principal upon a credit not then expired;—*Held*, that he was entitled to have the avails of such sales, as they became due, applied in satisfaction of the advances made in payment of such notes and acceptances as they fell due, and not that they should be applied upon the account in suit. *Bradley v. Richardson* (U. S. C. C.), 23 Vt. 720.

10. The plaintiff left money with the defendant for him to purchase, on commission, certain specified lots of butter. The defendant purchased and delivered at the place directed the lots of butter ordered, and other lots, and neglected on reasonable request to separate the parcels, and insisted that the plaintiff should take the whole, &c. *Held*, that the plaintiff could recover the money deposited. *Safford v. Kinsley*, 40 Vt. 506.

See COMMISSIONS.

## FENCES.

1. **Extent of obligation to maintain.** Under the recent statutes in this State, the law is, as it ever has been in England, that the owner is under no obligation to fence his land along a highway, his obligation in this respect being limited to his duty to restrain his cattle from trespassing upon his neighbor. *Holden v. Shattuck*, 34 Vt. 336.

2. The statutes of this State, in respect to fences between occupied lands, do not relieve the owner of cattle from the common law duty to keep them from straying into the possessions of others. Where the fences are divided pursuant to the statutes, and the cattle stray into the plaintiff's close through defect of the plaintiff's part of the fence, he cannot recover, for the reason that his own neglect contributed to the injury; but where not so divided, he can recover. *Keenan v. Cavanaugh*, 44 Vt. 268. *Sorenberger v. Houghton*, 40 Vt. 150.

3. The object and purpose of all legislation on the subject of fences are, to require and compel the owner of animals to restrain them from going at large, and to keep them upon his own premises. Since the statute of 1863, No. 20 (G. S. c. 102), the duty imposed, as to maintaining fences, has reference to fences between adjoining proprietors, and is one which they may mutually dispense with. If they do so, other persons cannot complain of it, but they remain under the same obligation to restrain their animals and keep them at home as they would be under if such adjoining proprietors kept up legal fences; and the land owner owes no duty in respect to fences except to an adjoining proprietor. Hence, it is no answer to an action for trespass upon occupied lands, by cattle other than those of an adjoining proprietor, that the plaintiff's fences were insufficient. *Wilder v. Wilder*, 38 Vt. 678. See *Jackson v. Rut. & Bur. R. Co.*, 25 Vt. 150. *Bemis v. Conn. & Pass. R. R. Co.*, 42 Vt. 375.

4. **Liability for defect.** The fact that the plaintiff's part of a division fence was insufficient, is no bar to a recovery for damages sustained solely through the insufficiency of the defendant's part of such fence. *Saeton v. Bemis*, 31 Vt. 540.

5. The right to recover damages suffered through the neglect of the defendant to maintain his part of a division fence, is not dependent upon the plaintiff's having proceeded to make or put in repair the fence, under G. S. c. 102, s. 6. *Id.*

6. The liability of a party for neglect to maintain his share of a division fence is not, under this statute, nor at common law, restricted to injuries connected with the use of the adjoining land, but extends to all damages which are the legal and natural consequences of such neglect—as, the escape of cattle from the adjoining land and consequent injury to them. *Id.*

7. In trespass *qua. clau.* for the breaking and entering by the defendant's cattle;—*Held*, that it is not necessary, in order to sustain the action, that the plaintiff should give any evidence as to the quality of his fences. A defect therein is matter of defense. *Sorenberger v. Houghton*, 40 Vt. 150, 44 Vt. 268.

8. The plaintiff declared in case, alleging that he and the defendant were owners and occupiers of adjoining lands; that the defendant was bound to keep up a legal division fence between them, and that he neglected to do so, whereby the defendant's mare passed over the fence upon the plaintiff's land, and kicked and injured the plaintiff's horse.—*Held*, that the obligation and neglect to keep up the fence are the gist of this action, therein differing from trespass *qua. clau.*, in which the gist of the action is the breach of the plaintiff's close; and the plaintiff failing to prove that the mare got over that part of the fence which the defendant was bound to maintain, both parts being defective, *held*, that the plaintiff could not recover. *Tupper v. Clark*, 43 Vt. 200.

9. Under the general counts in assumpsit for work, labor and materials;—*Held*, that the plaintiff could recover of the defendant one-half the expenses of building one-half of an undivided division fence between them, under an agreement that if the plaintiff would build such half the defendant would build the other, or pay the plaintiff for the one-half of what he should build—the defendant having neglected to build any part. *Strong v. Slicer*, 33 Vt. 466.

10. **Fence as a boundary.** Where a fence is built between adjoining proprietors by a mutual arrangement, and for convenience, on both sides of a line which they, or the occupants of the two lots, regard as the division line, this is very significant and important evidence to show the recognition and acquiescence in such line as the parties understood to be the true line, and as indicated by the general direction of the fence. The irregular line marked by the fence would not be established thereby, but that line would be established (if recognized for 15 years,) which the fence was intended to indicate by its general course, and which the parties had in mind as the true line, though not necessarily the original surveyed line. *Clark v. Tabor*, 28 Vt. 222. *Ackley v. Buck*, 18 Vt. 895.

11. As to whether, and how far, a fence or wall built for part of the length of what is claimed to be a line between two adjoining proprietors indicates a claim according to that same line extended, see *Hodges v. Eddy*, 38 Vt. 327, limiting and explaining *Buck v. Squiers*, 23 Vt. 498.

12. **Fence viewers.** Fence viewers are authorized to *divide fences*, but have no authority to settle the rights of different claimants to landed property, or to establish disputed boundaries. Neither party, therefore, is concluded by their decision from contesting the question of ownership in himself, or his adversary, or the location of their boundaries. *Shaw v. Gillman*, 23 Vt. 565.

See POUNDS.

## FORCIBLE ENTRY AND DETAINER.

1. Under the forcible entry and detainer statute (Slade's Stat. 187), an administrator may prosecute and show possession in his intestate, although he has not embraced the land in his inventory returned to the probate court. *Allen v. Ormsby*, 1 Tyl. 345.

2. Such process will not abate, though it states that he was possessed, as administrator. *Edmonds v. Morrill*, Brayt. 20.

3. Security for costs of prosecution must be given before the warrant issues. *Morgan v. Barrett*, Brayt. 125. *Whittaker v. Perry*, 37 Vt. 681. (G. S. c. 46. *Ib.* c. 81, s. 9.)

4. On a complaint under section 6 (Slade's Stat. 187), a minute of the time of exhibiting the complaint is not necessary. *Allen v. Ormsby*, 1 Tyl. 345. Otherwise, if brought upon section 24, *Hall v. Brown*, 2 Tyl. 64.

5. Upon trial of an appeal from a freehold court, the ordinary juror's oath in civil causes must be administered. *Allen v. Ormsby*, 1 Tyl. 345.

6. Where a tenant entered upon a farm under a parol lease for one year, containing stipulations that he would carry on the farm in a good husbandlike manner, build a particular piece of fence, cut a certain piece of bushes, pick up the stones in a certain field on the farm, cut none of the growing timber, and cut the hay and feed it out to the lessor's cattle on the farm, but there was no provision for re-entry for breach of these stipulations;—*Held*, that proof of such breach would not sustain an action for possession by the lessor under the "forcible entry and detainer" act (C. S. c. 44, s. 30. G. S. c. 46, s. 22), before the expiration of the year; that the intent of the act was to afford such summary relief, only in those cases where an action of ejectment would lie at common law. *Hadley v. Havens*, 24 Vt. 520.

7. A forcible entry by the landlord and ejectment of the tenant holding over, are not justified by the fact that the tenant had agreed to leave by a certain previous date, and that, if he did not so leave, the landlord might put him and his effects out in any way he should choose. *Dustin v. Cowdry*, 23 Vt. 681. *Whittaker v. Perry*, 38 Vt. 107.

8. The party forcibly put out of possession, even by him who has title and right of entry, is entitled by proceedings under the statute to restitution, and may subject the ejector to punishment by fine, and may sustain an action of trespass upon the statute, and recover therein three-fold damages for the expulsion and detention. One cannot acquire lawful possession by an unlawful act. *Dustin v. Cowdry*.

9. The party so wrongfully ejected may, without resorting to the statute remedy, waive the penalty and maintain trespass *qua. clau.*,

against the ejector, and title and right of entry will be no defense. *Id. Mussey v. Scott*, 32 Vt. 82. *Whittaker v. Perry*, 38 Vt. 107. *Carpenier v. Barber*, 44 Vt. 441.

10. Any person entitled to the possession of premises—as the grantee of the lessor—may recover possession against the lessee, or person holding under the lessee, by proceedings under G. S. c. 46, s. 22, before a single justice. *Barton v. Learned*, 26 Vt. 192.

11. In such proceeding before a justice, the jurisdiction is not defeated by setting the *ad damnum* of the writ at more than \$30, although (by sec. 25) the plaintiff could recover not exceeding that sum for rents. The jurisdiction to order restitution of the premises, is not affected by the amount of rents due. *Weston v. Haley*, 27 Vt. 288.

12. This summary remedy before a single justice does not apply to a detainer of lands, unless held by a technical lessee after all title and right in him, both legal and equitable, has ceased; and has no application to an equitable mortgagor. *Davis v. Hemmaway*, 27 Vt. 589; and see *Pitkin v. Burch*, 48 Vt. 521.

13. A party in possession of a house, having no family, left the house for the day, locking the door, and leaving his furniture in the house. In his absence, the party having title and right of possession forced open the door, set the furniture out into the road, fastened up the house, and posted up a notice on the door that he was in possession. *Held*, that this was not a violation of the statute of forcible entry and detainer, and was the exercise of a legal right in a legal manner, and put the party in lawful possession. *Mussey v. Scott*, 32 Vt. 82.

14. The entry into an unoccupied house in the night, and furtively, but without apparent force or violence, is a mere trespass, and not a forcible entry under G. S. c. 46. *Foster v. Kelsey*, 36 Vt. 199.

15. Where the complaint under G. S. c. 46 is for a forcible entry, and forcible detainer, there may be a conviction for the latter, though the evidence fail to prove the former;—as, where the entry is unlawful but peaceable, and the detainer is forcible; and in such case no demand in writing to quit possession is necessary. *Id.*

## FOREIGN LAW.

1. Does not affect domestic remedy. The law of another State which affects the remedy only upon a contract there executed, has no effect and furnishes no rule for decision, when suit is brought upon such contract in this State. *Cartier v. Page*, 8 Vt. 146, *Suffolk Bank v. Kidder*, 12 Vt. 464.

2. Instances. A statute of Canada provided, that “every promissory note on which no suit is brought within five years next after it shall have become due and payable, shall be considered to be paid and discharged, provided the debtor will make oath, if required, that such note is paid and discharged.” In an action in this State on a note executed in Canada;—*Held*, that the statute was merely a statute of limitations, and, as relating to the remedy, had no force or application in this State. *Cartier v. Page*.

3. By an act of the legislature of Massachusetts it was provided that no contract containing usury should be thereby rendered void, but that when, in an action upon a contract, it should appear upon special plea, that more interest was reserved or taken than is allowed by law, the defendant should recover his costs, and the plaintiff should forfeit three-fold the amount of the whole interest, and have judgment only for the balance. In an action in this State upon an usurious contract executed in Massachusetts;—*Held*, that this statute related to the remedy only and to the courts of that State, and could have no operation, nor furnish a rule of decision, in this State. *Suffolk Bank v. Kidder*, 12 Vt. 464.

4. It is no objection to the allowance by the auditor, in an action of book account, of items of debt created after the commencement of the suit, that such items were created in another state, by the laws of which they could not be recovered for in any action commenced before the credit had expired. This is a matter pertaining to the remedy merely. *Porter v. Munger*, 22 Vt. 191.

5. The plaintiff had an opportunity to urge his claim in set-off in a former suit between him and the defendant in the State of New York, where they both had their domicile, but neglected it. The statute of New York provided that, in such case, “he shall be forever thereafter precluded from maintaining any cause to recover such claim.” *Held*, that the statute did not operate to discharge or extinguish the claim, but related to the remedy and was local in its operation, and was not a bar to the action in this State. *Carver v. Adams*, 38 Vt. 500. See *WAGER*, 9.

6. Right barred by. Where a demand is absolutely barred by the laws of a foreign country where the contract was made, it cannot be revived by transferring it to an inhabitant of this State. *Woodbridge v. Austin*, 2 Tyl. 364.

7. Right local. A cause of action which accrued in New Hampshire, and was local there, and died with the person of the defendant, cannot be pursued against his estate in this State, although by the law of this State such cause of action would have survived here. It might be otherwise, perhaps, with a mere tran-

atory cause of action. *Burgess v. Gates*, 20 Vt. 326.

8. —not surviving. A cause of action which does not survive at common law and by the law of the State where it arose, cannot be prosecuted in this State, by force of a general statute of this State creating survivorship in such cases;—the cause of action being there extinguished by the death, and our statute having no extra-territorial force. So held in an action by an administrator for an injury in New Hampshire causing death. (G. S. c. 52, ss. 12 15.) *Needham v. Grand Trunk R. Co.*, 38 Vt. 294.

9. —of statute creation and mode of enforcement. Where an official bond, as a sheriff's or guardian's bond, is given in another State, and by the laws of that State is to have effect only in a particular way, and to be enforced only in a particular mode pointed out by those laws, the enforcing of it in that mode is the exclusive province of the tribunals of that State; and it cannot be enforced in this State, where it is merely a creation of the statute law. *Pickering v. Fisk*, 6 Vt. 103. *Judge of Probate v. Hibbard*, 44 Vt. 597.

See INSOLVENCY.

## FORMS.

1. Declaration. Approved form of declaration in case for false warranty—*warrantizando vendidit*. *Beeman v. Buck*, 3 Vt. 53. *Gode-nough v. Snow*, 27 Vt. 720.

2. In case of sale of lands. *Harlow v. Green*, 34 Vt. 379.

3. On order with conditions. *Goss v. Barker*, 22 Vt. 520.

4. On promissory note. *Binney v. Plumley*, 5 Vt. 500. *Brooks v. Edson*, 7 Vt. 351.

5. Plea. Plea in abatement for insufficient service of the writ. Held good. *Evarts v. Georgia*, 18 Vt. 15.

6. Indictment. Indictment for having in possession, with intent to pass, a counterfeit bill. *State v. Randall*, 2 Aik. 89.

7. For uttering, passing and giving in payment a counterfeit bank bill. *State v. Wilkins*, 17 Vt. 151.

8. Writ. Writ of *certiorari* on writ of error. *Brackett v. State*, 2 Tyl. 152.

## FRAUD.

I. WHAT CONSTITUTES FRAUD OR DECEIT.

II. EFFECT OF FRAUD.

III. RIGHT OF ACTION THEREFOR; PLEADINGS; EVIDENCE.

## I. WHAT CONSTITUTES FRAUD OR DECEIT.

1. Opinion. Fraud can not be predicated of the expression of an opinion, though erroneous, as to one's rights growing out of facts fully known to both parties. *Blake v. Peck*, 11 Vt. 483.

2. Non-actionable deceit—Instances. In the sale of a patent right for making saddles, the plaintiff falsely represented that a saddler in Burlington [120 miles distant] had offered him \$300 for the three northern counties in the State, and that his uniform price for a license was \$3.00 a saddle, and that he had so sold in New Hampshire. Held, that these representations were not such as the law declares a fraud. *Williams v. Hicks*, 2 Vt. 36; and see 1 Tyl. 387.

3. Where the defendant, by falsely asserting that he had attached the property of a debtor, induced the plaintiff to delay, for a time, attaching the same property, whereby the defendant was enabled to get his attachment first served;—Held, that this was not such a fraud as entitled the plaintiff, in equity, to a priority. *Bardwell v. Perry*, 19 Vt. 292.

4. After an audit between the parties, the defendant was informed, as the fact was, that the auditor had made report against him. The plaintiff, not knowing that any report had been made, but having heard that either no report had been made, or that it was against him, applied to the defendant to settle the suit; and thereupon, without inquiry made by the plaintiff, or disclosure of his own suspicions, or disclosure by the defendant of his knowledge of the auditor's report, the parties settled, each agreeing to pay his own costs, and to relinquish all claims; and the plaintiff thereupon executed to the defendant a discharge of the suit, costs and damages. Held, that such mere omission of the defendant to disclose his knowledge as to the report, was not, under the circumstances, fraudulent, so as to defeat the release. *Judd v. Blake*, 14 Vt. 410.

5. It is no fraud or legal wrong for one about to pay money to another, to inform such person's creditors of the fact, and to aid them in the attachment of the money when paid over. *Root v. Ross*, 29 Vt. 488.

6. A deputy sheriff had advertised for sale certain property taken on execution, and at the auction sale sold also an article of his own, of the same kind. Held, that he could recover the price, although he did not disclose his ownership, and the bidder supposed the article to be part of the property taken and sold on the execution; that this was not a fraudulent deception. *Rice v. Andrews*, 32 Vt. 691.

7. Adoption of a falsehood. Where one claims the benefit of a falsehood uttered in his presence, though he may not know it to be so



when uttered, he makes the falsehood his own. *Keyes v. Carpenter*, 3 Vt. 209.

8. **Falsehood at hap-hazard.** The affirmation of what one does not know or believe to be true, intentionally made to induce another to enter into a contract, is in law as unjustifiable as the affirmation of what he knows to be false. *Twitchell v. Bridge*, 42 Vt. 72.

9. **Passing off belief for knowledge.** See *Cabot v. Christie*, 42 Vt. 121, *post* 35.

10. **Half truth.** On the sale of a horse having an observed lameness, the defendants were held liable for a deceit, on the ground of a fraudulent concealment of the permanency of the lameness. By *Peck, J.*: As the plaintiff inquired in relation to the soundness of the horse, and the defendants undertook to tell, they were bound to disclose all they knew on the subject, and the plaintiff had a right to act upon the supposition that they had done so. Having discovered that the horse was permanently unsound, they had no right intentionally to conceal it, but were bound fully to disclose the whole truth. They had no right to impart a portion of their knowledge and withhold the residue for the purpose of deceiving the plaintiff. Under such circumstances, the suppression of the truth is equivalent to the assertion of a falsehood. *Graham v. Stiles*, 38 Vt. 578.

11. The defendant, wishing to buy of the plaintiff certain stocks, of the value of which he knew that the plaintiff was ignorant, and designing to mislead her and induce her to sell the stocks at less than he knew their value to be, told her of a fact calculated to depreciate their value and lead her to wish to part with the stocks, but omitted to disclose other and all the facts within his knowledge calculated to enhance their value, and thereby succeeded in purchasing the stocks at much less than their value. *Held*, that although this was telling a truth, it was not the whole truth, and was telling it in a manner to produce the effect of a falsehood, and was fraudulent and actionable, [under the peculiar confidential relations existing between these parties.] *Mallory v. Leach*, 35 Vt. 156.

12. A false representation of a material fact, not believed to be true when made, and made to induce a sale, if damage to the purchaser be occasioned thereby, is fraudulent and actionable. It is not necessary that the fact be directly misrepresented; but if a false impression be produced by words or acts, in order to mislead and obtain an undue advantage, this is a manifest fraud. *Howard v. Gould*, 28 Vt. 528.

13. The defendant having been informed, and having reason to believe, that his horse had the glanders, was inquired of by the plaintiff, in a negotiation for an exchange, what was the matter with the horse—which was apparently much diseased—and whether he had not got glanders. The defendant replied that the horse

had got the horse distemper of the worst kind, he supposed, but the plaintiff might examine him. The defendant did not communicate the information he had received respecting the glanders, and the plaintiff made the exchange after examining the horse, but relying upon the plaintiff's representation. The horse had the glanders. *Held*, that the defendant was liable for a fraudulent suppression of material facts, which, if disclosed, would probably have prevented the trade; and that, if the defendant believed the horse had the glanders, he was liable for fraudulent representations. *Id.*

14. **Fraudulent concealment.** The plaintiff labored for the defendant, under a contract with the defendant's son that he would pay therefor. *Held*, that the plaintiff could recover of the defendant in general assumpsit, upon proof that the parties fraudulently concealed from him the fact of the son's bankruptcy. *Carrigan v. Hull*, 5 Vt. 22.

15. The defendant traded off to the plaintiff a horse having a secret malady of a fatal character. In an action for a deceit, the county court charged the jury, that if they should find that the plaintiff was wholly ignorant of this internal malady before the trade, and that it was known to the defendant, that it was not obvious to the plaintiff and there were no indications or signs which would have led a person of ordinary vigilance and prudence to apprehend anything of the kind, or to suspect it, and the defendant received from the plaintiff such a consideration that he might reasonably suppose the plaintiff would not have so traded had he been informed of it, and that the plaintiff, if he had received such information, would not have so traded, then the defendant was bound in good faith to disclose the facts, and, if he did not, he was guilty of a deceit for which he was liable. This charge was *held* erroneous—the court not being prepared to say that the vendor of a chattel is, in all cases, bound to disclose all known defects in the article, which are unknown to the other party, and not discoverable by the exercise of ordinary care. *Paddock v. Strobbridge*, 29 Vt. 470. See *S. C.* in *CASES CRITICISED*.

16. **Affirmative falsehood.** Where the seller of a horse had reasonable and good ground to suppose that the horse was unsound, and knew that if he communicated what he had discovered and had been told about the horse, it would lessen the value of the horse in the estimation of the buyer, or any buyer;—*Held*, that it was an affirmative false representation and actionable, irrespective of the seller's actual belief, to assert that the horse was sound "so far as he knew"—the horse being in fact unsound. *Wheeler v. Wheelock*, 34 Vt. 558.

17. The plaintiff purchased of the defendant a machine which, as the defendant pre-

tended, embodied a new discovery in mechanics, by which perpetual motion could be produced, but which, in fact, was a humbug—the motive power being ordinary clock work artfully concealed in the base of the machine. The plaintiff was deceived by such representation into making the purchase, and upon discovering the cheat returned the machine. In an action for the deceit;—*Held*, that the plaintiff could recover the price paid. *Kendall v. Wilson*, 41 Vt. 567.

18. In 1862, A purchased of B a mowing machine, without seeing it, relying upon B's representation that it was "a good mower and did its work well." The machine was a good one of its kind, and a referee reported that that kind was in use up to 1860, and "as compared with other machines at that time to be procured was a good mower and did its work well," but then became gradually superseded by machines of a better kind, until in 1862 it had passed nearly out of use, and then, "when compared with the other mowers at that time to be procured, with reference to their draft and the quality of their work, it was of no value for the purposes of a mower." *Held*, that the report did not show any false representation; that if the machine was a good mower and did good work, its quality was not altered, though its market value may have been, by the introduction of better machines; and that the representation did not go to the value of the machine or the quality of the work as compared with other mowers. *Wallace v. Stone*, 38 Vt. 607.

19. **Confidential relations.** The defendant sold the plaintiff certain stock in a mining company and gave her a written agreement to repurchase the stock at a future day named, at a price named, if she should so desire; and he did so repurchase it at her request at the price named, which was much less than what he knew to be the then market value. In an action for fraudulent representations and concealment as to such value;—*Held*, that evidence of what was said at the time of the execution of the written contract was admissible, for the purpose of showing such a special confidence and relation between the parties as to characterize the subsequent conduct of the defendant in making the repurchase; and if such a confidence and trust was thereby created and existed at the time of such repurchase, that the defendant would keep the plaintiff advised of the true value of the stock, and he knew that she relied upon this, then it was a fraud in him to repurchase the stock at less than its value, without first communicating to her all the knowledge he possessed in regard to it. *Mallory v. Leach*, 35 Vt. 156.

20. A and B are creditors of C. C being in failing circumstances, discloses to A, who is an attorney, his situation, and his purpose to secure both. He directs A to make a mortgage

to B of certain lands, and to attach certain other property for his own security. A makes no objection, but makes out the mortgage to B, which C takes away to be recorded, and A then at an unusual hour, and unknown to C, attaches in his own behalf the same lands before the mortgage is recorded. *Held*, in chancery, that the mortgage took precedence of the attachment. *Temple v. Hooker*, 6 Vt. 240.

21. Where the defendant set up a contract which was largely to his personal advantage, and was obtained, without adequate consideration, from one who reposed great confidence in him, and whose mind had become enfeebled by a long course of intoxication, the contract was *set aside* in equity upon the inferences of fraud and undue influence arising from the facts. Under such circumstances, the burden is upon the defendant to prove affirmatively, that the contract was understood by the party executing it, and that he intended what it purported. *Conant v. Jackson*, 16 Vt. 335.

22. **Puffing.** A owned a bowling-alley subject to a lease to S. S secretly confederated with and employed R to represent to A the earnings of the alley as much greater than they really were, and to promise to purchase the property at a price much above its real value, if A would purchase in the lease and give R a good title. Upon these representations, A purchased in the lease of S at an exorbitant price, and gave S his notes therefor. R absconded without concluding his purchase. *Held*, that these representations were not excusable as mere "puffing," but that the transaction was such a fraud as entitled A to an injunction against S and to a surrender of the notes. *Adams v. Soule*, 33 Vt. 588.

23. **Fraudulent recommendation for credit.** Case lies against the defendant for advancing money to an insolvent, with the fraudulent intent of enabling him to purchase goods upon a credit, where the goods go into the possession of the defendant, although the plaintiff had no knowledge of the defendant in the sale. *Windover v. Robbins*, 2 Tyl. 1. *Robbins v. Windover*, 2 Tyl. 11.

24. An action lies for the false and fraudulent representation of the pecuniary responsibility of another, whereby the plaintiff has suffered damage. *Weeks v. Burton*, 7 Vt. 67. *Erwins v. Calhoun*, 7 Vt. 79.

25. D sent a written order to the plaintiff for a certain quantity of books to be sold him on credit, on which the defendant wrote and signed the following: "I consider the above order good." In an action for a false and fraudulent recommendation of D;—*Held*, that the proper construction of these words was not merely that the defendant believed that the plaintiffs might safely trust D with the books named, and that if they did so they would get their pay for them from D; nor yet a repre-

sentation that D was responsible for the amount and that payment thereof could be enforced, by law, out of his property; but it was a statement of the defendant's belief that D was responsible, predicated on the fact of his having pecuniary means rendering him able to pay the amount, whether such means could be reached by process of law, or not. *Crown v. Brown*, 30 Vt. 707.

26. In an action for false and fraudulent representations, by reason whereof credit was given to another for goods sold;—*Held*, that it was sufficient to allege the substance of the representation, without attempting a literal recital. *Cutler v. Adams*, 15 Vt. 237.

27. A declaration averring that the defendant asserted and represented in substance that F was a fit person to be trusted, and that the plaintiff might safely sell him goods on credit, is not sustained by proof of representation that F was "doing a fair business." *Id.*

28. An action for deceit does not lie against one who makes false representations of his own pecuniary resources, in order to obtain, and thereby obtaining, a credit for goods sold him. *Fisher v. Brown*, 1 Tyl. 887.

29. Case cannot be sustained for false and fraudulent representations by the defendant of his pecuniary responsibility and resources, whereby the plaintiff was induced to sell him property on credit, where the plaintiff has already sued and recovered judgment upon the contract, as a sale. *Dyer v. Tilton*, 23 Vt. 313.

30. An action for fraud will not lie against a person obtaining credit upon his simple representation, that he is safe to be trusted and given credit to. This should be regarded but as matter of opinion. *Jude v. Woodburn*, 27 Vt. 415.

31. The purchaser of goods on a credit obtained by his own misrepresentations of his circumstances and ability to pay, may be guilty of such fraud as authorizes the seller to rescind the sale and reclaim the goods. *Poor v. Woodburn*, 25 Vt. 234. 28 Vt. 314. *Fitzsimmons v. Joslin*, 21 Vt. 129. *Hodgden v. Hubbard*, 18 Vt. 504.

32. In respect to real estate. How far misrepresentations by the vendor of land conveyed by quit-claim deed, as to an incumbrance upon it not amounting to a total failure of consideration, may affect the contract,—considered. *Richardson v. Bortright*, 9 Vt. 868.

33. We are unable to see any sound reason, why a party should not be made liable to an action for fraud in a contract relating to land, as well as in a contract for the sale of goods. *Poland, C. J.*, in *Harlow v. Green*, 34 Vt. 379.

34. So *held*, where there was a false and fraudulent representation as to a boundary line, whereby the purchaser was deceived as to the quantity. *Id.* So *held*, where a lot conveyed

by its number was other and less valuable than the one represented and pointed out as the one bargained for. *Kelley v. Pember*, 35 Vt. 183; and so *held*, where the fraudulent representation was of the quantity of timber growing upon the lot sold. *Whittan v. Goddard*, 36 Vt. 780.

35. Where, in the sale of lands, the vendor represented the quantity to be larger than it was, and stated this as of his own knowledge, when in fact he was aware that he had no such knowledge;—*Held*, that this was an actionable fraud, although he believed the quantity to be as represented. It was a fraud to pass off his belief for knowledge. One's belief, to excuse him for a false representation, must be a belief in the representation *as made*. *Cabot v. Christie*, 42 Vt. 121.

36. Where the defendant's intestate, professing to have but not having power to sell lands, conveyed the same to the orator by quit-claim deed, and after payment of part of the price the matter lay dormant for some 20 years, and without benefit to the orator, chancery refused to compel the orator to receive confirmation of title, and enjoined the defendant from prosecuting the orator's bond for the balance, and decreed that it be surrendered to be cancelled. *Williams v. Mattocks*, 8 Vt. 189.

## II. EFFECT OF FRAUD.

37. Generally. Fraud invalidates every transaction, as well at law as in equity. *Morris v. Gill*, N. Chip. 68. *S. C.*, 1 D. Chip. 49.

38. Contracts fraudulent as to creditors do not thereby become void between the parties. *Carpenter v. McClure*, 39 Vt. 9. *Peasee v. Barney*, 1 D. Chip. 331. *Martin v. Martin*, 1 Vt. 91. *Gifford v. Ford*, 5 Vt. 532. *Conner v. Carpenter*, 28 Vt. 240. *Boutwell v. McClure*, 30 Vt. 676.

39. Where one, by fraudulent means, has induced another to pay him money, he cannot shield himself from paying it back by the fact that both parties had an illegal end in view—as, to stifle a criminal prosecution. The law applicable to a case of duress applies. *Hinsdill v. White*, 34 Vt. 558.

40. Effect as to third persons. A creditor who attaches property obtained by fraudulent practice or misrepresentation, acquires no better right to hold it than the fraudulent vendee had. He stands in the shoes of his debtor. *Poor v. Woodburn*, 25 Vt. 234. *Fitzsimmons v. Joslin*, 21 Vt. 129. *Hackett v. Callender*, 33 Vt. 97. *Field v. Stearns*, 42 Vt. 106. 43 Vt. 409.

41. A mere assignment of the goods in security of a pre-existing debt, confers no greater right than an attachment;—there being no new consideration in such case, the assignee

takes only the right of the assignor. *Poor v. Woodburn*; and see *Downs v. Belden*, 46 Vt. 674.

42. Where goods are obtained on credit by such fraudulent representations as entitle the seller to reclaim the goods of the buyer, he may reclaim them of an attaching creditor of the insolvent buyer before sale on execution, although the debt of the attaching creditor was contracted after the fraudulent purchase and on the strength of the debtor's having a good stock of goods in his store, including these goods, but on no other inducement except such possession and appearance. *Field v. Stearns*, 43 Vt. 106.

43. Where, through the fraudulent act of a third person, one of two innocent parties must suffer, the one who, by trusting such third person, had clothed him with the means of perpetrating the fraud, must bear the loss. *Pasumpsic Bank v. Goss*, 31 Vt. 321. *Farm. & Mech. Bank v. Humphrey*, 36 Vt. 558. *Barber v. Britton*, 26 Vt. 112.

44. A *bona fide* purchaser without notice will not be affected by the fraud of his vendor, or grantor. *Hoy v. Wright*, Brayt. 208.

45. A mortgaged to B and paid the debt, but the mortgage remained undischarged upon the record, when he mortgaged to C. A and B then fraudulently procured a foreclosure of the mortgage to B, so that B's title on the record appeared fair. Afterwards D purchased *bona fide* of B and without knowledge of the fraud. *Held*, that D acquired title as against the mortgage to C. *Atwater v. Seymour*, Brayt. 209.

### III. RIGHT OF ACTION THEREFOR.

46. A, knowing or having good reason to believe that B's possession of certain cattle was wrongful and that he was not the right owner of them, cooperated with C by advising him and furnishing him means, for the purpose and with the intent of having him buy and kill the cattle, and thus put them beyond the reach of the right owner; and C was thereby induced to and did buy, kill and dispose of them. *Held*, that A was liable in trover to the right owner. *Moore v. Eldred*, 42 Vt. 13.

47. Where the defendant by fraud induced the plaintiff to subscribe and pay for stock in a company to be formed under the statute;—*Held*, that an action lay for the fraud, whether the plaintiff's money came to defendant's use or not. *Paddock v. Fletcher*, 42 Vt. 889.

48. *Essentials*. To warrant a recovery for a false representation in a sale, it must be relied on, and be an inducement to the purchase. But it should not be left to the jury to find that the plaintiff would not have made the purchase but for such representation. This is a mere

speculative inquiry, and not the test of the plaintiff's right. *Cabot v. Christie*, 42 Vt. 121.

49. If the vendor's fraudulent representations constitute one of the inducements to a purchase, this is sufficient to avoid the sale. *James v. Hodsdon*, 47 Vt. 127.

50. To sustain an action for deceit in a sale, the plaintiff must prove, not only that the representations made were false and that he relied upon them as true, but that the defendant knew them to be false. *Bond v. Clark*, 35 Vt. 577.

51. There must be both fraud and damage. The lie must be relied upon, and must occasion damage. *Nye v. Merriam*, 35 Vt. 488.

52. The same rule applies where a party seeks to avoid a contract on that ground, and to recover back the consideration. He is entitled to be put in the same condition as if the representation had been true. If he is just as well off as if the representation had been true, he cannot complain, for he has suffered no damage. *Peck, J., in Putnam & Thompson v. Hill*, 38 Vt. 92.

53. The defendant put in a bid at the P. O. Department for a mail route, for and in the name of his minor son, which was accepted on the defendant's guaranty. The plaintiffs, desiring to get the contract for themselves, the plaintiff P went to Washington and got the contract annulled, and procured a contract for the plaintiffs at the same price. On the same day the other plaintiff, T, having no confidence that his partner would succeed at Washington, purchased of the defendant his contract and paid therefor a *bonus* of \$200, and got an order of the defendant, signed in the name of the son, to have the contract transferred to the plaintiffs. This was done without the knowledge of the son, or other authority than such as results from the relation of a father to a minor son. The plaintiff T, in dealing with the defendant, supposed him to be the party in whose name the contract had been taken, and the defendant purposely induced him so to believe. In an action to recover back the *bonus* paid;—*Held*, that as the son had never revoked the sale, but acquiesced in it, and as the contract with the P. O. Department was, at the most, only voidable by the Department on account of the minority of the son, the misrepresentation of the defendant had occasioned no damage to the plaintiffs, even though the plaintiffs would not have made the contract with the defendant if they had known of the son's minority; that the plaintiffs had got just what they purchased, and could not recover. *Id.*, 85.

54. *Rescission*. Where goods are obtained by false practice or misrepresentation, the vendor must, in order to sustain an action for the fraud, offer to rescind the contract of sale at the earliest possible moment after discovering the fraud, and thus abandon his remedy by

contract. By retaining the securities, when any such are given, or by not so offering to rescind, the contract becomes binding upon both parties, and the tort is waived. *Reedfield*, C. J., in *Poor v. Woodburn*, 25 Vt. 284.

55. Thus, where the creditor had sued upon the contract and recovered judgment;—*Held*, that an action on the case for the fraud did not lie. *Dyer v. Tilton*. 23 Vt. 313. 45 Vt. 157.

56. A party to a contract has a right to rescind on account of the fraud of the other party as soon as discovered; or he may proceed and take his rights under the contract, even after discovery of the fraud, and maintain his action for damages for the fraud. A ratification of the contract is not a waiver of the claim to damages for the fraud. *Mallory v. Leach*, 35 Vt. 156. *Kelly v. Pember*, *Id.*, 183.

57. Where goods are purchased, but upon such fraudulent representations on the part of the purchaser, and of the defendant [a third person], as to authorize a rescinding of the sale and a recovery of the property, and the property has come to the defendant and been by him converted into money, the vendor may waive the tort and maintain an action for money. But *quære* as to this, if the purchaser himself acted in good faith. *Phelps v. Conant*, 30 Vt. 277.

58. **Damages.** In an action for a deceit in the sale of a yoke of oxen, sold as and for working cattle, the referee found that the oxen were worth \$25 less for work than falsely represented, and \$10 less for beef. *Held*, that the plaintiff was entitled to the larger sum. *Ladd v. Lord*, 36 Vt. 194.

59. In an action for fraudulent representations in a sale, and actions of this character, the general rule of damages is the difference between the value of the property as it really was at the time of the sale, and what its value would have been had the representation, for which the seller is found liable, been true. He is liable only for such damages as followed in consequence of the particular representation or representations being untrue, for which the jury find him liable. For a disregard of this distinction the judgment below was reversed. *Bowman v. Parker*, 40 Vt. 410.

60. **Pleadings.** In an action for deceit or fraud in a sale, the *scienter* must be alleged and proved. Evidence of an express warranty alone will not support such declaration. *Bates v. Martin*, Brayt. 78. *Barlow v. Enos*, Brayt. 126. 3 Vt. 57.

61. Case of an attempt to draw a declaration sounding in fraud, alleging a fraudulent purpose, without any appropriate facts to found it upon. *Id.* *v. Gray*, 11 Vt. 615.

62. **Evidence.** An action for fraud in the sale of lands may be sustained by parol testimony, and it is not necessary that the fraud

should be apparent on the deed. [The fraud, in this case, was in pointing out wrong boundaries, and misstating the quantity of land conveyed as "more or less."] *Sandford v. Rose*, 2 Tyl. 428.

63. Gross inadequacy of price alone is evidence from which a jury will be warranted in presuming fraud, or mistake, in the contract, unless there are other circumstances in the case which rebut the presumption. *Brown v. Sawyer*, 1 Aik. 180. 17 Vt. 32.

64. In order to the setting aside of a contract for fraud, imposition, or undue influence, positive and direct evidence is not required. Though these must be proved, yet influence is not susceptible of direct proof. *Conant v. Jackson*, 16 Vt. 335.

65. An action for false and fraudulent representations of a person's circumstances and credit, is not an action of a criminal nature, and the plaintiff is entitled to a verdict upon a fair balance of evidence in his favor. *Cutler v. Adams*, 15 Vt. 237.

## FRAUDS, STATUTE OF.

- I. PROMISE OF ADMINISTRATOR.
- II. PROMISE TO ANSWER FOR THE DEBT, &C., OF ANOTHER.
- III. CONTRACT FOR THE SALE OF LANDS.
- IV. AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR.
- V. CONTRACT FOR THE SALE OF GOODS.
- VI. THE MEMORANDUM.
- VII. FORCE OF CONTRACT WITHOUT MEMORANDUM.
- VIII. PLEADING AND EVIDENCE.

### I. PROMISE OF ADMINISTRATOR.

1. A verbal promise of an administrator to pay a debt of his intestate out of his own estate, upon a consideration not for his personal benefit, since the statute of frauds of Nov. 9, 1822, cannot be enforced. *Harrington v. Rich*, 6 Vt. 666.

### II. PROMISE TO ANSWER FOR THE DEBT, &C., OF ANOTHER.

2. **Distinction between independent and collateral promises.** A parol promise to pay the debt of another, the original party remaining still liable, is within the statute of frauds. *Cole v. Shurtleff*, 41 Vt. 311. *Anderson v. Davis*, 9 Vt. 136. *Fullam v. Adams*, 37 Vt. 391.

3. Where a promise is ancillary to and in aid of the promise of another, it is within the statute of frauds. This is always the case,

where there is no new and independent consideration, and there exists another and previous liability. *Newell v. Ingraham*, 15 Vt. 422.

4. Where an agreement is auxiliary to a subsisting agreement which remains in force for the party now claiming on the new contract, there the new contract is collateral to the other, is within the statute of frauds, and must be in writing. But where the first contract is rescinded, superseded, or abandoned, so as not to be in force in the plaintiff's favor, then the new contract is independent, and is not within the statute. *Sinclair v. Richardson*, 12 Vt. 38.

5. The plaintiff, being under a contract with a third person to build a house on land of the defendant and having partly completed it, said to the defendant, "I want you to agree to pay me for the building of the house, or I can do no more to it." The defendant replied, "Do you go on and finish the house, and I will pay you for it, or see you paid," and thereupon the plaintiff went on and completed the house. In an action therefor the court directed a verdict for the defendant. *Held* erroneous;—that if it was then understood that the plaintiff wholly abandoned the first contract and was to proceed entirely on the employment of the defendant, then the new agreement was not collateral, and need not be in writing;—and that this was a question of fact for the jury to find. *Id.*

6. Release of original debtor. Where, by the promise to answer for the debt of another, the primary debtor is released and the secondary liability becomes the sole debt, the case does not come within the statute of frauds. *Watson v. Jacobs*, 29 Vt. 169. *Anderson v. Davis*, 9 Vt. 186. *Williams v. Little*, 35 Vt. 323.

7. The defendant owed B, and B owed the plaintiff a less sum. It was verbally agreed between the three parties, that the defendant would pay B's debt in discharge of B. *Held*, that the defendant was liable upon such agreement. *Williams v. Little*.

8. The promises to answer for the debt, default, &c., of another, named in the statute of frauds, are those of suretyship, or guaranty for the debt of another which subsists against him; for, if the effect of the new promise or contract be to discharge the original debt, the promisor becomes the sole debtor, and there is no debt of another to which his promise is collateral; therefore such promise is not within the purpose and spirit of the statute, and need not be in writing. *Poland, C. J.*, in *Fullam v. Adams*, 37 Vt. 394.

9. But where the promise is a mere contract of guaranty, leaving the original debt subsisting, it comes within the statute, though a distinct consideration therefor be paid directly to the party making the promise. *Id.*, 399.

10. Where auditors reported that the defend-

ant promised to see the plaintiff paid if A hired him, and A did hire him;—*Held*, that this was a collateral agreement, and by the statute of frauds must be in writing. *Skinner v. Conant*, 2 Vt. 458.

11. An undertaking by the defendant, that if the plaintiff would work for B the defendant would pay him if B did not, was *held* to be collateral and within the statute. *Aldrich v. Jewell*, 12 Vt. 125.

12. A, owing B, gave him a verbal order on C for the amount. C refused to pay upon such order, requiring a written order, or else B's accountable receipt for the money to be paid. B received the money and gave his receipt to account to C for it on demand. Afterwards C called on B for payment and threatened suit, of which B gave A notice, relying upon him to settle C's demand. A claimed that he had already paid C in discharge of B, and thereupon A and D requested B to suffer a suit by C, and thus afford A an opportunity to prove his alleged payment and, in consideration thereof, orally promised to indemnify B. *Held*, that such promise of indemnity was not affected by the statute of frauds, and that it bound A and D. *Peck v. Thompson*, 15 Vt. 637.

13. If a promise of indemnity is not collateral to the liability of some other person to the same party, it is not within the statute of frauds. In the absence of all evidence that there was a liability of any other person to the party to whom the promise of indemnity was given, to which such promise could have been collateral, it was *held* to be an original promise, and not within the statute. *Beaman v. Russell*, 20 Vt. 205.

14. The undertaking of a factor, authorized to sell goods on credit, is not a collateral engagement, but a direct and absolute one, that the debts for which the goods are sold shall be paid at the time they are due, or, in other words, that they shall be cash in the principal's account at the time they are due—and so, is not within the statute of frauds. *Bradley v. Richardson* (U. S. C. C.), 23 Vt. 730.

15. The defendant, at the request of S, carried certain papers for him to the plaintiff, that the plaintiff might commence certain suits for S. The plaintiff refused to do so, unless the defendant would become responsible for the advances in the suits. The defendant assured the plaintiff that S was good for that, and, if not, he (defendant) was; and thereupon the plaintiff commenced the suits, and made advances therein. *Held*, that the defendant's undertaking was collateral, and within the statute; and that the defendant was not liable for such advances, he having acted in good faith, although S was not responsible. *Steele v. Towne*, 28 Vt. 771.

16. A subsequent oral promise to pay, in

such case, was *held* to be without consideration and not enforceable. *Id.*

17. Where a partnership was formed, and property previously purchased by one of the partners and not paid for, went into the partnership and for its use;—*Held*, that the other partners were not liable therefor to the original vendor, and that their subsequent promise to pay him was within the statute. *Davis v. Evans*, 39 Vt. 182.

18. The defendant, a widow, promised the plaintiff that if he would not present his account against her deceased husband's estate, she would pay it. To this the plaintiff agreed and did not present his account for allowance. There was no property of the estate except such as by law passed or was assigned to the widow. *Held*, that the promise was within the statute and was also without consideration. *Durant v. Allen*, 48 Vt. 58.

19. The defendant requested the plaintiff, an attorney, to attend to certain suits in which the defendant's son was interested, saying that he (the defendant) would pay for it. The plaintiff did so, and made his charges therefor directly against the defendant. It did not appear that the son ever employed or promised to pay the plaintiff. *Held*, that this was an original promise, and not within the statute. *Hodges v. Hall*, 29 Vt. 209.

20. The preceptor of an academy requested one of his pupils to assist in getting up an exhibition of the pupils, upon the understanding between them that the preceptor would indemnify him for his services and expenses so that he should lose nothing, although subscriptions were relied upon for raising the necessary funds. *Held*, that the promise to pay what the subscriptions did not, was an original promise and not within the statute, there being no other person liable for the same debt. *Walker v. Norton*, 29 Vt. 226.

21. A promise made to one summoned as a trustee, that if he will pay the principal debtor the debt due him, the promisor will indemnify the trustee against any judgment which may be recovered against him in the trustee suit, is not within the statute. *Soule v. Albee*, 31 Vt. 142.

22. **Independent promise for the benefit of a third person.** The plaintiff and defendant were both members, and the latter steward, of a particular Methodist church and society. The defendant, in discharge of his duties as steward, applied to the plaintiff, saying: "I want you to board W (the minister); if you will do it, I will see that you shall be well paid, and have the money for it." The plaintiff boarded W, relying upon the defendant alone for payment. The defendant did not intend to become personally liable, but the plaintiff did not know that he was an officer of the society.

*Held*, that the contract of the defendant was direct, and not within the statute, and that he was liable for the board of W. *Bushee v. Allen*, 31 Vt. 631.

23. The performance of services at the defendant's request and on the faith of his promise to pay, creates a direct original indebtedness, not collateral, and is not within the statute of frauds, although the services were solely for the benefit of a third person, and that known to the plaintiff. *Eddy v. Davidson*, 42 Vt. 56.

24. Though the facts might also create a liability on the part of such third person, they would only show a direct joint indebtedness, not within the statute. *Id.*

25. The plaintiff, a physician, was called upon by the defendant's daughter to attend upon her during her last sickness. She was of full age and married, her husband being in the army, and she stopping with an aunt. The plaintiff made his charges against the defendant. After several visits, the defendant told the plaintiff he wanted him to keep on as before and he would pay him—pay the whole bill. Relying upon this, the plaintiff continued his services. *Held*, that the defendant was liable for the entire bill. *Bagley v. Moulton*, 42 Vt. 184; and see *Roberts v. Griswold*, 35 Vt. 496.

26. **Release of debtor.** Where the defendant, upon a consideration moving from a debtor, agreed to pay his debt to the plaintiff, and the plaintiff consented to charge the debt to the defendant on his request;—*Held*, that this was an original undertaking, by which the original debtor was released, and was not within the statute of frauds. *Gleason v. Briggs*, 28 Vt. 135.

27. The plaintiff made a coat for B, and, in consideration that the plaintiff would deliver it to B, the defendant verbally promised to pay the price. The plaintiff thereupon delivered the coat to B, and B "was discharged from the debt." *Held*, that the promise was not within the statute, and that the defendant was liable as sole debtor in the action of book account. *Watson v. Jacobs*, 29 Vt. 169.

28. The plaintiff, administrator of an estate, delivered all the assets to the defendant, in consideration whereof the defendant promised, by parol, to pay all claims that might thereafter come up against the plaintiff as such administrator. *Held*, that the defendant's promise was an original undertaking of indemnity, and not within the statute. *Randall v. Kelsey*, 46 Vt. 158.

29. The defendant retained the plaintiff as his attorney in any litigation which might grow out of a conveyance made to him by his brother John, who had failed, and in consideration of such retainer promised the plaintiff, verbally, to pay him one-half of a debt of John due to the plaintiff, and to pay the plaintiff reasonable

fees and charges for his services. *Held*, that the promise to pay the debt of John was within the statute, and could not be enforced by an action. *Fullam v. Adams*, 37 Vt. 391.

**30. Promissor receiving funds.** We know of no case in this State, where the parol promise of one to pay the debt of another—the original debtor's liability continuing—has been upheld upon any other consideration than the receipt of some fund or other security, either from the debtor or creditor, charged with the payment of the debt, so that a trust or duty was thereby created to pay the debt; and so that in making payment of the debt he would be really fulfilling an obligation of his own. When carried further than this, the statute of frauds is really repealed. *Poland, C. J. Ib.*, 405.

**31.** Thus, where the plaintiff, as a guardian, held securities and property of his ward and a sum was due him as guardian, and the defendant promised, that if the plaintiff would deliver to him such securities and property of the ward, he would pay the plaintiff the sum so due him as guardian;—*Held*, that such promise was not within the statute. *French v. Thompson*, 6 Vt. 54.

**32.** Where the original debtor places property of any kind in the hands of a third person, and that person, in consideration thereof, promises the creditor to pay the debt, the promise is binding, although not in writing, and although the original debtor may still remain liable. *Wait v. Wait*, 28 Vt. 350. *Merrill v. Englesby*, 28 Vt. 150. *Smith v. Rogers*, 35 Vt. 140.

**33.** The plaintiff and defendant were creditors of the same debtor, and the plaintiff was about to attach certain property of the debtor which the plaintiff knew of and which he could attach in preference to any other person, when the defendant promised, that if the plaintiff would forbear to attach and allow the defendant to attach, he would pay the plaintiff's debt. The plaintiff did so forbear and allowed the defendant to attach and secure his own debt. *Held*, that this promise was not within the statute of frauds. *Lampson v. Hobart*, 28 Vt. 697. (The court treated this as a case where the plaintiff had obtained a security for his debt, and the promise made in consideration of its surrender. *Fullam v. Adams*, 37 Vt. 404.) *Smith v. Rogers*, 35 Vt. 140.

**34.** The plaintiff had an attachment on certain logs of his debtor, Brown, and had trusted certain debtors of Brown. In consideration that the plaintiff would release his attachment on the logs and release the trustees [so that the defendant could bid off the logs at a sheriff's sale and have them sawed by the trustees, *Fullam v. Adams*, 37 Vt. 404] the defendant promised the plaintiff to pay him \$100 of Brown's debt. *Held*, that such promise was

not within the statute. *Cross v. Richardson*, 30 Vt. 641.

**35.** The plaintiff had a debt against the defendant's father, who had died, leaving an ample estate. The defendant, being sole heir, promised the plaintiff to pay the debt, if he would not present his claim for allowance against the father's estate. The plaintiff forbore to so present his claim, whereby it became discharged, and his claim against the funds in the hands of the defendant released. *Held*, that the promise was not within the statute, and was binding. *Templeton v. Bascom*, 33 Vt. 132.

### III. CONTRACTS FOR THE SALE OF LANDS, &C.

**36.** A contract for labor in cutting down trees and clearing land is not within the statute of frauds. *Forbes v. Hamilton*, 2 Tyl. 356.

**37. Standing trees.** In trespass for cutting and removing trees, where the plaintiff's title to the trees was derived from a parol contract of purchase of the land owner, made 21 or 22 years before, of all the timber on certain land to be taken off at any time the vendee should like, though it was expected by the vendor that it would be taken in ten years;—*Held*, that the purchase was of an interest in land, and within the statute of frauds. *Buck v. Pickwell*, 27 Vt. 157. (*Approved*, "to the extent of the matter decided," *Fitch v. Burk*, 38 Vt. 687. "The opinion" in this case has not "the force of authority beyond the very point of judgment." *Sterling v. Baldwin*, 42 Vt. 309.)

**38.** In a case where it was held that the sale of standing timber was a sale of an interest in land, and so the contract was required to be in writing, it was further *held*,—that where the contract was by parol, and the purchaser had paid the consideration and had entered upon the land from time to time and cut part of the timber, it became his as fast as cut, although he could maintain no action for a trespass to the standing timber. *Buck v. Pickwell. Yale v. Seeley*, 15 Vt. 221.

**39.** The statute of frauds, touching the sale of lands, applies to actions brought to enforce rights dependent upon and resulting from the contract; and is not limited to those cases where the contract must necessarily be set out in the declaration. *Buck v. Pickwell*.

**40. Lease.** A contract for a lease of land to commence *in futuro* is within the statute, and must be in writing. *Hawley v. Moody*, 24 Vt. 603.

**41. Exchange.** The parties contracted by parol to exchange lands. The plaintiff conveyed according to the contract. The defendant conveyed but a portion of the land agreed to be conveyed by him, and refused to convey



the residue. *Held*, that the contract was within the statute as "for the sale of lands," and that no action at law lay upon it. *Hibbard v. Whitney*, 18 Vt. 21. 32 Vt. 359. 26 Vt. 597.

**42. Agreement to reconvey.** The plaintiff conveyed land to the defendant, for an agreed price paid, under a parol agreement that the defendant would convey to any purchaser at a higher price whom the plaintiff should find within one year, and the plaintiff should have one-half the gain. *Held*, that the contract was within the statute as "for the sale of lands," that the plaintiff could not recover thereon, nor for his expenses in looking up such purchaser. *Ballard v. Bond*, 32 Vt. 355.

**43. Question of price.** Land was sold at an agreed price per acre, and was measured and computed by the parties, and conveyed and paid for according to such computation. There was an error in the computation, by mutual mistake, by which more was paid for the land than the grantor was entitled to by the contract. *Held*, that the grantee could recover back the excess paid, although the contract was not in writing, and this without an offer to rescind. *White v. Miller*, 22 Vt. 380.

**44.** The plaintiff purchased of defendant a lot of land for \$50, and paid him, and received from the defendant a quit-claim deed thereof; and the defendant promised the plaintiff to refund the money if he did not acquire a good title by the deed. No title was conveyed by the deed. *Held*, that the plaintiff could recover back the money; the court treating it as a question of price only, resting in parol—that is, \$50 for the whole lot, if the defendant had title to it, and in the same proportion for all he had title to. *Thayer v. Viles*, 23 Vt. 494. 41 Vt. 545.

**45.** Where the defendant sold to the plaintiff his share in an estate, for a certain price, and conveyed all his interest in the premises by quit-claim deed reciting the consideration as paid, but agreed by parol that if another heir, supposed to be dead, should turn out to be alive, whereby the share so sold would be reduced, he would refund a certain part of the price paid, and such heir was in fact living;—*Held*, that the plaintiff was entitled to recover upon such parol agreement. *Holbrook v. Holbrook*, 30 Vt. 483.

**46. Guaranty of quantity.** In a bargain, not in writing, for the sale of several parcels of land for one gross price, the defendant represented and guarantied that one of the parcels contained a certain number of acres. After the conveyance and payment of the price, the purchaser brought an action of assumpsit, counting upon such guaranty and adding the common money counts, to recover back the excess paid for an ascertained deficiency in the quantity. *Held*, that the guaranty was part of the con-

tract of sale, and the consideration of the whole contract was entire and indivisible, and, being "a contract for the sale of lands," was within the statute of frauds; and, not being in writing, no action lay upon it. *Dyer v. Graves*, 37 Vt. 369.

**47. Oral agreement conveys no interest.** An oral agreement for the purchase and conveyance of real estate, though followed by part payment and security given for the balance of the price according to the agreement, is but a promise, and conveys no interest, legal or equitable, in the estate, nor amounts in law to a permission or license to enter upon and enjoy it; and the agreement, standing alone, is not even evidence of a license to enter before the conveyance has been made and its terms approved and accepted; and, until the conveyance has been made, the purchaser, without license in fact given, is a trespasser by his entry upon the estate. *Whitcher v. Morey*, 39 Vt. 459.

**48.** The sale of an interest in land, without writing, is not a sufficient consideration for an agreement to pay the purchase price. *Davis v. Farr*, 26 Vt. 592.

**49.** Under a verbal contract for the sale of real estate, the tender of a deed, not accepted, does not entitle the vendor to maintain an action for the price. *King v. Smith*, 33 Vt. 22.

**50. When fully executed, an action lies for the price.** Where land has been conveyed, and the contract of sale, though not in writing, has been fully executed on the part of the grantor, and nothing remains to be done but the payment of the stipulated price, an action at law can be sustained to recover such price. Such case is not within the statute of frauds. *Bank v. Ormsby*, 28 Vt. 721. *Hibbard v. Whitney*, 18 Vt. 23. *Thayer v. Viles*, 23 Vt. 494. *Davis v. Farr*, 26 Vt. 596. *Hodges v. Green*, 28 Vt. 358. *Ballard v. Bond*, 32 Vt. 358. *Dyer v. Graves*, 37 Vt. 376.

**51.** So, in case of a parol sale of a pew in a meeting house, where the purchaser took possession and destroyed the pew and its identity, in repairing and remodelling the meeting house, so that he received all the benefit and advantage he could possibly have had by the purchase, if a deed had been executed;—*Held*, that the vendor could recover the price agreed to be paid, although the contract was not in writing, and no deed had been delivered. *Hodges v. Green*, as explained and limited in *Ballard v. Bond*, 32 Vt. 359.

**52. Action to recover back price.** The plaintiff had made a parol agreement for the purchase of land and paid part of the price and brought suit to recover it back, but, it appearing that the defendant had been ready to convey, there was judgment for the defendant. (29 Vt. 510.) The plaintiff brought a second

action for the money paid, and upon proof that the parties, after the first judgment, treated the contract as still subsisting and open, and the money paid as paid towards the price of the land, and that the plaintiff had offered to pay the balance of the price and the defendant had refused to convey, the plaintiff was allowed to recover. *Cobb v. Hall*, 38 Vt. 288.

#### IV. AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR.

53. It is only where it appears by the agreement that it is *not* to be performed within one year, that the statute of frauds requires it to be in writing. If the thing rests on contingency, and clearly may be performed within a year, the statute does not apply. *Blanchard v. Weeks*, 34 Vt. 589. *Redfield, J.*, in *Hinckley v. Southgate*, 11 Vt. 480. *Sherman v. Champlain Tr. Co.*, 31 Vt. 162, 182.

54. The defendant by parol agreed with the plaintiff to refrain from the practice of medicine at A, while the plaintiff should reside and practice medicine at A, and forever. *Held*, that the engagement of the defendant was personal, terminating at his death, and, as full performance *might* be complete within one year, the agreement was not within the statute. *Blanchard v. Weeks*.

55. An agreement, not in writing, must be capable of being completely performed within one year—that is, on the side of the party sought to be charged with its breach—in order to be exempt from the operation of the 5th clause of the statute of frauds. If to be performed, part in one year and part thereafter, the whole is within the statute. *Squire v. Whipple*, 1 Vt. 69. *Footle v. Emerson*, 10 Vt. 888. *Hinckley v. Southgate*, 11 Vt. 428. *Sheehy v. Adarens*, 41 Vt. 541.

56. Whether or not the statute applies to the case of a verbal contract, which, by its terms, is to be performed within one year by one party but not to be performed within one year by the other party, depends upon which party is sued. In an action against the party who is to perform his part within the year, the statute does not apply; but in an action against the other party, it does apply. *Sheehy v. Adarens*. *Pierce v. Paine*, 28 Vt. 34.

#### V. CONTRACT FOR THE SALE OF GOODS.

57. **Executory contracts.** The statute of frauds (Sec. 2) applies as well to executory contracts for the sale and delivery of goods, as to contracts for immediate sale and delivery. *Ide v. Stanton*, 15 Vt. 685.

58. **Contract to manufacture.** *Held*, (1), Executory contracts are within the statute of frauds; (2), Contracts for the manufacture

and future delivery of goods, wares and merchandise are not within the statute; but, (3), to come within this second class, the contract must require the performance of such work and labor upon the property which may be the subject matter of the contract, as shall materially and essentially change the character of the property itself, so that the property, as it is to be when delivered, shall be substantially different from what it is at the time the contract is entered into. *Ellison v. Brigham*, 38 Vt. 64.

59. The defendant agreed, by parol, to cut down all the trees on his land fit for logs, to cut the same into logs and draw and deliver the same to the plaintiff, at a place named, within the existing period of sledding,—to be paid for at a specified price per cord when delivered and measured. In an action for refusal to cut and deliver the logs;—*Held*, that the contract was not one for manufacture and delivery, but was a contract for the sale of all the logs that the specified trees would make, and was within the statute. *Ib.*

60. **Stock.** The plaintiff, without writing, purchased of the defendant certain shares of stock in a company at a given price then paid, and took delivery of the stock upon the defendant's orally agreeing to take it back and repay the plaintiff therefor, on request. The plaintiff afterwards tendered back the stock, and demanded repayment. *Held*, that the agreement for repayment was part of the original contract of purchase, qualifying it, and that the statute, as to a memorandum in writing, did not apply to it. *Fay v. Wheeler*, 44 Vt. 292.

61. **Earnest—Part payment.** Where a contract, not in writing, is taken out of the statute of frauds by the payment of earnest money, its terms may be afterwards varied by parol in respect to the time of performance, without any new consideration;—"the consideration for the old agreement being imported into the new agreement, which is substituted for it." *Paoker v. Steward*, 34 Vt. 127.

62. Where parties in making a contract omit to do what the statute requires to be done to make a valid contract,—as part payment, &c.,—it requires the consent of both parties to supply, subsequently, the thing omitted. *Willson, J.*, in *Edgerton v. Hodge*, 41 Vt. 676; and *held*, in such case, that a subsequent demand by the seller of part payment, or earnest, though in writing, does not bind him to accept it when offered. *Ib.*

63. **Accepting and receiving.** A contract for the sale of goods, under the second section of the statute of frauds, may be proved by parol, and an action lies thereon, provided the purchaser accepts and receives a part of the goods, &c. (Distinction taken between 1st and 2nd sections.) *Strong v. Dodds*, 47 Vt. 348.

64. In order to perfect a sale of goods, under

the statute, something more is necessary than a mere delivery; the purchaser must "accept and receive part of the goods." *Spencer v. Hale*, 30 Vt. 314. *Gibbs v. Benjamin*, 45 Vt. 124.

**65. Delivery to carrier.** The delivery of goods purchased to a common carrier selected by the purchaser, if accepted by the carrier and forwarded, is a sufficient acceptance and receipt by the purchaser to satisfy the statute. *Spencer v. Hale*.

**66.** The plaintiff, pursuant to the defendant's order, packed the goods ordered on purchase, marked them addressed to the defendant, and delivered them to a railroad company, as ordered, for transportation to the defendant, charges following, and duly advised the defendant. The goods were lost on the way and never came to the defendant. *Held*, that the railroad company was the servant and agent of the defendant, so that the receipt of the goods by it was such a receipt and acceptance by the defendant as answered the statute. *Strong v. Dodds*, 47 348.

**67. Other instances.** The plaintiff sold to the defendant, at auction, 16 sheep, then in the plaintiff's yard, for \$80.00. Upon the defendant's suggestion, the parties put the sheep into another yard of the plaintiff, when the defendant told the plaintiff that if he would keep the sheep until the next Saturday, he (defendant) would then come and get them, and pay all bills. To this the plaintiff assented and so kept the sheep, and on the next Saturday the defendant declined to take the sheep. In an action for the price;—*Held*, that the defendant did so "accept and receive" the sheep, as to satisfy the statute. *Green v. Merriam*, 28 Vt. 801.

**68.** Where a purchaser of goods has an election to repudiate a delivery, as, under the statute of frauds, he must do it immediately or he is bound by the acquiescence as an acceptance. *Spencer v. Hale*, 30 Vt. 314.

**69.** The plaintiff sold to the defendants, by parol, a quantity of logs at a saw mill for a certain price per M feet, board measure, neither party counting or knowing the number of logs, the plaintiff to procure the logs to be sawed into boards at his own expense, but as the defendants should direct. They did direct the miller how the logs should be sawed, and they were sawed accordingly, they informing him that they had bought the logs. Before the logs were sawed, they offered to sell the lumber and engaged a man to draw away the boards from the board-way for them, but he neglected to do so, and the plaintiff, on the call of the miller to clear the board-way, drew away the boards as sawed, and piled them up, and notified the defendants of the measurement and demanded payment, but the defendants refused either to pay or to take the boards. *Held*, that this

was a contract for the sale of the logs as boards, and that there was no acceptance of the boards sufficient to take the case out of the statute. *Gorham v. Fisher*, 30 Vt. 428.

**70.** Under a parol contract, within the statute of frauds, to furnish and deliver a certain quantity of lumber of different specified kinds, at one fixed price per thousand feet for all kinds, the boards and plank to be "square-edged," the plaintiff drew a part of the several kinds, and deposited it on a common near the defendant's house, the defendant helping to unload it. After a time, the defendant observed that some of the boards and plank were "wavy-edged," and sent word to the plaintiff that he should not accept the "wavy-edged" boards and plank. The plaintiff then gave the defendant notice in writing, that he rescinded the contract and notified the defendant not to meddle with nor use the lumber. The lumber had not then been measured, nor any part been used or paid for by the defendant. The defendant afterwards appropriated the lumber. *Held*, that he was liable in trover therefor. *Montgomery v. Ricker*, 43 Vt. 165.

**71. Part payment.** The plaintiff contracted by parol with the defendant for 31 sheep, at a stated price, to be delivered as he should want them for butchering. The defendant delivered 20 upon the contract, which the plaintiff received and paid for at the contract price, as delivered. The defendant refused to deliver the remaining 11 sheep, and this action was brought to recover damages for such refusal. *Held*, that there was an acceptance upon the contract of part of the property purchased, and a payment of part of the purchase money, either of which was sufficient to take the contract out of the statute of frauds, and make it binding as an executory contract. *Richardson v. Squires*, 37 Vt. 640.

**72.** The plaintiff, by verbal contract, sold the defendant a specified number of bushels of potatoes, at a specified price per bushel, amounting to more than \$40. The price falling in market, the defendant wrote the plaintiff to buy no more potatoes until the plaintiff heard from him, and, after this, received one car load upon the contract, and subsequently paid for such car load. *Held*, that this was such part acceptance and payment as took the contract out of statute. *Danforth v. Walker*, 40 Vt. 257.

**73.** H agreed to take of D a quantity of apples, and D sent several barrels more than H agreed to take, with word that what H could not sell he (D) would take back. D afterwards agreed to purchase of H a lot of poultry amounting to more than \$40, and it was then agreed that H should keep all the apples at a price then agreed upon, and this should apply as part payment for the poultry. *Held*, that this was a then present part payment, sufficient under the

statute of frauds. *Dow v. Worthen*, 37 Vt. 108.

74. An antecedent debt, agreed to be paid and extinguished at the time and so actually paid, may be part payment on a contract for the sale of goods, &c., to satisfy the statute, though not shown by writing, indorsement, credit or receipt; but it must be more than an agreement that it *shall* be so applied. It must be *pay down*, and so understood. *Ib.*

#### VI. THE MEMORANDUM.

75. **Completeness.** The written note or memorandum, to satisfy the statute of frauds, must, either by its own language or by reference to something else, contain such a description of the contract actually made, as shall obviate the necessity of resorting to parol evidence in order to supply any term of the contract, essential to its validity. *Ide v. Stanton*, 15 Vt. 685.

76. A stipulated price enters into the legal contemplation of a bargain, or contract of sale; and, therefore, a note or memorandum which does not furnish evidence of the price, is insufficient under the statute. *Ib.*

77. A written admission of a previous oral contract, signed by the party to be charged, satisfies the statute; nor need this be comprised in a single paper, or document, but distinct writings, and of different dates, properly conducing to prove the contract, are competent evidence. *Ib.*

78. The memorandum of a contract, such as to satisfy the statute, must contain the substantial terms of the contract, expressed with such certainty that they may be understood from the contract itself, or from some other writing to which it refers, without resorting to parol evidence. *Bennett, J., in Buck v. Pickwell*, 27 Vt. 167.

79. **Statement of consideration.** The statute does not require that the consideration should appear in writing, but only the promise of the party to be charged. *Smith v. Ide*, 3 Vt. 290;—the word *agreement* being “held susceptible of a meaning somewhat short of its strict legal import, and to be synonymous with *special promise or undertaking*.” *Royce, J., in Ide v. Stanton*, 15 Vt. 691.

80. It is not necessary that the consideration of a written contract should appear in the writing, whether or not the agreement is required by the statute to be in writing, but the consideration may be proved by parol. *Smith v. Ide*, 3 Vt. 290. *Patchin v. Swift*, 21 Vt. 292. *Troy Academy v. Nelson*, 24 Vt. 189. *Gregory, v. Glead*, 33 Vt. 405; and see *Phelps v. Stewart*, 12 Vt. 256.

81. **Kind of writing.** An exception, in a deed of lands, of the timber on the lands which the grantor “had sold to A B” was held not to

be a memorandum of the contract between the grantor and A B, such as to satisfy the statute of frauds. *Buck v. Pickwell*, 27 Vt. 157.

82. June 30, 1864, Adams conveyed by warranty deed to Sterling certain lands, with this reservation in the deed: “Reserving to myself all the hemlock timber standing [thereon] with the right to cut and remove at any time within two years.” August 24, 1864, Adams sold this timber to Quimby and gave this writing signed by Adams: “Sold to Wm. Quimby all the hemlock timber standing and down,” &c., (describing the same timber). “Quimby is to have one year from next June to get the lumber off the land. Received \$100 in full for the timber.” Nov. 22, 1864, Adams executed a quit-claim deed to Sterling, conveying “All the right of timber I reserved in my deed to Sterling on the 30th day of June, 1864, and meaning to include in this deed all the timber that is cut and standing on said lot.” Held, that said writing gave Quimby the right to enter upon the land and to cut and take away the timber, within the time named in the writing, notwithstanding the deeds to Sterling. *Sterling v. Baldwin*, 42 Vt. 306.

83. *Seemle*, that, as this contract gave a right to the soil for a time, it created an interest in land; but, being in writing, it answered the requirement of the statute of frauds; and need not be by deed as between the parties, nor as to Sterling, under the circumstances. (See observations of *Barrett, J.*, on the Vermont statute of conveyances.) *Ib.*

84. **Alteration by parol.** If any of the terms of a written contract, required by the statute to be in writing, are altered by contract not in writing, the entire contract is thereby reduced to the grade of a mere unwritten contract, and no action will lie upon it. *Dana v. Hancock*, 30 Vt. 616.

85. In a written contract for the sale and conveyance of land upon a survey, it was provided that A should make the survey. The survey was not made by A, but by B. In an action on the contract for refusal to convey, the plaintiff offered to prove that A could not be procured to make the survey and that thereupon the parties, orally, mutually agreed upon B, and that he made the survey in their presence. Held inadmissible. *Ib.*

86. **By whom to be signed.** An entry of the names of the seller and buyer of goods sold at auction, of the article sold, and the price at which sold, made by a clerk of the auctioneer, under his direction, in his auction sale book, is a sufficient memorandum to satisfy the statute of frauds. The auctioneer is the agent of both parties. *Harvey v. Stevens*, 43 Vt. 658.

87. The plaintiff's traveling agent took an order for goods from the defendant's clerk, agreeing on the kips, quantities, qualities and prices.

The agent wrote out the order and transmitted it by letter to the plaintiff to be filled. *Held*, that this was not a sufficient note or memorandum of the bargain to answer the statute,—for that such agent was not the agent of the defendant for that purpose, but only the agent of the plaintiff. *Strong v. Dodds*, 47 Vt. 348.

#### VII. FORCE OF CONTRACT WITHOUT MEMORANDUM.

88. The statute of frauds, which prohibits a suit upon certain contracts not in writing, does not make the contract void, but, so far as the same may have been performed, the party, as to what has been done, may defend under it. *Philbrook v. Belknap*, 6 Vt. 383. *Shaw v. Shaw*, *Id.*, 69. *Smith v. Smith*, 14 Vt. 440. *Hawley v. Moody*, 24 Vt. 603. *Cobb v. Hall*, 29 Vt. 510. *Mack v. Bragg*, 30 Vt. 571. *Packer v. Button*, 35 Vt. 188.

89. Such parol agreements are, to all intents, contracts, and perfectly valid for all purposes except actions, so long as they are acted under. *Redfield, J.*, in *Hawley v. Moody*, 24 Vt. 606.

90. Abandonment. That a parol contract for services is within the statute of frauds, where it is an entire contract, as for three years, &c., does not entitle the party rendering services under it to recover for part performance, when he has, without cause, abandoned the contract. *Philbrook v. Belknap*, 6 Vt. 383. *Mack v. Bragg*, 30 Vt. 571.

91. Refusal to perform. Where one has received advances or payments upon a parol contract not enforceable by reason of the statute of frauds, and afterwards repudiates it, the other party may sustain an action against him, as for goods sold, or money had and received, to recover for such advances or payments. *Hawley v. Moody*, 24 Vt. 603.

92. Part performance. At law, part performance of a verbal contract, required to be in writing, will not exempt it from the operation of the statute. *Hibbard v. Whitney*, 13 Vt. 21. 26 Vt. 597. 27 Vt. 187. 32 Vt. 359.

93. Part performance of a parol contract, required by law to be in writing, is no ground for relief at law; and part payment merely does not amount to such part performance as to entitle the party to enforce the contract in equity. *Hawley v. Moody*, 24 Vt. 603.

#### VIII. PLEADING AND EVIDENCE.

94. A declaration upon a contract required by the statute of frauds to be in writing, need not aver it to have been in writing. *Hotchkins v. Ladd*, 36 Vt. 593.

95. The defense of the statute may be shown under the general issue, or be pleaded specially, at the option of the defendant, *Id.*

96. A contract required by the first section of the statute of frauds to be in writing, is not illegal though not in writing, but only not capable of being enforced;—an immunity which the defendant may waive if he sees fit. Thus, where the objection to the proof of such contract by parol evidence was first raised by the defendant after the argument to the jury had commenced;—*Held*, that he had waived his right to object thereto. *Montgomery v. Edwards*, 46 Vt. 151. 47 Vt. 354.

#### FRAUDULENT CONVEYANCE.

##### I. WHAT IS, AND WHAT IS NOT; EFFECT; EVIDENCE.

##### II. AVOIDANCE BY ADMINISTRATOR.

##### III. THE PENALTY.

1. When it is incurred, and when not.
2. Action to recover penalty.

##### I. WHAT IS, AND WHAT IS NOT; EFFECT; EVIDENCE.

##### 1. To secure future support—Voluntary.

The conveyance by a debtor of all his property to secure his future support, or that of himself and family, or others, without making a provision for his debts, is, as to creditors not provided for, fraudulent and void. *Jones v. Spear*, 21 Vt. 426. *Crane v. Stickles*, 15 Vt. 252. 23 Vt. 549.

2. A party cannot, either by gift or in consideration of an agreement for support for life, convey his property so that it shall be valid against his creditors, without reserving what is amply sufficient for the payment of his then existing debts; this sufficiency depending upon the amount and nature, in connection with the situation, of the property reserved, in reference to the facilities it affords the creditors for collecting their debts. Cash on hand, and debts not attachable by trustee process, would not be a sufficient reservation. *Church v. Chapin*, 35 Vt. 223.

3. A voluntary conveyance in consideration of love and affection, or an absolute conveyance for an inadequate consideration, where the grantor at the time has sufficient other property to pay all his debts, and no fraud is intended, will not be defeated, as to existing creditors, by subsequent events rendering the grantor insolvent,—as, a flood; and is valid as against subsequent creditors of the grantor. *Brackett v. Waite*, 4 Vt. 389. *S. C.*, 6 Vt. 411. *Dewey v. Long*, 25 Vt. 564.

4. The intestate conveyed land to his sons, in consideration of their agreement to support himself and wife for their lives, and to pay certain sums as gifts to charities and to the other

children, such agreement being secured on the land. Two years afterwards the intestate contracted a debt, which, after his death, was allowed against his estate, which proved insufficient to pay the debt. *Held*, that the conveyance was not fraudulent; that neither the conveyance nor the gifts were revocable; and that the grantees, who were administrators, were not bound to account for the land in the settlement of the estate. *Rut. & Bur. R. Co. v. Powers*, 25 Vt. 15.

**5. Deed absolute—Unexpressed condition.** A conveyance absolute in form, though intended in trust, is not *per se* fraudulent, although taking a conveyance in that form, not expressing the trust in the deed, may afford strong evidence of a fraudulent intent. *Brooks v. Claves*, 10 Vt. 37. *Spaulding v. Austin*, 2 Vt. 555. *Gibson v. Seymour*, 3 Vt. 565.

**6.** An absolute conveyance of property with a secret agreement of defeasance, written or verbal, is not regarded in this State as a conclusive badge of fraud, but is open to suspicion. *Smith v. Onion*, 19 Vt. 427.

**7.** One may take security for a debt by a deed absolute, or by a bill of sale, when intended as a security; but if claimed as an absolute purchase, and he seeks by it to protect from creditors the property of the vendor, this is evidence of fraud. *Barker v. French*, 18 Vt. 460. If represented by the parties and justified as being an actual absolute conveyance of the property, it is, for that reason alone, void. *Redfield, C. J.*, in *Webster v. Denison*, 25 Vt. 496.

**8.** A conveyed to B all his real estate, upon consideration that B should pay all A's debts. The plaintiff having such a debt called on B for payment, who claimed offsets, and they compromised the matter by B's paying one-half, and by a surrender of the claims on both sides. Before this, A had told the plaintiff to get what he could of B, and that he (A) would pay the balance. After the compromise, the plaintiff sued A and took judgment for one-half the original claim, and levied his execution upon the lands conveyed to B. B had no knowledge of A's promise, nor of the suit, until after the judgment. In an action of ejectment against B, to recover the lands levied upon;—*Held*, that there was no evidence that the deed to B was made with intent to defraud or delay the plaintiff as a creditor; that so far as B was concerned, the claim was extinguished by the compromise and payment; and that the judgment should be regarded either as a debt against A accruing subsequent to the deed, for the payment of which neither B nor the land was holden, or else as an attempted fraud upon the compromise and settlement, by attempting to give it the appearance of a prior claim, *Ingals v. Brooks*, 29 Vt. 398.

**9. Consideration inadequate.** A conveyance may be void as to creditors of the grantor, for mere inadequacy of the consideration paid—as, where the price paid for a farm was less than half the value. *Church v. Chapin*, 35 Vt. 223.

**10.** In the case of a sale claimed to be fraudulent as to creditors, the court charged the jury generally, that the sale was valid if made *bona fide*, and for a valuable consideration, and the buyer took possession *before* the attachment. *Held* defective and erroneous, in that it omitted the element of the adequacy of the consideration, as also possession *at the time* of the attachment; that it was the duty of the judge not only to instruct the jury in the law and the facts necessary to be found, but particularly to point out what testimony would constitute the proper evidence of such facts. *Durkee v. Mahoney*, 1 Aik. 116.

**11. Full consideration.** A sale may be void as to creditors for fraud, although the purchaser may pay a full consideration and take possession—as, where it is done to enable the seller to abscond and cheat his creditors. *Fuller v. Sears*, 5 Vt. 527.

**12. Intent must be fraudulent in both parties.** To render a sale void as to creditors on the ground of fraud, both the vendor and vendee must participate in the intent to delay the creditors of the vendor, at least to the extent of the vendee's having knowledge of such intent on the part of the vendor. *Leach v. Francis*, 41 Vt. 670. 43 Vt. 48.

**13.** The plaintiff was owner of a foundry, and tenant in common with E in another foundry. E was insolvent, and for the purpose of withdrawing his property from the reach of his creditors, sold his interest to the plaintiff. The plaintiff knew of E's purpose and his insolvency, but purchased the property, paying a full consideration therefor, not with the intent of aiding E in his purpose, but for his own individual use, and only because he thought it necessary for the preservation and promotion of his own business interests, by preventing a ruinous competition. *Held*, that he could hold such property against the creditors of E. *Root v. Reynolds*, 32 Vt. 139.

**14.** But if, in such case, the purchaser is a simple volunteer, without any adequate motive or purpose except to buy the property cheap, this would be a lending of himself to the fraud of the seller, although he might not be actuated by a wish to defraud the seller's creditors. *Edgell v. Lowell*, 4 Vt. 405, as explained by *Root v. Reynolds*.

**15. Preference.** A creditor has the same right to secure his debt by purchase, or other contract, that he would have by attachment; and though not a creditor to the full amount of the purchase, if the purchase is made upon

adequate consideration and without any intent to defeat or delay any of the creditors of the vendor, it cannot be impeached by such creditors, even if the vendor was, at the time, threatened with attachments, and this was known to the purchaser. *Lyon v. Rood*, 12 Vt. 238. 32 Vt. 145.

16. There is nothing fraudulent as to creditors, nor objectionable, in giving a note to a surety to indemnify him against his suretyship, and it is no objection to his suing and recovering upon the note, that he has not paid the debt for which he is surety. *Fletcher v. Edson*, 8 Vt. 294.

17. So, one in failing circumstances may give a note payable before the maturity of his debt, for the purpose of having it immediately sued and secured by attachment, and it will be good as against other existing creditors. *Shedd v. Bank of Brattleboro*, 32 Vt. 709.

18. Subsequent creditors. A conveyance void as to existing creditors, by reason of a fraudulent intent, is void also as to subsequent creditors. *McLane v. Johnson*, 43 Vt. 48.

19. Good between the parties. As a general rule, actions will not be entertained which are predicated upon a prohibited transaction; but the statute prohibiting conveyances, contracts, &c., in fraud of creditors (G. S. c. 118, s. 32), limits the effect of the prohibition, by enacting that such conveyances, contracts, &c., "shall as against the party or parties only whose right, debt or duty is attempted to be avoided, &c., be null and void." In an action by the payee of a promissory note against the maker, which was founded upon consideration;—*Held* to be no defense, that the note was covinous and designed by both parties to defraud creditors; and *semble*, that the decision would be the same at common law. *Carpenter v. McClure*, 39 Vt. 9. See *Peaslee v. Burney*, 1 D. Chip. 331. *Martin v. Martin*, 1 Vt. 91. *Gifford v. Ford*, 5 Vt. 532. *Conner v. Carpenter*, 28 Vt. 237. *Boutwell v. McClure*, 30 Vt. 674. *Seaver v. Pierce*, 42 Vt. 325.

20. Where a husband, to avoid being compelled by the town to contribute to the support of his mother, conveyed land to his wife without consideration;—*Held*, that such conveyance was good as between the parties, and he could not allege his own fraud to avoid it. *Roberts v. Lund*, 45 Vt. 82.

21. Evidence of fraud. To prove the fraud of the grantor in a conveyance claimed to be fraudulent as to creditors, his acts and declarations before the conveyance are evidence against the grantee. *McLane v. Johnson*, 43 Vt. 48. *Edgell v. Lovell*, 4 Vt. 405.

22. But such acts and declarations are evidence only of his own fraudulent purpose. The participation of the grantee must be shown by

separate and independent evidence. *Eaton v. Cooper*, 29 Vt. 444.

23. On the question whether a particular sale was fictitious and colorable;—*Held*, that evidence of other like fraudulent dealings between the parties at about the time in question, was admissible as evidence of the intent. *Pierce v. Hoffman*, 24 Vt. 525.

24. Fraud in law. The doctrine of *fraud in law*—constructive fraud—as applicable to a change of title in personal property without change of possession, has been adopted in this State on the ground of *policy*. It propounds a kind of rule of evidence, prescribing what facts proved shall be held to show the existence of such fraud, and employs the want of change of possession as a kind of conclusive *estoppel in pais*. *Barrett, J.*, in *Daniels v. Nelson*, 41 Vt. 161.

## II. AVOIDANCE BY ADMINISTRATOR.

25. An administrator cannot avoid the deed of his intestate, though made to defraud creditors, and although there be no other fund, except the lands conveyed, for the payment of debts. *Peaslee v. Burney*, 1 D. Chip. 331. *Martin v. Martin*, 1 Vt. 91. (Changed by stat. 1831. G. S. c. 52, s. 48, and *seq.*)

26. The statute authorizing an administrator, where there is a deficiency of assets, to sue for any property of the intestate by him conveyed with intent to defraud his creditors, does not extend to a case where a full consideration was paid to the intestate, and so the assets of the estate were not prejudiced thereby; for, otherwise, this would be making the defendant pay a second time. *Allen v. Mower*, 17 Vt. 61. *Allen v. White*, 17 Vt. 69.

27. On a bill in equity by an administrator to set aside his intestate's conveyance as fraudulent as to creditors, and to appropriate the estate to the payment of debts;—*Held*, that this is not properly the case of a trust, and the question as to proof of a trust by parol is not applicable; but the question is one of fraudulent intent, to be proved as such intent may be proved in any other case. *McLane v. Johnson*, 43 Vt. 48.

## III. THE PENALTY.

### 1. When it is incurred, and when not.

28. In general. A conveyance may be fraudulent so as to be void against the grantor's creditors, and yet the statute penalty not be incurred. *Brooks v. Claves*, 10 Vt. 37. See 26 Vt. 734.

29. The word *right*, as used in the statute against fraudulent conveyances (G. S. c. 118, s. 32), is synonymous with debt, or duty, or is

confined to a right of the nature of a debt, and does not mean a mere right to attach the grantor's property. *Ib.*

30. Where a conveyance is made with intent to have the property disposed of and appropriated to the payment of the debts of the grantor, the parties thereto are not subject to the penalty for a fraudulent conveyance, although they may have intended to prevent the attachment of the property, and a consequent sacrifice thereof;—and yet the conveyance may be inoperative. *Ib.*

31. It seems, that if the intent of one of the parties to a conveyance or judgment is only to delay creditors temporarily by preventing an attachment, the penalty under G. S. c. 113, s. 38, is not incurred by either party, although the conveyance or judgment may be void. *Barnum v. Hackett*, 35 Vt. 77.

32. A fraud may be committed in the conveyance of one's individual property to avoid his partnership debts, as much as to avoid any other debt he owes, and equally subject him to the statute penalty. *Forbes v. Davison*, 11 Vt. 660.

33. A conveyance made to defraud all creditors is made to defraud each creditor, and entitles either one to sue for the penalty. *Ib.*

34. **Intent of both parties.** In order to subject one to the penalty for being a party to a fraudulent conveyance, or judgment, the intent to defraud must exist in the minds of both parties, at the time of the conveyance or judgment. *Brooks v. Clages*, 10 Vt. 87. *Smith v. Kinne*, 19 Vt. 564. *Barnum v. Hackett*, 35 Vt. 77.

35. But where the party on one side consists of two or more persons, it is not necessary that such corrupt intent exist in all such persons, but such as participate in the combination or common criminal intent, and those only, are liable. *Barnum v. Hackett*.

36. In a *qui tam* action to recover the penalty for receiving a fraudulent conveyance;—*Held*, that although the intent of the grantor was fraudulent, if the defendant received the conveyance in good faith, he was not liable; and that although he was aware of the fraudulent intent of the grantor, the burden of proof was not changed so as to make it incumbent on him to prove that in conveying the land to a third person, at the request of the grantor, he acted in good faith. His intent, in this respect, was not within the issue. *Smith v. Kinne*, 19 Vt. 564.

37. **Justifying.** A party to a judgment, or conveyance, who assents to it and sets it up as *bona fide*, knowing it to be fraudulent, is subject to the statute penalty although not a party to the original fraud, and even though the judgment was rendered or the conveyance

made without his knowledge. *Wright v. Eldred*, 2 Aik. 401.

38. The acceptance of a fraudulent conveyance with knowledge of its object, is of itself a justification of the same. *Forbes v. Davison*, 11 Vt. 660.

39. **As to consideration.** One may become party to a fraudulent conveyance as a purchaser, so as to be subject to the statute penalty therefor, although he may pay a full consideration on his purchase, if he participates in the fraudulent intent of the grantor. *Colgate v. Hill*, 20 Vt. 56. *Lowell v. Edgell*, 4 Vt. 405. 32 Vt. 144. 43 Vt. 55.

40. **Conveyance made in another State.** A conveyance of property, however fraudulently intended or conceived, made in another State, cannot be a breach of our penal laws, or subject the party to a penalty therefor. *Slack v. Gibbs*, 14 Vt. 357.

## 2. Action to recover penalty.

41. **Parties.** A surety is so far a creditor of his principal, from the date of his suretyship, that he is treated as a "party aggrieved" by a subsequent fraudulent conveyance of his principal; and his right to sue and recover the penalty given by the statute is perfected by his subsequent payment of the debt. *Beach v. Boynton*, 26 Vt. 725. 28 Vt. 393.

42. Before the statute of 1844, No. 21 (G. S. c. 113, s. 34), the grantor and grantee in a fraudulent conveyance could not be joined, as defendants, in a *qui tam* action for the penalty. *Slack v. Gibbs*, 14 Vt. 357.

43. Several creditors, having distinct debts due them severally, cannot join in such action, to recover the penalty. *Carroll v. Aldrich*, 17 Vt. 569.

44. **Declaration.** *Held*, that it was not necessary that the declaration should conclude *contra formam statuti*, inasmuch as such conveyance was an offense at common law. *Fuller v. Fuller*, 4 Vt. 123.

45. **Evidence.** In an action to recover the penalty for a fraudulent conveyance, full proof must be made, as in criminal cases. *Brooks v. Clages*, 10 Vt. 87. 13 Vt. 548.

46. In a *qui tam* action by a creditor against a party to a fraudulent conveyance of his debtor;—*Held*, that the admissions of the debtor, not a party, acknowledging his indebtedness to the plaintiff, which were made before the alleged fraudulent conveyance, were admissible to establish such indebtedness; but that those made afterwards were not. *Aiken v. Peck*, 22 Vt. 255.

47. The subsequent admission of the party confessing the judgment, but not a party to this suit, that the judgment was fraudulent,



was held not admissible. *Barnum v. Hackett*, 35 Vt. 77.

48. **Recovery.** If a conveyance is made to defraud a creditor, the right to an action for the statute penalty immediately accrues. The recovery of the penalty does not pay the debt, nor does the collection, or payment, or assignment of the debt cancel the penalty, or affect the action. *Forbes v. Davison*, 11 Vt. 660.

49. The penalty for being party to a fraudulent note, judgment, &c., is the whole sum mentioned in such note, judgment, &c., although but part of the consideration was fraudulent. *Webb v. Long*, 17 Vt. 587. *Wright v. Eldred*, 2 Aik. 401.

## FUGITIVE.

1. The governor of this State was held not authorized to surrender to the governor of Canada, on his application, one who had committed a felony in Canada, and had escaped into this State. Such fugitive, having been arrested by the warrant of the governor of the State for the purpose of such surrender, was released on *habeas corpus*. *Ex parte Holmes*, 12 Vt. 631.

2. Article 4, s. 2, of the U. S. constitution and the U. S. statute of 1798, relative to the surrender of fugitives from justice, apply to a fugitive who has been indicted for obtaining money or property by false pretences in a State which has, by statute, made that a crime. *In re Greenough*, 31 Vt. 279.

## G.

### GAMING.

Where two or more game with another, under a secret agreement to divide between them what either may win from him;—*Held*, that they are liable jointly and severally, as tort feorsors, for whatever may have been won by, or paid to, either of them; and that a judgment recovered against one of the confederates, unsatisfied, is no bar to a recovery against the others, although the action is assumpsit, as prescribed by the statute (G. S. c. 119, s. 18)—it being for a tort in fact. *Preston v. Hutchinson*, 29 Vt. 144.

### GIFT.

1. **Necessity of delivery.** A mere agreement to give cannot be enforced; and a gift without delivery, whether *inter vivos* or *causa mortis*, is ineffectual, both at law and in chancery. *Carpenter v. Dodge*, 20 Vt. 595.

2. A promise to give, to take effect only after the death of the promissor, without delivery of the promised gift, is void. *Frost v. Frost*, 33 Vt. 639.

3. The intestate promised the plaintiff to pay her after his death a certain sum per year while she should live with him and keep his house. *Held*, that if the consideration of this promise was understood by the parties to be partly for such services, and partly for the purposes of a mortuary gift, the plaintiff could recover only for such part as was intended as compensation for the services. *Id.*

4. A gift by deed of personal property, for valuable consideration expressed, transfers the property without delivery of it. *Redfield, C. J.*, in *Sherman v. Dodge*, 28 Vt. 31.

5. A deposited in the defendant savings bank, Jan. 5, 1864, \$220 of her own money in the name of B, her niece, and took a deposit book in which, by her direction, was entered by the treasurer: "1864, No. 530. B deposited \$220," and a like entry was made on the treasurer's books. B died in May, 1865, and A in August, 1865. A retained the book in her own possession during her life, and it was found among her papers after her decease. *Held*, that the transaction constituted an agreement, a legal privity between the bank and B, by force of which the bank became accountable to her and to no other person; and A never having asserted any right to the money, nor made any effort to recall it, it was to be treated as a perfected gift to B. *Howard v. Savings Bank*, 40 Vt. 597.

6. Where the consideration for the enlistment of a soldier to the credit of a town was its agreement to pay a bounty of \$1,000, to be paid to the soldier's minor son with interest when he should arrive at the age of 21 years, or, in case of the decease of the son before that time, then to the soldier's wife, and this was consummated by the giving of a town order expressed in like terms;—*Held*, that on the death of such soldier, said order and claim was not a part of his estate to be inventoried, but was from its origin vested in the son. *Mason v. Hyde*, 41 Vt. 232.

7. The testatrix had \$300 which she intended to give to her nephew, Daniel Blanchard, if she should not live to want it; and, on expressing this intention to one Sheldon, and her wish to

so invest the money that, if she should need any part of it in her life time, she could collect it, but, if she died without collecting it, the money and interest should go to said D B, Sheldon proposed to take the money and furnish security that her desire should be carried out. The testatrix thereupon delivered Sheldon the money and took his note, with surety, promising to pay her "\$800 with annual interest on demand, if she called for it before she deceased, if not, to be paid to Daniel Blanchard by her order." She never called for the money, but retained the note, and it was found with her other papers after her decease. *Held*, that the delivery of the \$800 to Sheldon was for D B and vested the property in him, subject to be defeated only by the testatrix calling for it, and that Sheldon continued to hold the money for D B so long as the testatrix refrained from calling for it, and that this was good as a gift *inter vivos*; and in an action of trover by D B for the note, —*held*, that he was entitled to it as against the executor. *Blanchard v. Sheldon*, 48 Vt. 512.

**8. Causa mortis.** A *donatio causa mortis* is properly a gift of personal property by a party who is in peril of death, upon condition that it shall presently belong to the donee in case the donor dies, but not otherwise. There can be no such valid donation—1st, unless the gift be with a view to the donor's death; 2d, unless it be conditioned to take effect only on the donor's death by his existing disorder, or in his existing illness; and 3d, unless there be an actual delivery of the subject of the donation. *Smith v. Kittridge*, 21 Vt. 288. *French v. Raymond*, 39 Vt. 623. *Blanchard v. Sheldon*. *Holley v. Adams*, 16 Vt. 206.

9. The donor's own promissory note is rather a promise to give than a gift, and is not the subject of a gift *causa mortis*. *Smith v. Kittridge*.

10. But a note against a third person may be. *Id.* *Caldwell v. Renfrew*, 88 Vt. 213. *McConnell v. McConnell*, 11 Vt. 290.

11. A gift made by a person in ordinary health cannot be sustained as a *donatio causa mortis*. *Smith v. Kittridge*, 21 Vt. 288. *Blanchard v. Sheldon*, 48 Vt. 512.

12. S had sent money at different times, to the amount of \$100, to her uncle to be put into the savings bank for her, which he had done, himself taking and always keeping the bank book. In her last sickness at his house, she said she gave her money to him—that it was all his. Nothing was delivered, and it did not appear that she knew there was any bank book. *Held*, that for want of a delivery, the gift could not take effect *causa mortis*. *French v. Raymond*, 39 Vt. 623.

13. The delivery in a gift *causa mortis*, as in gifts *inter vivos*, may be to a third person in trust to hold for the donee, and the husband of

the donor may be such trustee. *Caldwell v. Renfrew*. *Blanchard v. Sheldon*.

14. And *semble*, he might be a donee *causa mortis*. *Caldwell v. Renfrew*.

15. A gift of real estate cannot be sustained as a *donatio causa mortis*, for that extends only to personalty. *Meach v. Meach*, 24 Vt. 591.

16. M being desperately sick, in prospect of certain and speedy death, executed to his wife a deed in common form of all his real estate, valued at \$10,000, and at the same time executed to her a deed of all his personal estate, consisting of stock on his farm and choses in action, and all of which he should be possessed at his decease. Both deeds were duly recorded. M continued hopelessly sick for nearly a month, when he died. Upon a bill by the widow against the administrator;—*Held*, (1), That the deed of the real estate could not be upheld as a post-nuptial settlement; nor as a *donatio causa mortis*; nor as a testamentary disposition of the estate; (2), That the deed of the personal property was valid as a *donatio causa mortis*. *Id.*

GOVERNOR—*See* FUGITIVE.

GOVERNOR AND COUNCIL—*See* STATUTE, I.

### GOVERNOR'S RIGHT.

1. The Governor's right in the New Hampshire charters is located in severalty by the charters. *Wentworth v. Strong*, 1 Tyl. 191.

2. The "Governor's Right," as commonly indicated in the town charters, is a grant in severalty. If title to it fail in part, as by reason of a previous grant, there is no right to compensation to be taken out of the other lands granted. *Strong v. Paine*, 1 D. Chip. 201.

3. A township was granted in sixty-nine equal shares to persons named, among whom was named "His Excellency Benning Wentworth, Esq., a tract as marked in the plan B W, to contain 500 acres, which is to be accounted two of the within shares." These shares were not designated on the plan by the letters B W. *Held*, that although these shares could not vest in severalty, yet the grant was not void, but conveyed two shares undivided in the whole town, and not a located tract of 500 acres. *Sumner v. Conant*, 10 Vt. 9.

### GRANTS.

1. **New Hampshire grants.** The Governor of New Hampshire, while this territory was under that jurisdiction, and after the transfer

to New York, the Governor of that province, had a power to grant such lands as were then in the right of the King. These grants were not made in the personal or even jurisdictional right of the Governors, but by royal authority given for that purpose, and they are to be considered as royal grants. The King was, in view of the law, the ultimate owner of all the lands within his dominion, and had the reversion in himself. An estate in fee was said to be derived out of the King's right, and to be subordinate to that right. Agreeably to this doctrine, a surrender to the King might be made of a former grant. On a surrender, the King was in of his former right and might grant again, as he pleased. *Paine v. Smead*, N. Chip. 99. *S. C.*, D. Chip. 56. 3 Vt. 560.

2. The surrender of a New Hampshire charter to the Royal Governor of the Province of New York, after this territory was transferred to New York, enabled him to re-grant the same lands, and his grant in confirmation of the rights under the New Hampshire charter was valid. *Id.*

3. **Grants by legislature.** A grant by the legislature, either to individuals or to a foreign corporation, gives them a capacity to take the thing granted. *Lord v. Bigelow*, 8 Vt. 445.

4. A legislative grant to a corporation aggregate vests an absolute title without words of perpetuity. Such grant cannot be afterwards controlled by the legislature, any more than an absolute grant to individuals. *Caledonia Co. Grammar School v. Burt*, 11 Vt. 632.

5. The legislature are perpetually bound by the conditions of all grants made by them, the same as individuals; but, after a grant is once made, no legislature can annex new terms or conditions to the tenure or title of the thing granted, even of exemption or privilege to the grantee, which a subsequent legislature may not repeal. *Herriok v. Randolph*, 13 Vt. 525. See CONSTITUTIONAL LAW, I.

6. **Public rights in general.** The legal title to the rights of land in a township, which, by the charter, are reserved for public uses, and are placed "under the charge, direction and disposal of the inhabitants of such township forever," vests in the municipal corporation, but as a trustee in the strictest sense, for the uses named. *Montpelier v. East Montpelier*, 27 Vt. 704. *S. C.*, 29 Vt. 12. *White v. Fuller*, 38 Vt. 193. (*Pawlet v. Clark*, 9 Cranch, 292.)

7. The legislature has no power to change the grant of the public rights as made in the town charter, or the appropriation of the proceeds thereof, without consent of the town interested; but may, with such consent, as in this case. *Poultney v. Wells*, 1 Aik. 180.

8. A conveyance in fee by selectmen of the public lands, where they are empowered by the

statute only to lease them reserving an annual rent, is void. *Bush v. Whitney*, 1 D. Chip. 369. *Lampoon v. New Haven*, 2 Vt. 14. *Williams v. Goddard*, 8 Vt. 500. *White v. Fuller*, 38 Vt. 205.

9. Before division of a town by draft, the proprietors may, by the statute, vote to a public right the lot on which a settler is placed under that right. *Evarts v. Dunton*, Brayt. 70.

10. The same rule of acquiescence applies to the location of the public lands, as to the lands of individuals. *Boothe v. Coventry*, 4 Vt. 295.

11. **Grammar school lands.** Where the charter of a town was granted by the State to 64 proprietors, each to take one-seventieth part, and six-seventieths were reserved for the use of county grammar schools, &c.;—*Held*, that such six-seventieths never vested in the proprietors, to hold in trust or otherwise, but remained in the State, and were at its entire disposal for the uses named. *Grammar School v. Burt*, 11 Vt. 632.

12. The legislature has absolute and entire control and disposal over the grammar school lands reserved in the town charters, for the uses and purposes for which they were reserved. *Orange Co. Grammar School v. Dodge*, Brayt. 223. *Caledonia Co. Grammar School v. Burt*. *Orleans Co. Grammar School v. Parker*, 25 Vt. 696. *White v. Fuller*, 38 Vt. 198.

13. **Propagation society.** The statute granting to towns the "society lots," only vests the uses in the towns, and does not affect the legal estate. *Rood v. Willard*, Brayt. 66.

14. The selectmen of a town cannot maintain ejectment to recover lands granted to the "Propagation Society." *Colchester v. Hill*, Brayt. 65.

15. **First settled minister.** The right granted or reserved in a town charter to the first settled minister, does not vest until a minister is settled, but remains under the temporary control of the legislature, who may, until such settlement, appropriate the use and avails, —as for the benefit of the town. *Poultney v. Wells*, 1 Aik. 180.

16. The right of land, variously expressed in the several town charters as reserved for the first settled minister of the gospel, becomes vested in the first minister duly settled, and when once vested his title does not become divested by any after separation or the dissolving of his connection with the inhabitants, as minister. *Dow v. Hinesburgh*, 2 Aik. 18. *Williams v. North Hero*, 46 Vt. 301.

17. A town charter reserved "lands to the amount of one right to be and remain for the purpose of settlement of a minister and ministers of the gospel in said town forever,"—and declared that this right, as likewise the right for common schools, and for the social worship of

God, "together with their improvements, rights, rents, profits, dues and interests, shall remain unalienably appropriated to the uses and purposes for which they are respectively assigned, and be under the charge, direction and disposal of the inhabitants of said town ship forever." *Held*, that the reservation intended a succession of settled ministers, and that the right did not vest absolutely in the minister first settled, and that he could not convey a fee therein. *Williams v. Goddard*, 8 Vt. 492. 39 Vt. 495. 46 Vt. 818.

18. To constitute a first settled minister, so as to entitle a person to the right by that name usually reserved by the Vermont and New Hampshire charters, there must be a permanent settlement and engagement of him as minister, according to then existing laws, to continue, as for life. *Sheldon v. Goodsell*, 1 Aik. 225. *Dow v. Hinesburgh*, 2 Aik. 18. *Charleston v. Allen*, 6 Vt. 633. 46 Vt. 320.

19. The charter of the town of "Two Heroes," embracing South Island and North Island, reserved to public uses six rights or shares, among which was "one right for the first settled minister of the gospel," \* \* "to be under the charge, direction and disposal of the inhabitants of said island forever." *Held*, (1), that the participation of the inhabitants in such disposal was to be such as should be provided by the laws in existence at the time when such settlement of a minister should at any time be made; (2), that in order to the valid settlement of a minister, so as to vest in him the title to such right, it was not necessary that the inhabitants should participate in their corporate or municipal capacity, but only in their individual or social capacity; and that such settlement might be made by a few of them, acting according to the recognized forms and modes adopted in such cases. *Williams v. North Hero*, 46 Vt. 301.

20. Case illustrating the valid settlement of a minister of the gospel, with reference to the title to the right reserved in the town charter for the first settled minister;—also, one attempted by fraud,—the claimant having before surrendered his credentials as a minister, and ceased to be a member of any church. *Ib.*

21. **Grants by private persons.** Lands conveyed to Middlebury College for the use of the college, although not by charter, were held "sequestered to public use." *Middlebury College v. Cheney*, 1 Vt. 336.

22. Where an acre of land was conveyed to a town for the purpose of building a school house thereon and maintaining a school;—*Held*, that the town, having built the school house and a school being maintained therein, did not forfeit the land, or any part of it, by other uses of the land not inconsistent with the object of the conveyance. *Castleton v. Langdon*, 19 Vt. 210.

23. A grant of land, although carrying everything belonging to the land as an incident or appurtenant to it, passes only such appurtenances as existed at the time of the grant; it does not create a new one. *Swasey v. Brooks*, 30 Vt. 691.

24. **Reservation.** A reservation is something taken from the whole thing covered by the general terms of the grant, and cuts down and lessens the grant from what it would be except for the reservation. *Miller v. Lopham*, 44 Vt. 416.

## GUARANTY.

- I. CONSTRUCTION AND EFFECT.
- II. CONDITIONS OF GUARANTOR'S LIABILITY.
- III. SATISFACTION AND RELEASE.
- IV. ACTION.

### I. CONSTRUCTION AND EFFECT.

1. **Rule of construction.** In the construction of a guaranty, technical rules are not to be resorted to where the meaning of the parties is plain and obvious. *Noyes v. Nichols*, 28 Vt. 159.

2. **Absolute undertaking.** One who stipulates for a thing to be done by himself or another, is bound to see it done. Where the terms of a guaranty are that the principal shall pay, or that payment shall be made, this is an absolute undertaking, and no demand of payment of the principal, or notice of his default, is necessary to charge the guarantor. *Smith v. Ide*, 8 Vt. 290. *Knapp v. Parker*, 6 Vt. 642. *Train v. Jones*, 11 Vt. 444. *Peck v. Barney*, 18 Vt. 93. 18 Vt. 35. *Noyes v. Nichols*, 28 Vt. 159. *Mitchell v. Clark*, 35 Vt. 104.

3. The debtor and another agreed to execute their note to the creditor for the amount of his debt, at the expiration of a certain time, in consideration that the creditor would forbear to sue the debtor for that period. *Held*, that this was not a guaranty requiring any proceedings to collect of the debtor, but a direct undertaking to satisfy the debt by the new note; and, for a breach, the creditor was entitled to recover the value of the note promised to be given, which, *prima facie*, was the amount of the debt and interest. *Ferris v. Barlow*, 2 Aik. 106.

4. A and B gave the plaintiff a writing, in which they jointly and severally promised to pay him any sum of money that A should be owing him up to a specified future day, not to exceed \$500 at any one time, and interest. The plaintiff advanced property to A upon the strength of this writing to the amount named. In an action thereon against A and B, B made defense that he was only a surety and

guarantor, and that he had received no notice of the acceptance of the guaranty and that the plaintiff had acted upon it. *Held*, that this was a joint undertaking for the same thing upon the same consideration, and that B was equally liable with A, without other notice of acceptance than A received by passing off the paper for the property advanced. *Maynard v. Morse*, 36 Vt. 617.

**5. Whether indorser, or guarantor—distinction.** A verbal agreement between the indorser and indorsee of a promissory note, made at the time of the indorsement, that the maker should not be called upon for payment until a certain time, was *held* to take the case out of the law merchant as to demand and notice; and, upon the understanding of the parties that, unless paid by the time named, the indorsee should sue the maker, the indorser was *held* liable as guarantor, where such suit proved fruitless. *Marsh v. Babcock*, 2 D. Chip. 124.

**6.** The general rules of law governing notes and bills, as applicable to charging an indorser, do not apply to a note assigned with a warranty that it is "due and collectable"; but the assignor is liable only according to the terms of the warranty;—that is, that the note is due, and that it can be collected by suit. *Foster v. Barney*, 3 Vt. 60.

**7.** A guaranty of a note in the following form: "I guarantee the said note is good and payment of the same"—is an absolute undertaking of payment, and, in order to hold the guarantor, it is not necessary to present the note for payment, give notice of non-payment, or bring suit against the maker. *Woodstock Bank v. Downer*, 27 Vt. 539.

**8. May be both.** The defendant, the payee of a negotiable promissory note, indorsed and signed the following words upon it: "I guarantee the payment of the within note"—and put in circulation. *Held*, that to a remote holder he was liable upon it, as indorser, upon proof of demand and notice. *Held*, also, that he was liable as an absolute guarantor, without proof of demand and notice—and (by *Davis, J.*) such guaranty is negotiable. *Partridge v. Davis*, 20 Vt. 499. 31 Vt. 428. But on this last point, *contra. Redfield, J.*, in *Sandford v. Norton*, 14 Vt. 283, and *Sylvester v. Downer*, 20 Vt. 361.

**9.** If one indorse a note and at the same time guaranty that it is good and collectible, the holder may elect to treat him as either indorser, or guarantor; and to an action on the guaranty it is no defense, that the holder failed to charge him as indorser. *Dana v. Conant*, 30 Vt. 246.

**10. Conditional undertaking—Particular terms.** One of the indorsers of a promissory note gave to the holder a writing, as follows: "I hereby guaranty to said R the col-

lection and payment of the said note, and agree to pay the same on condition that said R does not call on me for payment till the 1st of May, 1881." *Held*, not an absolute promise to pay, but only a promise to pay in case the note could not be collected of the maker. *Russell v. Buck*, 11 Vt. 166. *Bennett, J.*, dissenting.

**11.** The guaranty of a promissory note as "good until January 1, 1850," or "good and collectible for two years from date," is a contract that the parties to it, for the time limited, shall be and remain in such a condition that payment can be enforced by the due use of legal process. *Hammond v. Chamberlin*, 26 Vt. 406. *Bull v. Bliss*, 30 Vt. 127, limiting *Wheeler v. Lewis*, 11 Vt. 265.

**12.** The guaranty of a promissory note was in this form: "I hereby guarantee this note good until January 1, 1850." *Held*, that a recovery could not be had therefor under a declaration counting against the defendant as indorser, nor under a count upon it as a guaranty "that the note should be paid by January 1, 1850"; and that the guaranty was satisfied by the fact, that the note could have been secured and collected of the maker by legal process, at all times during the continuance of the guaranty. *Hammond v. Chamberlin*.

**13.** The guaranty of a note as "collectible" is not satisfied by the fact that the maker had real estate which might have been attached, or taken in execution. *Foster v. Barney*, 3 Vt. 60.

**14. "Credit."** A sale of goods upon time of payment given, the title of the goods to remain in the vendor until payment of the price;—*Held* to be a conditional sale on credit, and to be within the terms of a guaranty of payment for goods sold "upon a credit." *Noyes v. Nichols*, 28 Vt. 159.

**15. "All drafts, &c."** Where a letter of credit was drawn at Burlington, Vt., by the defendant resident there, and directed to a bank in Michigan, agreeing to accept and pay all drafts drawn on him by A B;—*Held*, that this did not bind him to accept and pay drafts drawn upon him by A B made payable in New York. *Michigan State Bank v. Leavenworth*, 28 Vt. 209. See *Same v. Pecks*, 28 Vt. 200.

**16. "Claim and demand."** Where one transferred certain notes, railroad bonds, mortgages, stocks and other securities specified in a schedule, and gave a guaranty that "each claim and demand is absolutely good and collectible and bind myself to make up any loss in the collection," &c;—*Held*, that the guaranty did not embrace the railroad preferred stock named in the schedule, and the payment of the dividends thereon. *Dana v. Conant*, 30 Vt. 246.

**17. Circulating guaranty.** D, a country merchant, who was about going to New York to purchase his usual fall supply of goods for the

business of a country store, where goods of every variety and description are usually kept for sale, received from the defendant, his former partner in the same business, a written guaranty, agreeing to be responsible for what goods D might purchase in New York more than he paid for himself. The guaranty was directed to no person in particular. With it, D purchased his supplies of different parties, on the customary credit, and of the plaintiff after he had made purchases of other parties. In an action upon the guaranty;—*Held*, that the intent of the guaranty was to give D the credit necessary to enable him to purchase of as many different dealers as might be necessary to make up his country store assortment; and that its purpose was not complete and executed by a sale by one person on the faith of it, but was the same in legal effect and extent as if it had been a separate letter to each dealer. *Lowry v. Adams*, 22 Vt. 160.

18. **Continuing.** A requests B to indorse a note for him to the bank of T, for \$2000, and, in order to secure B, procures C to sign a note with him for the same sum payable to B, and delivers it to B, who indorses the note to the bank. Afterwards, at A's request, B indorses for him a like note to the bank, and with it the first is taken up, and A pledges the same note as security for such second indorsement. On C's being inquired of by B, whether A had a right to pledge the note for the second accommodation, he replied that he was liable on the note to B, and that A might thus pledge it. Afterwards, A procured B to indorse for him a blank note which A filled up to F bank for \$2000, and got it discounted at the bank of T, and so took up the second note,—the note signed by A and C still remaining in B's hands. The last note payable to F bank B was compelled to pay. *Held*, that the note signed by A and C was a continued guaranty to that amount and remained as security to B generally for any sums A might procure of B, or by means of B's name as surety, to the amount of the note, unless C had expressed his dissent thereto. *Adams v. Clark*, Brayt. 196.

19. The defendants and C signed the following writing: "C. C. Trowbridge, Esq., President, Detroit, Michigan;—R H & Co. are authorized to value upon us, or either of us, to the amount of \$25,000 in such amounts and on such times as they may require, which will be duly honored, and we hereby jointly and severally hold ourselves accountable for the acceptance and payment of such drafts," and delivered it to R H & Co., who passed it to the bank of which Trowbridge was president, and on credit of it got bills discounted. *Held*, as interpreted by the course of dealing of the parties, (1), that the writing bound all the signers to the payment of such drafts as might

be accepted by either of them; (2), that this was not a single guaranty for \$25,000 and then to end, but was a continuing or standing guaranty to that amount; (3), that they were, under the circumstances, bound by the acceptance by C of bills drawn payable elsewhere than where the drawees resided. *Michigan State Bank v. Pecks*, 28 Vt. 200.

20. The defendants gave the plaintiffs a guaranty, as follows: "Mr. Lyman Wilson wishes to buy stock for his shop and pay in six months or before. We will be surety for him for a sum not to exceed one hundred dollars." *Held*, that the guaranty was not exhausted by the first delivery of stock amounting to \$50.08, but covered the whole amount of \$100, delivered from time to time within a reasonable time, and all within two months from the date of the guaranty, as called for by Wilson. *Keith v. Dwinell*, 38 Vt. 286.

21. **Other instances.** Where one guaranteed the performance of the contract of another;—*Held*, that he was not bound to make indemnity for acts of voluntary grace extended to the primary party, and where the other party had gone beyond his legal duty under the contract. *Corlies v. Estes*, 31 Vt. 658.

22. Where a guaranty was given to the plaintiff, a lawyer, to pay him for services for a third person in a pending lawsuit;—*Held*, in an action upon the guaranty, that it was no objection to a recovery for the whole services, that the plaintiff had afterwards formed a law co-partnership, by the terms of which his partner was entitled to share in the pay for the services thereafter rendered, and that the charges therefor were made against the defendant upon the partnership books,—the entire services having been performed personally by the plaintiff. *Roberts v. Grincoold*, 35 Vt. 496.

23. The plaintiff had been retained by D, as his counsel in a lawsuit, and had rendered services which he had charged to D. In reply to letters from the plaintiff claiming that the defendant ought to pay him, the defendant wrote; "I can assure you that he (D) is perfectly good, and will hold myself accountable that he shall pay you for all the services you have or may render him in the suit." The plaintiff relied upon this engagement and continued to render services in the suit to its close, in faith of the engagement, and according to the expectation and understanding of the defendant. In an action upon the guaranty;—*Held*, that there was a sufficient and apparent consideration for the guaranty; that notice of its acceptance appeared; and that the plaintiff was entitled to recover for both the past and future services, and for disbursements for court and clerk's fees. *Id.* See *Bagley v. Moulton*, 42 Vt. 184.

24. A guaranty of payment for all clothes-

wringers to be from time to time sold to B, was *held* not to extend to such as were, without orders, forwarded to B before, but not accepted by him until after, the guarantor had given notice to the seller that he should not be responsible for any more clothes-wringers ordered by B. *Machine Co. v. Morris*, 89 Vt. 398.

25. The plaintiff leased a farm and stock to the defendant, Ballard, by writing not sealed, which purported to be a contract between them only,—the defendants, Blake and Baker, not being mentioned in the body of the writing. The writing was signed by the plaintiff, and immediately after his signature was the following: "For the payment of said contract being fulfilled on the part of the said Ballard, we the undersigned will become responsible"—which was signed by the three defendants. Ballard went into possession under the contract; but neither of the other defendants ever received any benefit from the contract, or from Ballard's occupancy. In a joint action against the three for failure of Ballard to perform certain stipulations recited as on his part to be performed;—*Held*, that he was liable by reason of his having entered into possession, and so accepted the contract; but that the obligation of the other defendants was an independent guaranty, collateral to the principal contract, and that they were not liable as joint contractors with Ballard. *Cross v. Ballard*, 46 Vt. 415.

## II. CONDITIONS OF GUARANTOR'S LIABILITY.

26. **Acceptance and notice thereof.** A guarantor is entitled to notice of the acceptance of his guaranty; but his acknowledgement of liability and his promise to pay are evidence that he had received seasonable notice, and supersede the necessity of proving it. *Peck v. Barney*, 13 Vt. 98.

27. To prove notice of the acceptance of a guaranty, a letter announcing it, properly directed to the guarantor and put into the post office is sufficient. The presumption is that such letters are received in due course of mail. *Oaks v. Weller*, 16 Vt. 68.

28. Notice of the acceptance of a guaranty must be given to the guarantor, in reasonable time, in order to bind him, whether the guaranty be general, or special. *Oaks v. Weller*, 13 Vt. 106. *Louvy v. Adams*, 22 Vt. 160. *Woodstock Bank v. Downer*, 27 Vt. 539.

29. Express notice is not necessary in such case. It is sufficient, if the acceptance be seasonably made known to the guarantor in any other way; and the jury may find the fact from such facts and circumstances as fairly tend to prove it,—as, the relation of the parties, the guarantor's opportunity to know, &c. *Train v. Jones*, 11 Vt. 444. *Oaks v. Weller*, 16 Vt. 68. *Louvy v. Adams*. *Woodstock Bank v.*

*Downer*. *Noyes v. Nichols*, 28 Vt. 159.

30. Where a guarantor had knowledge that the plaintiffs were furnishing goods to the principal from time to time upon the guaranty, and had a general knowledge of about the amount furnished, this was *held* sufficient notice to charge him, although this did not come from the plaintiffs. *Noyes v. Nichols*.

31. **Default of principal and notice thereof.** The contract of guaranty is not, as between the parties, negotiable. A collateral guarantor is entitled to reasonable notice of the default of the principal debtor, and if he sustain loss, or prejudice, in consequence of not receiving such notice, he will be exonerated to the extent of the loss so suffered. In the case of an absolute guaranty, no demand and notice are necessary in order to charge the guarantor. *Redfield, J., in Sandford v. Norton*, 14 Vt. 228. 20 Vt. 361.

32. The mere guarantor of a bill or note is not discharged by the neglect of the holder to give notice of non-payment, unless he has been actually prejudiced by such neglect—as, when there are previous indorsers, &c. *Bull v. Bliss*, 30 Vt. 127.

33. The sufficiency of notice to a guarantor of non-payment must depend upon the circumstances of the case, and may be proved by circumstances—as was done in this case. *Keith v. Drinnell*, 88 Vt. 286.

34. **Duty to pursue principal.** Where one guaranties that a promissory note shall be good and collectible for a time named, he in effect insures the solvency of the parties thereto for the time named; and if such parties be or become, during the time named, or when the note falls due, utterly insolvent, this is *prima facie* a sufficient excuse for an omission to attempt to collect the note, or to make demand of payment. *Bull v. Bliss*, 30 Vt. 127. *Dana v. Conant*, 30 Vt. 246.

35. Where one takes a note with a guaranty that it shall be collectible when due, he must, in order to a recovery upon the guaranty, first have pursued with reasonable diligence all legal means of collecting the note from all the prior parties to it, whether makers or indorsers, unless they are wholly insolvent. *Benton v. Fletcher*, 31 Vt. 418. *Foster v. Barney*, 3 Vt. 60. *Russell v. Buck*, 11 Vt. 166. *Wheeler v. Lewis*, 11 Vt. 265. *Sylvester v. Downer*, 18 Vt. 32.

36. — **and exhaust his remedies.** Where a party receives paper, duly indorsed, upon a guaranty that it is good and collectible, such guaranty has reference as much to the responsibility of the indorsers as of the principal, and the holder must take the necessary steps to charge the indorsers, and to collect the pay of them, unless insolvent, or the guarantor will be discharged. *Dana v. Conant*, 30 Vt. 246.

37. In an action upon the guaranty of a note that it is collectible, where a prior indorser of the note had died before its maturity, but his estate was solvent;—*Held*, that in order to recover, the plaintiff must have exhausted all legal means of collection from the estate afforded by the probate court, and the county court on appeal. *Benton v. Fletcher*, 31 Vt. 418.

38. The defendant transferred to the plaintiff two promissory notes with a lien upon a canal boat originally given to secure the same, and gave a guaranty conditioned that before pursuing the defendants, the plaintiff should "use all reasonable endeavors and means to collect the sums of the said notes, &c." *Held*, that the plaintiff was first bound to resort to the security upon the boat, if by reasonable diligence it could be done, and could be made available for the purpose of obtaining payment. *Brainard v. Reynolds*, 36 Vt. 614.

### III. SATISFACTION AND RELEASE.

39. A guaranty that a note is collectible, is satisfied by proof that the maker had sufficient personal attachable property when the note became due to satisfy it, which the guarantor offered to turn out on the attachment. *Meeker v. Denison*, Brayt. 237.

40. Where a note payable on demand was assigned 23 days after its date, with a warranty that it was due and collectible;—*Held*, that a delay of five or six days in bringing suit upon it was not such an unreasonable delay as to discharge the assignor. *Foster v. Barney*, 3 Vt. 60.

41. Where the guaranty of a promissory note was, that it should be good and collectible until a day named, and the holder brought suit against the maker before the expiration of the time limited, but failed of collecting the debt through his negligence in prosecuting the suit;—*Held*, that having made his election to sue when he did, and having failed through negligence, the guarantor was discharged. *Wheeler v. Lewis*, 11 Vt. 265. 30 Vt. 131.

42. In an action upon the guaranty of a note assigned and warranted to be "due and collectible," where it appears that the plaintiff's suit upon the note failed, or proved ineffectual, through his fault, he cannot recover of the guarantor;—as, where such suit failed through defective service of the writ by a deputized person. *Beach v. Bates*, 12 Vt. 68.

43. Where the defendant agreed to indemnify the plaintiff against loss from having indorsed the note of a third person, and, when the note fell due, the plaintiff took it up, and took for it another like note payable in future, which he indorsed and was obliged to pay;—*Held*, that this substitution of another security was *prima facie* a release of the guaranty, and threw upon the plaintiff the burden of showing,

beyond all peradventure, that the debt would not have been paid, if he had not furnished the money to take up the first note. *Hurlburt v. Hendy*, 27 Vt. 245.

44. A guarantor is not discharged by an attachment and sale by the guarantee of the goods sold to the principal, after default of payment; nor by the guarantee taking a note of the principal payable on demand, with a mortgage as collateral; nor by his purchase in of a prior mortgage and causing it to be foreclosed, the time given for redemption not having expired; or other act working no damage to the guarantor. *Noyes v. Nichols*, 28 Vt. 159.

45. Where a party had a running account with the plaintiffs, and the defendant gave them a guaranty for further purchases to a specified amount, and the party made further purchases, charged in account, exceeding the amount of the guaranty, and made general payments from time to time, without application, to an amount exceeding the guaranty and the previous account;—*Held*, that the guaranty was cancelled, and that such payments could not be applied by the plaintiffs to the after accrued account, leaving the guaranty unsatisfied. *Pierce v. Knight*, 31 Vt. 701.

46. W had obtained goods of the plaintiff upon the defendant's guaranty, and to the amount of the sum guaranteed. W desiring further supplies, the plaintiff agreed to take of him bark and other property as he should deliver from time to time, and pay him therefor in goods. Under this arrangement a further account accrued, and W delivered such property from time to time, and died insolvent. In an action upon the guaranty, it not appearing that such new agreement was made in bad faith, nor operated to the injury of the defendant;—*Held*, that the defendant could not claim that the property so delivered by W should be first applied upon the guaranty, but only that the balance above paying the new account should so apply, for that the application must be controlled by the special agreement. *Keith v. Dwinell*, 38 Vt. 286.

### IV. ACTION.

47. **Declaration.** Where notice of the acceptance of a proffered guaranty is necessary in order to charge the guarantor, but such notice is not a substantive part of the contract, it may be stated in the declaration in general terms, and need not be set up as one of the provisions of the contract itself. *Oaks v. Weller*, 16 Vt. 63.

48. In an action upon the guaranty of a note that it is or shall be "good and collectible," the declaration must aver notice to the defendant, before suit brought, of the measures taken to collect the note and of their failure.



For want of such averment, judgment was arrested. *Sylvester v. Downer*, 18 Vt. 88.

**49. Consideration.** A guaranty to B, in writing, the payment of a note, payable on demand, which B held against C. The guaranty expressed no consideration, and was given more than a year after the date of the note. This guaranty was afterwards allowed against A's estate, and was paid by his administrator. In an action by the administrator against C to recover the money paid, it not appearing that the guaranty was given, or the money paid, at the request of C, or that he in any way sanctioned the proceedings, except, as it was stated in the case, that the guaranty was given "for the benefit of C;"—*Held*, that the plaintiff could not recover. *White v. White*, 30 Vt. 338.

**50. Effect of judgment against principal.** It is a general rule, that, in a collateral undertaking by way of guaranty, where a suit is necessary to fix the liability of the guarantor, the first judgment is *prima facie* evidence of the default. But where the guarantor is liable without suit against the principal, the judgment against him is regarded as strictly matter *inter alios*. *Redfield, J. Fletcher v. Jackson*, 23 Vt. 581, citing *Bramble v. Poultney*, 11 Vt. 208.

**51.** The costs of suit against the maker of a note cannot be recovered of a person who absolutely guarantied its payment;—such suit not being necessary to charge the guarantor. *Woodstock Bank v. Downer*, 27 Vt. 539.

**52.** A guarantor against a charge or incumbrance upon a chattel was *held* bound by the result of a suit establishing such incumbrance, and to pay the expenses of defending against it, where he had had notice of the suit, and assisted in the defense. *Brown v. Haven*, 37 Vt. 439.

See JUDGMENT, 57, *et seq.*

## GUARDIAN.

**1. Appointment.** Under Slade's Stat. c. 47, s. 14, authorizing the appointment of a guardian for a spendthrift on the complaint of the selectmen, &c., of the town to which he "belongs;"—*Held*, that where the spendthrift was confined in jail, though in a town other than the town of his usual residence, but where he had no legal settlement in the State, the complaint was properly made by the selectmen, &c., of the town in which the jail was situated. *Crushing v. Hale*, 8 Vt. 88. (In G. S. c. 72, ss. 12, 13, the word is "reside.")

**2.** Where one, upon his own application, was appointed guardian of an insane person, not being a relative nor describing himself in his application as a "friend," but was certified as a

"friend" by the probate court in the order of inquest, and where the appointment was made without any notice to the insane person, for which cause the guardianship was afterwards discharged by the court;—*Held*, nevertheless, that such appointment was not void, and that the guardian was entitled to have his accounts, as such, allowed in the probate court. *Cleveland v. Hopkins*, 2 Aik. 394, *Royce, J.*, dissenting.

**3.** Under the probate act of 1821 (Slade's Stat. 356, s. 102), the appointment by the probate court of a guardian to a *non compos*, without notice to him, was *held* null and void on appeal. *Shumway v. Shumway*, 2 Vt. 339.

**4.** Where the right and authority of a mother as guardian of her minor child is extinguished by her marriage, the probate court may appoint a new guardian without notice to her. *Farrar v. Olmstead*, 24 Vt. 123.

**5.** A decree of the probate court, unappealed from or unreversed, appointing a guardian of a minor, is conclusive and cannot be attacked collaterally. *Id.*

**6.** A conveyance by the guardians of a lunatic, by license of the probate court, was *held* good to protect the purchaser against the heirs of the lunatic, although it did not appear that the lunatic had notice of the inquisition and the appointment of the guardians, and although it did not appear by the record by whom the debts were contracted for which the sale was licensed. *Smith v. Burnham*, 1 Aik. 84.

**7.** Where a complaint for the appointment of a guardian of a spendthrift recited that it was made by a majority of the selectmen and civil authority, and the magistrates acted thereon and made the appointment;—*Held*, that this was sufficient *prima facie* evidence that the complaint was made by such majority. *Crushing v. Hale*, 8 Vt. 88.

**8. Removal.** Where a guardian is removed by the probate court and another is appointed guardian in his place, and an appeal is taken by the former, such appeal does not vacate the decree so as to leave him in possession of his rights as guardian, but rather suspends them during the pendency of the appeal; and the custody and control of the ward and estate belong to the new guardian, until restored to the former by a decision of the appeal in his favor. *State v. McKown*, 21 Vt. 503. 26 Vt. 218.

**9. Extinguishment.** The marriage of a *feme sole*, guardian by appointment, extinguishes the guardianship. *Field v. Torrey*, 7 Vt. 372. So, also, the right of the mother, being a widow, as guardian of her minor children, is extinguished by her marriage. *Farrar v. Olmstead*, 24 Vt. 123. (G. S. c. 72, ss. 2, 54.)

**10. Powers.** The guardian of a spendthrift, under the statute, has not merely a

naked power, but a power coupled with an interest in the ward's estate. Thus, he may sell standing trees upon his ward's lands, and take payment therefor, or notes to himself; and may retain such notes against any claim or release of his ward after the discharge of the guardianship, and sue and recover thereon to the extent of any balance due him for advances to his ward. *Thompson v. Boardman*, 1 Vt. 367.

11. **Liabilities.** A guardian who contracted with the plaintiff to support his ward, without undertaking to limit the right of the plaintiff to the estate of the ward for indemnity, was held to have bound himself personally. *Hutchinson v. Hutchinson*, 19 Vt. 437.

12. **Attachment.** The property of an insane person in the hands of his appointed guardian, and of which he has returned an inventory, is not subject to attachment in suit against the ward. *Hale v. Duncan*, Brayt. 132.

13. **Accounting.** After the termination of a guardianship, an action of account lies in the county court in behalf of the ward against the guardian to compel an accounting, not only for the time the defendant held the property as bailiff, but also while he held it as guardian. *Harris v. Harris*, 44 Vt. 320. *Field v. Torrey*, 7 Vt. 372.

14. The settlement of a deceased guardian's account, or a claim upon his bond for not accounting, should not be presented to the commissioners, but proceedings for the settlement of the account should be in the probate court, upon citing in the administrator. *Waterman v. Wright*, 36 Vt. 164.

15. Creditors of an insane person, under guardianship, have no such interest as entitles them to institute proceedings in their behalf upon the guardian's bond. *Aldrich v. Williams*, 13 Vt. 373.

16. The guardian of a person adjudged by the probate court to be insane, does not lose his right to recover for his services and disbursements as guardian, by a verdict rendered on appeal that the ward was not insane at the time of such adjudication and appointment of a guardian—the guardian having acted in good faith, and not being party or privy to the proceedings instituted for his appointment. *Harwood v. Boardman*, 38 Vt. 554.

17. A guardian presented to the probate court, for allowance, his account as guardian, 32 years after his appointment, 23 years after his ward became of age, and 8 years after her death, but in due time after the appointment of

an administrator of her estate. *Held*, (1), that the statute of limitations did not apply to bar the account; (2), that the lapse of time was explained by the facts and circumstances of the case, so that no presumption of payment or settlement of the account arose—as, that the ward was always *non compos*, and resided in the family of the guardian, who always had possession of the estate, and married her mother; and that no measures were ever taken to settle her estate, until after the death of her mother and the appointment of an administrator, &c. *Kimball v. Ives*, 17 Vt. 430.

18. A father, who had been appointed guardian of his minor son, agreed with the son to sell him his time until of age, for a price agreed. The father resigned his trust and the plaintiff was appointed guardian, and afterwards, by request of the ward and believing that this would be beneficial to the ward, carried out the arrangement with the father and paid him from the ward's estate the sum agreed. *Held*, that the plaintiff should not be allowed this sum in settlement off his account as guardian, unless he showed affirmatively that his ward was at least no worse off than if he had had his money, with interest, on arriving at his majority. *Bannister v. Bannister*, 44 Vt. 624.

19. A guardian should not be allowed compensation for taking care of the trust fund, while he himself is the borrower of it. *Farwell v. Steen*, 46 Vt. 678.

20. A guardian received some securities of his ward bearing annual interest, and afterwards converted part of the estate into securities bearing simple interest, and afterwards collected them all and mingled the money with his own, rendering no account of the interest received, and with such funds, and his own commixed, made investments which yielded more than six per cent interest; but the ward's funds could not be directly and wholly traced into any of these investments. *Held*, that the guardian should be charged with annual interest on the whole trust fund. *Ib.*; and see *Hapgood v. Jennison*, 2 Vt. 294.

21. **Guardian ad litem.** The court never appoints a guardian to prosecute for, but only to defend, an infant party. *Priest v. Hamilton*, 2 Tyl. 49.

22. A guardian *ad litem*, like an attorney or other agent for conducting a suit, has no authority to execute a release discharging the interest of a witness. *Walker v. Ferrin*, 4 Vt. 523.

See INSANE PERSON, 9-17.

## H.

## HABEAS CORPUS.

1. **In what cases.** A party improperly imprisoned on execution may be relieved by *habeas corpus*, when all depends upon certain papers and documents prescribed by statute; and is not put to his *audita querela*, unless his claim to be discharged rests on matter *in pais* upon which an issue suitable for a jury trial might be expected to arise. *Davis, ex parte*, 18 Vt. 401. *Kellogg, ex parte*, 6 Vt. 509.

2. A defendant in a *causas*, issued in an action on contract upon affidavit under G. S. c. 88, s. 78, will not be released on *habeas corpus*, because the authority signing the writ refused to examine him for a discharge. *In re Hosley*, 22 Vt. 363. 81 Vt. 507; nor, because the creditor had previously commenced another suit for the same cause of action, and had attached property to twice the amount due. That is matter of abatement merely. *Id.*

3. To justify a discharge on *habeas corpus* for any irregularity occurring before judgment, it should ordinarily, perhaps, be of a character to render the judgment void. *Redfield, C. J., in Tracy, ex parte*, 25 Vt. 98.

4. Mere matter of error in a conviction, or what would be ground of new trial, does not render the conviction void, so as to authorize a discharge on *habeas corpus*; as, where a wife was convicted and imprisoned for the sale of intoxicating liquor, upon a complaint and warrant against her husband and her, but there was a *non est* return as to the husband. *In re Dougherty*, 27 Vt. 325.

5. A *habeas corpus* will not lie, where the imprisonment is under merely voidable process. *In re Greenough*, 81 Vt. 285. *Kellogg, ex parte*, 6 Vt. 509; but only where the judgment or process is void, *Id.*,—as, an execution returnable in 120 days, which by law should be 60 days, and the arrest is made after the 60 days. *Hatch, ex parte*, 2 Aik. 28.

6. A misapprehension as to the power of a justice to punish for contempt, is not such a "misapprehension, &c.," under G. S. c. 90, s. 13, as authorizes the supreme court to relieve on *habeas corpus*. *In re Cooper*, 32 Vt. 258.

7. Where a party was adjudged guilty of contempt and imprisoned for disobedience to an order of a chancellor, where no notice had been given him to show cause;—*Held*, that the proceedings were irregular, and he was discharged on *habeas corpus*. *Langdon, ex parte*, 25 Vt. 680.

8. **Procedure.** A jailer made return to a

writ of *habeas corpus* directing him to bring a prisoner into court for trial, that the prisoner was sick and languishing so that he could not be removed without endangering his life. *Held* sufficient in this instance, but in future such returns must be accompanied with affidavits of physicians. *Bryant, ex parte*, 2 Tyl. 269.

9. Where the imprisonment is upon an execution between party and party, it is proper that notice of the application be given to the creditor. *Hatch, ex parte*, 2 Aik. 28.

10. A writ of *habeas corpus* issued in vacation must be signed by a judge, and not by the clerk, and must be made returnable forthwith in all cases. *In re Cooper*, 32 Vt. 258.

11. Issues and questions of law arising upon the trial of a *habeas corpus* in the county court, may pass to the supreme court upon exceptions. *Id.*

12. On *habeas corpus*, the relator may controvert the return of the cause of his detention and prove any other facts material to the determination of the case; but the court will not re-examine, *de novo*, the proceedings of the magistrate who issued the warrant, and undertake to regulate his discretion. *In re Powers*, 25 Vt. 261. *In re Hosley*, 22 Vt. 363. *In re Tracy*, 25 Vt. 98.

13. **Effect of discharge.** The discharge upon *habeas corpus*, of a prisoner in execution, by a judge having jurisdiction to issue the writ and decide the question of the lawfulness of the imprisonment, is a protection to the sheriff in an action for an escape, whether the proceeding was in all respects regular, or the judge erred in the exercise of his judgment, or not. *Hathaway v. Holmes*, 1 Vt. 405.

14. A discharge on *habeas corpus* from imprisonment on execution, on the ground of privilege from arrest while in attendance at court, is no bar to a subsequent arrest upon an *alias* execution on the same judgment. *In re Eldred*, 2 Vt. 462.

## HARRIS' GORE.

**Harris' Gore.** The charter of Harris' Gore, dated Oct. 30, 1801, recited that the same was granted by Act of the Legislature passed Feby. 25, 1782, to G and others. June 1, 1789, G by deed of warranty conveyed "one whole right and share in Harris' Gore drawn in my name to me." The lands in said Gore were not in fact divided or allotted till the year 1802,

when certain lots were set to that right. *Held*, (1), that the recital in the charter of the time of the grant by the Legislature was at least *prima facie* evidence of the fact; (2), that such grant in 1783 vested the land at once in the grantees as effectually as when engrossed and recorded. *Cross v. Martin*, 46 Vt. 14.

## HIGHWAYS AND BRIDGES.

### I. ESTABLISHMENT.

#### 1. By dedication and adoption, and by adverse use.

#### 2. By statutory proceedings.

### II. PENT ROADS.

### III. DISCONTINUANCE.

### IV. REPAIRS; HIGHWAY SURVEYOR.

### V. INDICTMENT FOR NOT BUILDING, OR REPAIRING, OR FOR OBSTRUCTING.

### VI. CIVIL LIABILITY OF TOWNS FOR INSUFFICIENCY.

### VII. RIGHTS OF LAND OWNER, AND OF THE PUBLIC.

#### I. ESTABLISHMENT.

#### 1. By dedication and adoption, and by adverse use.

1. **Official act.** Official acts of the officers of a town, recognizing a road as a public highway, are sufficient to prove it such, so as to make the town chargeable for an injury occasioned by its insufficiency, although there is no record of any survey, or laying out. *Emery v. Washington*, Brayt. 129.

2. The *consent merely* of the selectmen that any person should travel on any path, whether a public or a private road, is no *act* recognizing such road as a highway for which the town is responsible; neither is their knowledge that a traveler on such road supposes it to be a public highway of any importance, unless by some act of theirs it can be inferred that they have opened the road, or adopted it as a highway to be repaired by the town. *Williams, C. J., Blodgett v. Roylton*, 14 Vt. 288. 27 Vt. 456.

3. Where a new road was laid out as an improvement of an old road, and worked, and the selectmen afterwards, on petition, decided to discontinue the old road, and it was fenced up with their consent, and public travel was compelled to go upon the new road which was left open;—*Held*, that these were such unequivocal acts as indicated an intention to make the new road the thoroughfare for public travel, and, not being repudiated by the town, but acquiesced in, constituted such an adoption of the new road as made the town liable to a traveler for its insufficiency, although the selectmen had

caused no record to be made of the discontinuance of the old road, nor had filed for record their certificate of the opening of the new road. *Blodgett v. Roylton*, 17 Vt. 40. S. C., 14 Vt. 288. 34 Vt. 427.

4. Where the selectmen, by consent of the land owner, straightened a highway running through his farm, and the straightened road was built and opened in fact for travel and the former track was fenced up;—*Held*, that the former track became discontinued by substituting the new one for it as the highway, without any record either of the alteration or of the opening for public travel, and that the landowner could thereafter maintain trespass against a person unnecessarily traveling upon the old track. *Closson v. Hamblet*, 27 Vt. 728; distinguished from *Young v. Wheelock*, 18 Vt. 493.

5. A town having assumed and adopted a turnpike as a town highway, in the mode prescribed by a statute, and having afterwards treated it like its other highways by including it in the tax bills and repairing it, &c., and the turnpike company having removed their gates and ceased all care and control of the road, and permitted the whole franchise and stock to be sold on execution;—*Held*, that a dedication should be presumed, and that the town was liable for the insufficiency of the road. *Barton v. Montpelier*, 30 Vt. 650.

6. Neither the mere fact of a dedication of land to the public as a highway, nor the use of the land by the public as a road for public travel, will impose upon a town the duty to keep the road in repair as a highway. To this end, there must be an acceptance of the dedication by the town, acting through its proper officers;—by acts of such officers and not mere declarations. *Kellogg, J., in Folsom v. Underhill*, 36 Vt. 587. *Bennett, J., in Hyde v. Jamaica*, 27 Vt. 454. *Bailey v. Fairfield*, Brayt. 128; and see *Paige v. Weathersfield*, 13 Vt. 424. *Young v. Wheelock*, 18 Vt. 496.

7. Where a road has been opened by private persons and has been used by the public for travel, the including of it in the rate bills of the highway surveyors as a public road on which the highway taxes are to be expended, the expenditure of money and labor upon it, and the leaving of it open for public travel and use as a common highway, are evidence of its adoption by the town as a highway; and if so done with the intention to regard and treat the road as an existing highway, the road thereby becomes a highway adopted by the town, which it is liable to keep in repair. *Folsom v. Underhill*, 36 Vt. 580.

8. Where a road and bridge had been built by private persons for their own benefit, but had been used for travel by the public, and the road on each side of the bridge had been, by repairs, &c., adopted by the town as a highway,

and there was no other way to cross the stream except by this bridge, an instruction to the jury, that they should treat the bridge as in like manner adopted in the absence of evidence to the contrary, was *held* correct—although the surveyed line of the highway, as made by the selectmen in their recorded survey of it, diverged from the traveled line six or eight rods west of the bridge and came into it again eight or ten rods east of the bridge, and crossed the stream two or three rods above the bridge, and so as to throw the bridge outside the highway as surveyed. *Ib.*

9. M applied to the selectmen to vary the location of a highway across his farm, and, as an inducement, offered to give the land for the new location in exchange for the other. The town accepted this offer, built a bridge across a creek on the new route, allowed the former road to be closed up, and public travel was thus diverted over the new road. No record was made of these proceedings. M and his grantees occupied the road for six years, when, upon petition, the selectmen laid out a pent road along the line of such substituted highway, for which M's grantee claimed damages. *Held*, that he was not entitled to damages; for that the facts stated constituted a dedication of the land by M, and an acceptance by the town. *Fairfield v. Morey*, 44 Vt. 239.

10. Travel having diverged from a pent road as surveyed, the owner of the land over which the road was laid ploughed and fenced in the unused portion, and worked the course of divergence as a highway. *Held*, that this amounted to a dedication to the public of the substituted track; and that a subsequent owner of the land could not, without revocation, maintain trespass for the use of such substituted track as a highway, although such use had not continued for fifteen years; and *quære*, whether the dedication and license could be revoked. *Prouty v. Bell*, 44 Vt. 72.

11. The town and public having, for more than forty years, treated as a highway a space adjoining but without the limits of the original survey and location, the town is liable for any insufficiency thereof, the same as if within such survey. *Bagley v. Ludlow*, 41 Vt. 425.

12. **Leaving land open.** Where the owner of land threw it open to the public who might have to pass over it in doing business at his carriage shop;—*Held*, that the mere use of the land by an adjoining proprietor for a way to his own premises, in the absence of any decisive act indicating a separate and exclusive use under a claim of right, would be presumed to have been with the permission of the owner, and not adverse to his right, even though that use had been open, notorious and uninterrupted. *Plimpton v. Converse*, 44 Vt. 158.

13. Since 1889, the owner has not been re-

quired to fence his lands along a highway. An omission so to do is no evidence of an intent to dedicate them to the public; nor is the act of throwing or leaving open to the highway land in front of his house, or place of business, so that his customers may have more convenient access thereto, any evidence of such intent. *Morse v. Ranno*, 32 Vt. 600.

14. **Adverse use.** Where the right of the public to the use of one's land as a highway stands upon the basis of mere enjoyment, fifteen years' adverse and continuous use is necessary to perfect the right; and the extent of the acquiescence—as, the width of the highway—must be determined by the extent of the actual occupation and use. *Ib.*

## 2. By statutory proceedings.

15. **Laying out by selectmen.** The usual and legitimate evidence that a highway has been laid out, established and opened for travel, is the town records showing the survey and the certificate that the road is open for travel. *Young v. Wheelock*, 18 Vt. 493. *Blodgett v. Royalton*, 14 Vt. 288. 3 Vt. 457. *Ib.*, 590. 11 Vt. 600.

16. Where a petition to the selectmen of a town was for the laying of a highway in that town to the town line, there to connect with a proposed highway, to be laid out by another town, which was to connect with a highway to be laid out by a third town, in another county;—*Held*, that this was well enough, and was within the jurisdiction of the selectmen. *Moore v. Chester*, 45 Vt. 503.

17. Where the record of the laying out or discontinuance of a highway is collaterally attacked, the regularity of the preliminary proceedings will be presumed—as, the existence and regularity of the petition; or notice to landholders of the proceedings to discontinue. *Kidder v. Jennison*, 21 Vt. 108. *Haynes v. Lassell*, 29 Vt. 157.

18. The laying of a highway by selectmen is not void, so as to render their successors in office trespassers for the building of it, because there was an omission to specify a time for the land-owner to lay the land open to be wrought; nor because of an omission to return the petition to the town clerk's office; nor because no notice was given to the land-owner of the doings of the selectmen laying the road, so that he might appear and claim his damages. *Kidder v. Jennison*.

19. It is not an objection to the legal establishment of a highway, that the selectmen required a bond from the petitioners to save the town from the expense of building it, as a condition of laying it out. *Patchin v. Doolittle*, 3 Vt. 457.

20. The power given to selectmen to widen

and to re-survey highways, by G. S. c. 24, ss. 16, 17, implies the right to straighten the road. *Closon v. Hamblet*, 27 Vt. 738.

**21. Building.** A petition for the discontinuance of a highway, laid by the selectmen, but not yet built, does not suspend or prevent their proceeding to build the road. *Taft v. Pittsford*, 28 Vt. 286.

**22.** An appeal by a land owner from the laying of a highway vacates the former proceedings in laying the road, and suspends all proceedings towards building or opening the road, and the powers of the selectmen to charge the town with any further expense. *Ib.*

**23.** A person who has contracted to build a road laid by the selectmen, cannot proceed under his contract, after an appeal from the laying of the highway and notice thereof to him, and recover of the town therefor, although the selectmen give him a town order for such subsequent work. *Ib.*

**24.** The fact that a town had availed itself of the plaintiff's labor in constructing a highway, by subsequently repairing it and suffering the public to use it, was held not to bind the town to pay for constructing it. *Pratt v. Swanton*, 15 Vt. 147.

**25. Village trustees.** The act incorporating the village of Bennington (Acts of 1849, p. 119), giving the trustees power to lay out, &c., highways in said village, does not deprive the selectmen of a like power previously given by the general law. *Bennington v. Smith*, 29 Vt. 254.

**26.** Under the act incorporating the village of Rutland (Acts of 1865 p. 212), giving the trustees power to lay out, &c., highways in said village, an appeal lies to the county court on their refusal. In such case, the town should be made defendant,—not the village. *Landon v. Village of Rutland*, 41 Vt. 681.

**27. Opening.** The certificate of selectmen that a road is opened, is to be made after it is worked and ready for travel, and not properly before. *Patchin v. Doolittle*, 8 Vt. 457.

**28.** The lodging in the town clerk's office of the proper certificate of the opening of a new highway, is an act essential to consummate the opening of the road. Until this is done, the land owner is not under obligation to remove his fences; nor is he entitled to damages; nor can individuals use the land as a highway. *Patchin v. Morrison*, 3 Vt. 590. *Warren v. Bunnell*, 11 Vt. 600. 14 Vt. 282;—nor can the land owner commence proceedings before a justice for the appraisal of his damages. *Emerson v. Reading*, 14 Vt. 279. 19 Vt. 456; and see *Blodgett v. Roylton*, 14 Vt. 288. *Battles v. Braintree*, 14 Vt. 348.

**29.** In June, 1841, the selectmen of a town altered an old highway by laying out, as an "open road," 122 rods of new road having its

termini in the old road, and set over the old road between such termini to the land owner in part compensation for his land damages, and recorded the survey bill the same day. The next autumn the inhabitants of that highway district cut out the new road and made it passable for teams, and the land owner fenced up the old road, and public travel thereafter went principally upon the new road. The next spring, the selectmen made and delivered to the highway surveyor of the district a tax bill, describing the highways in such way as to include both parcels, and the surveyor caused most of the taxes to be worked out on the new road. In July, 1842, the plaintiff sustained damage while traveling upon the new road by reason of its insufficiency. No certificate of the opening of the road had been made by the selectmen, and recorded in the town clerk's office. (G. S. c. 24, s. 80.) In an action against the town for the injury;—*Held*, that the road was not legally established and opened, so as to make the town liable. *Young v. Wheelock*, 18 Vt. 498. 27 Vt. 454. *Ib.* 731.

**30.** Where the charge left to the jury to determine what would constitute an opening of a road and a public highway, without in any way stating to them what the law required, it was held erroneous. *Blodgett v. Roylton*, 14 Vt. 288.

**31.** Where a highway had been laid out and made and repaired by the town, and had been traveled by the public for some twelve or thirteen years, and the land owner had accepted his land damages and built his fences along the sides of it;—*Held*, that this was such an acquiescence on his part, that he could not now object that no certificate of the opening of the road had ever been filed with the town clerk, and could not maintain trespass for work done on the road in repairing it. *Felch v. Gilman*, 22 Vt. 88.

**32. Re-assessment of damages.** The owner of the land at the time a highway is laid over it, is the person to bring a petition for re-assessment of damages under G. S. c. 24, s. 82,—not the owner at the time it is laid open for work. *Rand v. Townshend*, 26 Vt. 670.

**33.** Any number of land owners, who are dissatisfied, may join in the same petition, although holding by independent titles. *Ib.*

**34.** Where a land owner commenced proceedings before a justice for the appraisal of his damages for the laying of a highway, before the proper certificate had been lodged in the town clerk's office that the road was opened;—*Held*, that the order of the justice made therein was void. *Emerson v. Reading*, 14 Vt. 279; and see *Tunbridge v. Tarbell*, 19 Vt. 458.

**35.** A petition for re-assessment of damages, under G. S. c. 24, s. 71, is in season, if brought before the expiration of sixty days after the road is in fact "laid open to be worked,"—that

is, after the work of opening has commenced. *Myers v. Pownal*, 16 Vt. 415.

**36. Reference and award.** The selectmen and the person through whose land they have laid a highway, may, at any time after the survey of the road, although not recorded, settle the question of damages by a reference under the statute; and the award made will be binding. *Tunbridge v. Tarbell*, 19 Vt. 453.

**37.** An award of damages for the laying out of a highway, made on arbitration, is not avoided by the landowner's keeping the road fenced up, but the town must resort to its remedy for opening it, under the general laws. *Schoff v. Bloomfield*, 8 Vt. 472.

**38. Action for damages.** If the survey of a highway is effectually abandoned before the road is opened or made, there can be no consideration for the landholder's retaining the damages paid. In such case, they may undoubtedly be recovered back. *Royce, J.*, in *Stiles v. Middlesex*, 8 Vt. 436. But see *Stacey v. Vt. Central R. Co.*, 27 Vt. 89.

**39.** Damages were awarded and paid to a landowner for the laying of a highway, but while the opening of it was delayed by his request, it was, on his application, resurveyed and altered in two-fifths of its course, but still all upon his land, and the final report was silent on the subject of damages. *Held*, that the town could not recover back the damages paid. *Stiles v. Middlesex*.

**40. Report of commissioners.** It is not a sufficient reason for rejecting the report of commissioners for assessing damages on the laying out of a highway, that they refused to hear the testimony of witnesses in relation to the damages. *Lyman v. Burlington*, 22 Vt. 131.

**41.** Commissioners appointed by a justice to assess damages on laying out a highway made report to the county court, as prescribed by statute, which report the court set aside for irregularity. At a subsequent term, the same commissioners, having re-examined the premises and made a new appraisal, made a second report, which, being regular, the court accepted. *Held* authorized and correct. *Id.*

**42. County court—Proceedings.** An application to the county court for the laying out of a highway, under G. S. c. 24, s. 44, must be brought within a reasonable time after the refusal of the selectmen to lay out such highway, but is not required to be brought at the next succeeding term after such refusal, although more than twelve days have intervened between such refusal and the then next term. *Moore v. Chester*, 45 Vt. 503.

**43.** The citation attached to a petition to the county, or supreme court, for the laying of a highway, under G. S. c. 24, ss. 44, 64, must be to the defendant towns. Where the citation

was to the selectmen, naming them, although served on them as the statute requires, the petition was dismissed. *Drown v. Barton*, 45 Vt. 38.

**44.** On a petition to lay out a highway, the court will only examine the petition itself to determine its jurisdiction; and the court refused to hear read an affidavit that the road had already been laid out by the selectmen before the date of the petition. *Burgess v. Georgia*, 11 Vt. 134.

**45.** G. S. c. 24, s. 41, requiring that commissioners for laying a highway be "disinterested freeholders," means only that their pecuniary interest shall not be directly affected by the establishment of the highway. It was *held* no disqualification, that one of the commissioners was related to one of the petitioners within the fourth degree of affinity. *Chase v. Rutland*, 47 Vt. 398.

**46. Jurisdiction.** The county court has no jurisdiction, in the establishment of a bridge, to make an order as to the plan, materials or workmanship, or that it be built in any particular manner. Such order is void. *State v. Williston*, 31 Vt. 153.

**47.** Nor, to order hills graded upon an existing completed highway, where no new survey is made, and no new highway, or alteration of an old one, is laid and established. *Hutchinson v. Chester*, 33 Vt. 410. (Altered by stat. 1869, No. 19.)

**48.** An order for establishing a highway, described as a line from point to point simply, without prescribing the width of the highway, imposes no obligation on the town in respect to it. *State v. Leicester*, 33 Vt. 653.

**49.** It is no objection to the validity of proceedings of the county court in laying out a cross road, or lane, that it is laid only to land not occupied as a dwelling place. *Paine v. Leicester*, 22 Vt. 44.

**50. Ornament.** Ornament and the improvement of grounds about a public building—as a court house—may be taken into consideration and regarded in connection with the convenience and necessity of a proposed highway; but these alone are an insufficient basis upon which to lay a highway. *Woodstock v. Gallup* 28 Vt. 587. •

**51. Two or more towns.** A highway may be laid out and established in a town upon the petition only of freeholders of such town, although "the only land or premises interested in the construction thereof" are situate in another town,—in this case, an adjoining town. *Gilman v. Westfield*, 47 Vt. 20.

**52.** The statute which prescribes that "where a river runs between two towns they shall jointly erect, &c., all necessary bridges," applies not only to cases where the river may be in neither town, or is partly in each, but to

where the whole bed of the stream may be in one of the towns. *Brookline v. Westminster*, 4 Vt. 224.

53. Where the county court had on application appointed commissioners to lay out a highway on the line between two towns, after the refusal of the selectmen of such towns so to do;—*Held*, that the commissioners had no authority to lay out, nor the county court to establish, a highway reported lying along such town line, but wholly within one of the towns, where it was not affirmatively found that such deviation was required on account of the position of the land or nature of the soil, and that both towns were benefited in a similar manner as though such highway were on such line. *In re Bridgeport*, 24 Vt. 176. (G. S. c. 24, s. 37, and seq.)

54. If a petition for a highway within the original jurisdiction of the county court to lay out and establish, be, in good faith, brought to such court, but the commissioners lay only a portion of the road prayed for, and such portion as would have first to be petitioned for to the selectmen, if it alone were asked for, the jurisdiction of the county court, which appears on the face of the petition, is not thereby defeated, but the court may establish the portion so laid. *Kelley v. Danby*, 46 Vt. 504. *Kent v. Wallingford*, 42 Vt. 651.

55. The petition prayed for a highway to be laid out through and into five towns in the same county. The commissioners laid a portion only of such highway, extending into and through three of said towns. The portion so laid was partly laid upon old established town highways, and partly over new routes. It crossed the line between two of said towns on one of said old highways, making one of the new portions of road laid wholly within one town, and another portion wholly within another town, but the whole road as laid formed a continuous line of highway from *terminus* to *terminus*. *Held*, that the highway, as so laid, was one which was within the original jurisdiction of the county court to establish, and it was so established. (G. S. c. 24, s. 52.) *Kelley v. Danby*.

56. So, where the petition was for a road extending into two towns of the same county, and it was laid in but one. *Kent v. Wallingford*, 42 Vt. 651.

57. **Practice—Petition.** No hearing will be had upon the merits of an application to lay a highway, until the coming in of the report of the commissioners. *Hewes v. Andover*, 16 Vt. 510.

58. **Report.** Where the report of road commissioners is filed at least 15 days before the session of the court, the filing of exceptions thereto on the second day of the term is in season under Rule 15 (1 Aik. 400), as modified by

G. S. c. 24, s. 47. *In re Buckmaster*, 16 Vt. 326.

59. Testimony to be used on the hearing of the report of a road committee should be in the form of depositions taken with notice, and not in the handwriting of the adverse party, his agent or attorney. *Burgess v. Grafton*, 10 Vt. 321.

60. A road committee should report to the court their opinion of the utility and necessity of the road asked to be laid, whether they return a survey of it, or not. *Marsh v. Chester*, 2 Aik. 239.

61. Where commissioners for the laying of a highway report against its necessity, *semble* it is not competent for the county court to receive evidence and establish the highway. *Woodstock v. Gallup*, 28 Vt. 590.

62. Where the commission issued from the supreme court, and the report was not to lay the road, on the ground that the public good did not require it;—*Held* that unless there was some improper practice upon or by the committee, amounting to fraud or gross partiality, the report should be regarded as final. *Shattuck v. Waterville*, 27 Vt. 600.

63. The provision of G. S. c. 24, s. 49, that the court may reject or accept, in whole or in part, the report of commissioners for the laying, &c., of a highway, applies exclusively to cases where the report is in favor of the petition, either laying or discontinuing the highway. *Id.*

64. The acceptance of the report of the committee laying a road is *ipso facto* an establishment of the road, and all which the law requires. *State v. Newfane*, 12 Vt. 422.

65. The question as to the propriety and necessity of establishing a highway in a particular place is one of fact, the decision of which, in the last resort, is placed exclusively in the judgment of the county court. *Gallup v. Woodstock*, 29 Vt. 847.

66. **Adjudication conclusive.** Under an indictment against a town for not making and opening a highway established by the county court;—*Held*, that it was no defense that the highway, as laid and established, extended upon the land and track of a railroad, it not appearing that the railroad company objected. The adjudication of the county court binds the town until set aside, and cannot be set aside in this collateral manner. *State v. Vernon*, 25 Vt. 244.

67. **Contribution between towns.** The right of one town to claim, and of the county court to order, contributions from other towns "in the vicinity" towards the expense of making a highway, is not limited to towns in the same county. (G. S. c. 24, s. 67.) *State v. Woodbury*, 27 Vt. 731.

68. In apportioning between several towns



the expenses of a bridge built by one, the commissioners cannot fix the specific sums to be paid by the contributing towns, but should only settle and define the proportions. But where the commissioners fixed upon the whole cost at a certain sum (\$1,890), and awarded that the other towns should severally contribute certain specific sums, (\$600 and \$150), and the county court determined the proportions as  $\frac{1}{11}\%$  and  $\frac{1}{18}\%$ ;—*Held*, that this was not an error of which the contributing towns could complain. *Rockingham v. Westminster*, 24 Vt. 288. (G. S. c. 24, s. 65.)

69. Where the plaintiff town erected a bridge, under an order of court by which the defendant town was assessed a certain proportionate part of the expense;—*Held*, that after notice to the selectmen and demand of payment, *assumpsit* lay against the defendant town for its part of the expense,—the amount determinable on trial. *Brookline v. Westminster*, 4 Vt. 224. 19 Vt. 629. 24 Vt. 292. 45 Vt. 429.

70. After a highway has been built, so that the amount of that part of the expense of building which was apportioned to a particular town can be ascertained, the county court may order such town to pay a specific sum, representing such part apportioned, by a day fixed, and, on default, may issue an execution therefor. *Londonderry v. Peru*, 45 Vt. 424.

71. Under G. S. c. 24, s. 65, past expenses in the erection of a bridge cannot be awarded against a town in which such bridge is not located, but only future expenditures. *Pomfret v. Hartford*, 42 Vt. 134.

72. Under this statute, the county court has jurisdiction to appoint commissioners and compel towns benefitted by a road already laid out and built, and lying in another town, to contribute to the expense of maintaining and keeping such road in repair. *Jamaica v. Wardsboro*, 45 Vt. 416.

73. The court of chancery will not interfere to enjoin a proceeding in the county court discontinuing and relaying a highway, upon the ground that it was procured by one town to enable that town to maintain a petition, under the statute, against the other towns for aid in maintaining a bridge on such highway, although that was the prevailing motive for the proceeding; and although such other towns had no notice of such proceedings until after their completion, and until service of the petition upon them for assessments towards building the bridge. *Wardsboro v. Jamaica*, 27 Vt. 470.

74. The statute having made no provision for the appointment of a commissioner to expend an assessment under G. S. c. 24, s. 65;—*Held*, not to be error to refuse it. *Jamaica v. Wardsboro*, 47 Vt. 451.

75. The supreme court established a highway extending from town C through the plain-

tiff town into town G, and apportioned one-fifteenth of the expense of making the road through the plaintiff town to be paid by F, the defendant town, when completed and opened for travel. The plaintiff had made a portion of the road through its territory, which did not benefit the defendant, when the court, on petition, discontinued the unconstructed part, without any modification of the former judgment. *Held*, that the defendant was not liable for any part of the expense. *Fairfax v. Fletcher*, 47 Vt. 326.

76. In supreme court. A petition to the supreme court for the laying of a highway was allowed to be amended after the coming in of the report of the commissioners, by inserting in the petition an averment that the petitioners were "freeholders of the towns and vicinity," although regarded as an indispensable averment. This was done by consent of the petitioners, and there was no appearance by the petitioners. *Howe v. Jamaica*, 19 Vt. 607.

77. Proceedings in the county court, in relation to laying out highways and appraising the damages thereby occasioned, cannot be revised in the supreme court on exceptions, but only by *certiorari*. *Adams v. Newfane*, 8 Vt. 271. *Lyman v. Burlington*, 23 Vt. 131. (Changed by stat. 1872, No. 88.)

78. The questions how far the public good or the necessity of individuals may require a road, and how many or how few persons may live upon the road, or whether the road is laid to accommodate the land of one person only, are all questions of fact upon which the discretion of the county court is to be exercised, and cannot be revised by the supreme court, unless the facts stated upon the record show that the county court could not, in point of law, render the judgment they did. *Paine v. Leicester*, 22 Vt. 44.

79. If the facts reported by the commissioners were of the *kind* which warranted the order of contribution, the decision of the court will not be reversed, there being no error *in law*. *Jamaica v. Wardsboro*, 47 Vt. 451.

80. Damages to land owner. The Constitution, Part I, art. 2, provides that "when private property is taken for public use, the owner ought to receive an equivalent in money." By G. S. c. 24, s. 78, it is enacted that, "In estimating the damages which may be sustained by any person owning or interested in lands, by reason of laying out or altering any highway, the benefits which such person may receive thereby shall be taken into consideration." *Held*, that the act was not repugnant to the constitution; that, to bring a case within this provision of the constitution, it should be such a taking as divests the owner of all title to or control over the property taken, and be an unqualified appropriation of it to the public;

that it does not embrace the case of taking land for a highway, which does not divest the owner of his title in fee, and in which the public acquires only an easement. Thus, where the county court accepted the report of road commissioners that they had disallowed the claim of a land owner for damages occasioned by the laying of the highway, for the reason that the benefits resulting therefrom equalled any damages to the land and the expense of fencing the same;—*Held*, on *certiorari*, that there was no error in the proceedings. *Livermore v. Jamaica*, 23 Vt. 361. See *Hatch v. Vt. Central R. Co.*, 25 Vt. 65-6.

81. In assessing damages, the value of the land taken, the expense of fencing against the road, and the damage done to the land remaining, are the only matters proper to be taken into consideration. An award including damages for the discontinuance of a highway, and the expense of building a cross road on the party's own land from his dwelling, in order to reach the highway laid out, was *held*, in these respects, invalid. *Dalrymple v. Whitingham*, 26 Vt. 345.

82. It is error for road commissioners to award land damages against a town, on the laying out of a highway, without giving notice thereof to the town, so that it may appear and be heard on that subject. *Thetford v. Kilburn*, 36 Vt. 179.

83. Where the proceedings are erroneous only in respect to the awarding of land damages, the practice is not to quash the whole proceedings upon *certiorari*, but only to remand the case to the county court, to be sent out to the commissioners to appraise the damages anew. *Ib.*

84. In the laying out of a highway through lands of which the record title was in the estate of an intestate, where there had been no decree of distribution to the heirs, nor division in severalty between them by deeds or occupation, but only a written agreement for such division;—*Held*, that the payment of the land damages was properly made to the administrator, and that notice to him, as the representative of the estate, of the hearings before the commissioners was sufficient, and the heirs were bound by the proceedings. *St. Albans v. Seymour*, 41 Vt. 579.

85. On the establishment of a highway, the order of the court for payment of land damages becomes a perfected judgment on the expiration of the time fixed for payment, on which the land owner is entitled to an execution immediately (G. S. c. 24, s. 70); and, before the enactment of G. S. c. 24, ss. 82, 83, the discontinuance of the highway, before being built, did not affect the judgment; nor did the loss of the right to build the highway by lapse of time; nor a change in the location of

the highway with the assent of the land owner, unless he intended thereby to waive his claim for damages; nor a new appraisal of damages by the selectmen. *Kent v. Wallingford*, 42 Vt. 651. *Townshend v. Taft*, *Ib.* 656.

86. —to turnpike company. In taking the franchise of a turnpike corporation for the purposes of a highway, under G. S. c. 24, s. 79, where the turnpike lies in several towns, the value of the whole franchise should be apportioned among and against the several towns, according to the value of the portions lying in the respective towns. *Taylor v. Rutland*, 26 Vt. 313.

87. Setting over old road. Under the statute authorizing turnpike commissioners to set over the old road, if, in the opinion of the selectmen, it may be discontinued;—*Held*, that such opinion could not be shown by parol, but the expression of such opinion must appear in the record, or in writing. *Fisher v. Beeker*, *Brayt.* 75. 2 Aik. 897.

88. A highway established before the act of Nov. 7, 1800, cannot, when subsequently discontinued, be legally set over, under sec. 2 of that act, to any other person than the owner of the soil. *Pettibone v. Purdy*, 7 Vt. 514.

89. Costs and execution. Under the statute of 1833, an execution was allowed to be issued by the county clerk against a town, upon a petition signed by part of the petitioners for laying out a highway, for the amount assessed to the town by the road commissioners, and costs,—such execution requiring the money to be paid to the clerk. *Hill v. Sunderland*, 7 Vt. 215.

90. The award and taxation of costs by a road committee, under the act of 1823, created a debt on which an action of debt lay, as upon a judgment. *Shelburn v. Eldridge*, 10 Vt. 123.

91. Under a road petition, the increased expense of a second examination occasioned by the death of one of the committee and the appointment of another in his place, was *held* to be taxable in the costs against the towns where the road was laid. *Howard v. Colchester*, 24 Vt. 644.

## II. PENT ROADS.

92. All pent roads are public highways, though called in the early statutes "private roads"; that is to say, they may be used by all, but they are not open highways. *Wolcott v. Whitcomb*, 40 Vt. 40.

93. From the laying of a road as a pent road, without any prescribed regulations as to gates and bars, it is implied that the owner of the land may and he has the right to protect his field and crops by suitable and proper gates and bars, not interfering with the reasonable use of the road as a pent road. *Ib.*

94. Pent roads, like other highways, are required to be "opened" by the recording of the proper certificate; and the land owner is entitled to his damages, as in case of other highways. *Warren v. Bunnell*, 11 Vt. 600.

95. Upon a petition for the laying of a highway, a pent road may be laid. *Whittingham v. Bowen*, 22 Vt. 317.

96. A pent road is open to all who wish to travel it, and the town is bound to keep it in reasonable repair, taking into consideration the character and importance of the road; and is liable for injuries caused by its insufficiency. *Loveland v. Berlin*, 27 Vt. 713.

### III. DISCONTINUANCE.

97. In petitions to discontinue roads laid out by committees of the supreme court, the practice is to appoint the same committee that laid out the road. *Livingston v. Jericho*, 11 Vt. 96. (Changed by G. S. c. 24, s. 73.)

98. Selectmen cannot discontinue a road laid by the road commissioners, or by a committee appointed by the Legislature, or by the supreme or county court. *State v. Shrewsbury*, 8 Vt. 223. (1836.)

99. A highway may be discontinued without notice to the land-owners. *Haynes v. Lassell*, 29 Vt. 157; and see *Bostwick*, *ex parte*, 1 Aik. 216.

100. The plaintiff promised to pay the defendant town \$100, if the selectmen would lay and construct a certain road and discontinue the old road passing through his land. The selectmen laid the road and hired K to build it, promising him, as part payment, the \$100 subscribed by the plaintiff. After the new road was built and accepted, the selectmen directed the plaintiff to pay K the \$100, they promising to discontinue the old road. The plaintiff gave K his note therefor. The town afterwards neglecting and refusing to discontinue the old road running through the plaintiff's land;—*Held*, that he could recover of the town the \$100, as for money paid to its use; and this, although there was an understanding between K and the plaintiff that K should not call on the plaintiff to pay the note, unless he should recover of the town. *Morrill v. Derby*, 34 Vt. 440.

### IV. REPAIRS; HIGHWAY SURVEYOR.

101. **General duty to repair.** In replevin, the defendant avowed the taking, as surveyor, under a vote of the town to raise money to be expended upon "the Lake road." Replication, that there was no such "legally laid out Lake road." The replication was *held* insufficient; for the town may be bound to keep the road in repair, though not legally laid out. *Stoddard v. Gilman*, 22 Vt. 568.

102. **Case of sudden damage.** Under G. S. c. 25, s. 18, providing that when on any extraordinary occasion any bridge or highway shall be suddenly destroyed or impaired, &c., it shall be the duty of the surveyor *forthwith* to cause such highway to be repaired, &c., it is implied that the surveyor first have knowledge or notice that the road has been so injured as to require repairs, or that he be in fault for not having such knowledge or notice. *Clark v. Corinth*, 41 Vt. 449.

103. A charge in such case, that it was the duty of the surveyor, after such notice, to go immediately, as soon as practicable, about repairing the road, with such force as he could raise under the power given by the statute, with the force and means at his command and within his control; and if, by so doing, he could have put the road in a reasonably safe condition for travel before the plaintiff passed over it and was injured, and he failed to do so, this was the fault of the town, and the town was liable—other necessary facts being proved—was *held* correct. *Ib.*

104. The town must proceed with as much dispatch as the magnitude of the work under the existing circumstances,—as, the difficulty of procuring material, &c.,—will reasonably permit; but not utterly regardless of economy and of the town's interests, nor yet consulting its own convenience merely. *Briggs v. Guilford*, 8 Vt. 264.

105. This statute must receive a reasonable construction, and where it is evident that an immediate attempt to repair the road would be fruitless, it would be unreasonable to require it. As bearing upon the question of the duty of the surveyor;—*Held*, that it was competent to show the condition of the highway and the nature and extent of the work required; as also the number of miles of road which the town was required to maintain, their condition, and the population of the town. *Spear v. Lowell*, 47 Vt. 692.

106. **Duty towards adjoining land-owner in making repairs, &c.** In repairing a highway, the town is bound to use reasonable care and prudence to guard against endangering or injuring the lands or fences of the land-owner upon the margin, but is not absolutely responsible for the results. For a failure in this respect, a special action on the case will lie, but not trespass. *Baxter v. Winooski T. Co.*, 22 Vt. 114. *Felch v. Gilman*, 22 Vt. 38.

107. The defendant, for the purpose of widening a highway running along a side-hill through the plaintiff's farm, and which was unsafe by reason of its narrowness, drew and dumped stone on the lower side of the road, some of which rolled down against and through the plaintiff's side fence and into his field. The widening of the road was necessary, and was

done in a proper and reasonable manner, and was approved by the highway surveyor. *Held*, that the defendant was not liable therefor in trespass, nor (by *Redfield*, C. J.) in any action. *Morse v. Weymouth*, 28 Vt. 824.

108. As to water course. The corporate duty imposed by statute upon towns to build and keep in repair their highways, requires of them, upon principles applicable to the owners of adjoining lands, that in building a highway across a natural stream of water, they provide some suitable and sufficient means for the passage of the water, and maintain the same in such condition that the stream shall not be obstructed thereby, to the injury of persons owning lands adjoining; and for a failure in either of these respects the town is liable to the party injured. *Huynes v. Burlington*, 38 Vt. 350.

109. Where the embankment of a highway crossing a natural stream of water washed and slid down by the action of the elements, so as to choke the culvert and prevent the passage of the water, to the injury of the adjoining landowner;—*Held*, that for neglect to remove the obstruction, after reasonable notice, the town was liable in an action for damages. *Ib.*

110. A natural stream of water passed under a highway by a culvert built by the town. A railroad company, upon their own land below, built an embankment of earth, with an extension of such culvert through it which fell to decay, and the embankment thereby stopped the flow of the water and set it back upon the plaintiff's land on the other side of the highway. In an action against the town for neglect to remove such obstruction after notice and request;—*Held*, that the town was not liable. *Ib.*

111. Surveyor. After a demand and notice by a highway surveyor for payment of a tax in labor, and neglect for three days, he may distrain. *Andrews v. Chase*, 5 Vt. 409.

112. The selectmen of a town already divided into highway districts, for which surveyors of highways have been chosen by the town, have no authority thereafter, and during the year, to alter such districts so as to create a new one, and appoint therefor an additional surveyor. *Lamphire v. Windsor*, 27 Vt. 544; nor to combine districts, and enlarge the jurisdiction of one of the surveyors. *Scott v. Mount Tabor*, 48 Vt. 391.

113. A highway surveyor is not an agent of the town to bind it by his declaration that a highway in his district is safe; but such declaration to a traveler bears upon the question of due care on his part in attempting to travel upon the highway. *Clark v. Corinth*, 41 Vt. 449.

114. A highway surveyor is bound by statute "to keep in repair at all times the highways in his district." This duty is not limited by the amount of the tax-bill put in his hands, nor is its performance dependent on the will of the

selectmen; and for all necessary expenditures made by him for this purpose, beyond the means furnished him by the town, the town is liable to him. *Stockwell v. Dummerston*, 45 Vt. 448.

115. Where a highway surveyor, having expended all the taxes in his rate bill upon certain roads of his district, was directed by the selectmen to repair another road, and the inhabitants of the district upon his call refused to assist, whereupon he made the repairs at his own expense;—*Held*, that he could recover the amount of the town in an action of book account. *Gassett v. Andover*, 21 Vt. 342.

116. So, where a bridge and highway were impaired by a freshet so as to require immediate repairs, and the highway surveyor, who had already expended all the taxes in his rate bill, called upon the inhabitants of his district to assist in the reparation, and they refused;—*Held*, that he might make such repairs at his own expense, and recover the amount of the town in an action of book account. (G. S. c. 25, s. 18.) *Ib.*

117. Where the plaintiff, as highway surveyor under a void appointment, performed services and made expenditures in needed repairs of the highways in his supposed district;—*Held*, that in the absence of any contract aside from his relation of highway surveyor, and without a subsequent express ratification of his acts, he could not recover of the town, although he acted in good faith, and with the knowledge of the selectmen who appointed him. *Lamphire v. Windsor*, 27 Vt. 544.

118. The selectmen, in a tax bill and warrant issued to a highway surveyor, described the road upon which the tax bill was to be worked, but the same, though opened and used for public travel, had not been legally established. The surveyor in good faith worked the road, but was sued in trespass therefor by the owner of the land and a recovery was had against him. In an action by him against the town for indemnity;—*Held*, that under G. S. c. 84, s. 63, he was entitled to recover. *Ladd v. Waterbury*, 34 Vt. 426.

119. In order to make a highway surveyor liable as for neglect of duty, the limits and description of his district should be established, and indicated in the rate bill and warrant. *Newbury v. Tenney*, 2 Aik. 295. 27 Vt. 546.

#### V. INDICTMENT FOR NOT BUILDING, OR REPAIRING, OR FOR OBSTRUCTING.

120. Where a court of sessions, or any other tribunal, is empowered to impose a duty on any corporation or individual which affects or interests the public, a neglect to perform that duty subjects those neglecting to an indictment at common law;—as, where a town neglects to

build a bridge ordered by road commissioners. *State v. Whitingham*, 7 Vt. 390.

121. In an indictment against a town for not making and opening a highway laid out and established, it is not necessary, in describing the highway, that the courses and distances of the survey should be stated; but it is sufficient if the *termini* are given with reasonable certainty, and the intermediate points or direction are so stated as to enable the court, from the indictment itself, to issue a commission to the agent to be appointed by the court to expend the fine which shall specify so particularly the location of the road, as that he may know where to work it. *State v. Newfane*, 12 Vt. 422. *State v. Brookfield*, 2 Vt. 548. (See *State v. Jericho*, 40 Vt. 121, and G. S. c. 24, s. 18.)

122. On trial of an indictment against a town for neglect to make and open a road laid by a committee of the court;—*Held*, that evidence offered that it was absolutely and physically impossible to make the road where laid, was properly rejected. *State v. Brookfield*.

123. After an indictment found against a town for not keeping in repair a highway, the discontinuance of such highway and the opening of a new one, cannot defeat the prosecution. *State v. Fletcher*, 13 Vt. 124.

124. In 1831, a highway was laid out and worked on the line between Alburgh and Canada, that being the center line of the highway, and was traveled by the public until 1844, when the selectmen made a new survey, locating the entire highway, three rods in width, in Alburgh, making the State line the north line of the highway. This road was afterwards used for public travel and highway taxes were expended on it, although no certificate had been deposited in the town clerk's office that the highway, as newly located, was opened for travel. *Held*, that this was not the laying of a new road, but the widening of an existing one, and that an indictment lay for neglect to repair the road. *State v. Alburgh*, 23 Vt. 262.

125. The statute which imposes a fine, recoverable by complaint before a justice, for placing any obstruction in a highway, is merely cumulative, and does not take away the remedy by indictment at common law. *State v. Wilkin-son*, 2 Vt. 480.

#### VI. CIVIL LIABILITY OF TOWNS FOR INSUFFICIENCY.

126. **Highway—Bridge.** A bridge near the corner of four towns, and a highway leading across the same, but in the town of H, were duly established and laid by a committee of the legislature, who apportioned the expense of the bridge between the four towns, and directed the manner of building the bridge, requiring wing walls to be extended from the abutments

of the bridge to and along the banks of the river, and that the space between should be filled by the four towns as part of the expense of building the bridge. This was done, and the wing walls and railings upon them had ever been kept in repair by the four towns, but the road, including the space between the wing walls, had been kept in repair by the town of H, and the town of W, to which it was afterwards annexed. *Held*, that such space between the wing walls was not bridge, but highway, and that the town of W was answerable for its insufficiency. *Powers v. Woodstock*, 88 Vt. 44.

127. **Private way.** A town is not liable for an injury received upon a road, or way, opened by individuals upon their own land for their own benefit, unless recognized by the town as a public highway,—as, by doing labor upon it, or authorizing the highway tax to be expended upon it. There is no way in which an individual can, for his own benefit, lay out a highway and compel the town to adopt it as such. *Page v. Weatherfield*, 18 Vt. 424. 27 Vt. 454.

128. **Extra viam.** A traveler upon the highway turned out under an open tavern shed, and left his horse hitched there while he was attending to some business in the village. In getting his team to resume his journey, the horse was backed out of the shed over the bank of a gulf, extending from the shed to the traveled track of the highway, there being no sufficient muniments along the bank, or the margin of the highway. The shed and the place of the accident were without the limits of the highway. *Held*, that he could not recover against the town for the injury. *Sykes v. Pawlet*, 43 Vt. 446.

129. **Place without the State.** A town is not liable for damages occasioned by the insufficiency of a bridge, where the place of injury is beyond the territorial limits of the State, although the town has been accustomed to share in the expense of maintaining the bridge, and it lies partly in this State. *Brown v. Fairhaven*, 47 Vt. 886.

130. **Margins.** The plaintiff, in a dark night, was traveling upon a highway in the village of Montpelier with a horse and sleigh. The ordinary traveled path was of sufficient width, but was destitute of snow, and sleighs had been driven in the ditch and had made a path there in the snow. In this ditch there was a hole dug, three feet from the outer edge of the ordinary traveled path, of which the highway surveyor had been notified. The amount of travel upon this road was large. The plaintiff in traveling ran into this hole, whereby his horse and sleigh were damaged. In an action against the town therefor;—*Held*, that the jury should have been instructed, that if the plaintiff diverg-

ed from the traveled road without necessity, but merely for the purpose of having the benefit of snow [or, if the horse took the same direction from a natural instinct, or from inability to see the road on account of the darkness] the town was not responsible for the injury. *Rice v. Montpelier*, 19 Vt. 470. See 21 Vt. 397. 41 Vt. 439.

131. Towns are bound to keep their roads, including the margin, in such condition as to be reasonably safe against those accidents which may fairly be expected to occur; and although the town will not be liable for an injury occasioned by the traveler voluntarily and without necessity diverging from the traveled path,—as in *Rice v. Montpelier*; yet if this be by ordinary accident—as, in this case, by being forced upon a log in the ditch, two feet out of the traveled track—the town may be liable. *Cassidy v. Stockbridge*, 21 Vt. 391.

132. Where a traveler receives an injury outside the traveled part of a highway, it is not an essential condition of his right of recovery against the town, that he should have been forced out of the traveled path by unavoidable accident, or circumstances beyond his control. He may leave it voluntarily, and yet from necessity; as where he leaves the road voluntarily from a reasonable fear of injury if he remains in it,—this is a necessity in the eye of the law. *Glidden v. Reading*, 38 Vt. 52.

133. Thus, where the plaintiff was properly in the highway, but was blind, and ignorant of the character of the road, and it was so dark, being in the night, that nobody could see him, and, hearing a team approaching him, he left the traveled part of the road in order to avoid the team, and in so doing stepped or fell over the bank wall, which was unprotected by any railing, and so received an injury;—*Held*, that he was justified by necessity in getting out of the traveled path; and if in so doing he acted with reasonable care and prudence, he could not be said to have contributed to his own injury. *Id.*

134. Towns owe a statutory duty to travelers, for the breach of which the party suffering special damage may maintain an action, to remove from the margins of their highways objects unlawfully deposited there, which, by their frightful appearance, make it unsafe to travel the road with ordinary horses. *Morse v. Richmond*, 41 Vt. 435. *Barrett, J.*, dissenting.

135. While traveling upon a highway, the plaintiff's horse was frightened by some bales of burning hay, which had been wrongfully thrown off a railroad train upon the margin of the highway, and had not been removed by the town authorities after due notice, by which fright the horse ran and the plaintiff was injured. In an action against the town to recover for the injury, the court charged the jury, that

although the surface and width of the traveled track were faultless, and the bales of hay were outside that track upon the highway margin, still, the town would be liable, if the bales of hay presented such an appearance that they might reasonably be expected to, and naturally would, frighten ordinary horses, and the injury happened by reason of the plaintiff's horse taking fright at them. *Held*, correct. *Id.*

136. **A second path.** A town had worked and kept in repair on the whole length of its road a traveled track "sufficiently wide and suitable for the passage of all travel, both vehicles and on foot." There was a narrow foot-path 15 or 20 feet south of said track, and near the fences on the south side, which public foot travel had for 30 years or more passed over. This foot-path passed over ground in its ungraded and natural condition; had never been worked by the town, nor ever been obstructed. On the south edge of the road, and on a level with it, there was also a feasible foot-path somewhat traveled. In an action against the town to recover for an injury to a foot traveler, traveling by choice upon the first named foot-path, the court charged that such continuous use by the public of said foot-path, the town knowing of such use and doing nothing to prevent it, rendered the town liable for the injury occasioned by the foot-path being out of repair. *Held* erroneous, and that, upon the facts stated, the town was not, as matter of law, bound to provide more than the traveled track. *Whitney v. Essex*, 38 Vt. 270.

137. In an action against a town for an injury received upon a highway, the plaintiff's evidence tended to prove that a road leading through a village had, for thirty years or more, been kept in repair by the town, but there was no evidence of a survey, or of work done upon the road except at points some distance east and west of the place near which the accident occurred; that there was a foot-path running along the south side of the main track in the village, and about four feet south of it, which was the natural place for persons on foot to go, and was generally traveled by such in going to and from and between the postoffice and stores, and was better for walking than the main track; that this footpath ran over some hay-scales, owned by private parties, which had been there for more than 30 years, but had never been controlled by the town, nor had any work been done by the town upon the foot-path; that in going from the postoffice along this foot path across the floor of the hay scales, the plaintiff fell through the floor by reason of its insufficiency, and was injured. The court charged that the plaintiff was not entitled to recover. *Held* erroneous (*Barrett, J.* dissenting), and that the decision in this case reported, 38 Vt. 270, being upon different evidence, does

not conflict with the present decision. *Whitney v. Essex*, 42 Vt. 520.

138. Where a land owner has given up his land to the public use for a highway, and the town has voluntarily taken upon itself the burden of keeping it in repair, the same end is attained that would have been, if it had been laid out with all the statutory formalities. *Ib.*

139. The assumption of the burden is the act of the town, and proof of this is not necessarily confined to proof of the acts of the selectmen. *Ib.*

140. Any evidence that a town has kept a road in repair, within its limits, tends to show that the burden of keeping it in repair has either been cast upon it by necessary proceedings, or that the town has voluntarily assumed the burden without any proceedings; and evidence that work had been done on this road, in both directions from the place of the accident, tended to show that the road, at this place, had been adopted. *Ib.*

141. According to the evidence in this case, the highway had, at this place, one path for foot travel, and another for carriage travel, and one path was adopted as much as the other. *Ib.*

142. The fact that the owners of the hay scales had permitted the public to use the floor of the hay scales for so long a time, was sufficient evidence to be submitted to the jury, upon the question whether the owners had in fact given up the floor to the use of the public for that purpose. *Ib.*

143. The injury sought to be recovered for was received while the plaintiff was traveling upon a side track, west of the track which the town had worked for the purposes of travel. The defendant requested the court to charge: "If the jury find that the east road, at the time of the accident, was in good and sufficient repair, and was of sufficient width, and in proper condition to accommodate all the travel which then had occasion to use it, and that from its position, form and construction it was apparently the place designed by the town as its highway, and that the plaintiff voluntarily, or by mere choice of his horse, left the wrought way and went upon the west track—it being conceded that that track was never worked by the town—the defendant is entitled to a verdict, no matter what the motive for the diversion, or the condition of the margin." *Held*, that the defendant was entitled to have this request answered affirmatively; but *quære* whether it was not adequately answered. *Ozier v. Hinesburgh*, 44 Vt. 220.

144. In *Goodrich v. Colchester* (Chittenden Co. Dec. T., 1855), on the report of referees, the town was *held* liable for an injury to the plaintiff upon a side track outside the limits of the surveyed highway, although the town had neither made nor repaired it, and the surveyed

track had been worked and was in good condition, but the side track had long been used by the plaintiff and the public as a route of travel, and there was nothing to indicate to the public that it was not a recognized highway, and the plaintiff turned into it, in the night time, with his horse and wagon.

145. **By-way.** A railroad company, having occupied a highway in constructing their railroad, built a by-way around the obstruction, through the insufficiency of which a traveler upon it was injured. *Held*, that the town was liable therefor, although it had resisted the obstruction by the railroad, and had not adopted the by-path. *Batty v. Duxbury*, 24 Vt. 155. *Ib.* 484.

146. Towns having reasonable notice of obstructions in their highways are bound to remove them, or make safe by-ways to pass around them, or see to it that they are made by others, in order to exonerate themselves from liability to travelers, and in such case the town is liable for the insufficiency of such by-way. *Ib.*; and see *Willard v. Newbury*, 22 Vt. 458. 27 Vt. 461. *Barber v. Essex*, 27 Vt. 62. 41 Vt. 439. *Dickinson v. Rockingham*, 45 Vt. 99. *Bates v. Sharon*, 45 Vt. 474.

147. The location of a railroad across a highway, under the charter of the railroad company, does not, while the railroad is building, operate a discontinuance of the highway, but only a temporary suspension of its use; and during such temporary obstruction rendering the highway unsafe, the town is bound to provide a suitable by-way, and take all proper and reasonable precautions to prevent travelers from passing upon the highway while it remains unsafe—as, by maintaining barriers or obstructions. If the town omit its duty in this respect, it is liable for injuries to travelers occasioned thereby. *Willard v. Newbury*. *Barber v. Essex*.

148. A town is responsible for the insufficiency of a highway occasioned by the acts or neglect of a railroad company in the construction of their railroad across a highway under their charter. *Ib.*

149. The town is primarily responsible for such neglect of the servants of the railroad company, and is entitled to indemnity against the company. *Batty v. Duxbury*, 24 Vt. 155. *Newbury v. R. R. Co.* *Ib.* 162.

150. Where a by-way is built for passage around a highway bridge while being repaired, its sufficiency, as to a traveler injured thereon, is to be determined with reference to the purpose and occasion of it; if as sufficient and in as good repair as was reasonably demanded for such purpose and occasion, the town is not liable for an injury upon it *Briggs v. Guilford*, 8 Vt. 264.

151. A highway having become impassable

by a freshet, one of the selectmen of the town placed a barrier across it near the foundrous place, intending thereby to divert travel around such place and over a certain private way, not before adopted by the town, until the highway should be repaired. The plaintiff, traveling upon the highway, and having occasion to go to and return from a dwelling house situate on said private way, was injured while passing over it on his return, by reason of its insufficiency. He had no occasion to use the obstructed portion of the highway in going to or returning from said house, and would not have used it, though it had not been washed out, but had been in perfect condition. *Held*, nevertheless (*Wheeler and Royce, J. J.*, dissenting), that such private way had thus become, temporarily, a substitute for a portion of the main road, and was an open public highway for all travelers who had occasion to use it, whether to go to and from said house, or to pass around the wash-out, and that the town was liable to the plaintiff for its insufficiency. *Dickinson v. Rockingham*, 45 Vt. 99.

**152. Statute exemptions.** Under G. S. c. 25, s. 41, exempting towns from liability for damage upon highways, "sustained in consequence of the passing on such highway, &c., of any carriage bearing a load exceeding 10,000 pounds in weight;"—*Held*, (1), that no action could be sustained, in any case, for such damage where the load exceeded that weight; (2), that the word "load" meant the material placed upon the carriage for the purpose of removal, and did not include the carriage itself, nor anything—as a rack—employed simply for the purpose of transportation of that material; nor did it include the driver. *Howe v. Castleton*, 25 Vt. 162.

**153.** Where a bridge was "good and sufficient except in the matter of its springing when driven upon on a trot," and it was one of that class of bridges which the statute makes it unlawful to drive upon at a rate faster than a walk, and the plaintiff received an injury by reason of the springing motion of the bridge while driving across the bridge upon a trot;—*Held*, that the town was under no obligation to provide a bridge sufficient for such use; and whether the springing of the bridge was occasioned by the plaintiff's own driving, or by the driving of one who just preceded him on a trot, the plaintiff could not recover. *Abbott v. Wolcott*, 38 Vt. 666.

**154.** G. S. c. 25, s. 73, provides that it shall not be lawful to drive over certain bridges at a rate faster than a walk, and that any person guilty of such offense shall forfeit and pay a certain penalty, &c. The next section provides that no person shall be liable to such penalty, unless a board with directions to that effect shall have been posted up, &c. *Held*—such

board not being posted up—that the statute made such driving unlawful, nevertheless, although, in such case, the penalty would not be incurred. *Id.*

**155. Sunday travel.** A person traveling upon Sunday, in violation of G. S. c. 93, s. 8, which prohibits, under a penalty, traveling on that day except from necessity or charity, cannot recover of a town for an injury sustained, while so traveling, through the insufficiency of a highway. *Johnson v. Irasburgh*, 47 Vt. 28; and see *McClary v. Lowell*, 44 Vt. 116.

**156. —repairs.** In an action against a town alleging the insufficiency of a highway suddenly become impaired, where there was no conflict in the evidence, the court ruled, as matter of law, that, as the case was presented, neither the officers nor inhabitants of the town were obliged to turn out and repair the road upon the Sabbath. *Held* correct,—and *quare* as to such obligation in any case, merely to facilitate travel. *Spear v. Lowell*, 47 Vt. 692.

**157. Coasting.** Coasting on sleds in a highway is not an insufficiency of the highway. Where a traveler was injured by being run against by a boy coasting in the highway;—*Held*, that the town was not liable, although the selectmen, having the authority to prohibit coasting, had neglected to do so. *Hutchinson v. Concord*, 41 Vt. 271.

**158. Insufficiency of bridge.** On a case stated, it was *held* that a certain turnpike bridge, elevated and long, required for reasonable safety of travelers something more than certain side timbers; and that, for want a railing, the bridge was insufficient. *Holley v. Winoski T. Co.*, 1 Aik. 74. 15 Vt. 715. See 6 Vt. 247.

**159.** *Held*, that in a cattle-raising state, like Vermont, a turnpike (or highway) bridge should be sufficient to sustain a drove of cattle, if passed over with common care and prudence. *Richardson v. Royallton, &c., T. Co.*, 6 Vt. 496.

**160.** The declaration alleged the injury to have been caused by the insufficiency of a bridge. The proof was of a defect in the abutment. *Held*, no variance; for that the abutment was part of the bridge, in the sense in which the term is ordinarily used. *Bardwell v. Jamaica*, 15 Vt. 498.

**161.** The word "supports," as used in G. S. c. 25, s. 73, refers to that upon which the bridge stands or rests, and which supports it from beneath—such as the abutments or piers, or trestles. *Abbott v. Wolcott*, 38 Vt. 666.

**162. —of highway.** A referee found and reported that the highway was insufficient and out of repair, from the fact that the main path had been blocked up with drifts of snow from four to six weeks, which had crowded the travel into the ditch, &c. *Held*, that these facts, so



far from showing the road sufficient, showed the most gross neglect on the part of the town, and that there was no error in fact or law apparent in the report. *Green v. Danby*, 12 Vt. 338.

163. Heavy snow ridges, formed across a highway by the passing of railroad trains crossing it, were cut through, but too narrowly for safety of travel upon the highway. A fresh drift formed within this cut, in passing over which, the plaintiff, a traveler, was overturned and injured. The referees reported that if the cut had been sufficiently wide for the reasonable safety and accommodation of ordinary travel the accident would not have happened, notwithstanding the fresh drift of that day. *Held*, a sufficient finding that the efficient cause of the accident was the defect from lack of reasonable and sufficient width of the road way. *Barton v. Montpelier*, 30 Vt. 650.

164. **Sufficiency, a question of fact.** In an action against a town for an injury caused by the insufficiency of a highway, where the plaintiff's horse was driven over the left bank, the court charged the jury that if the road, at the time and place in question, was well beaten to such a width that the horse might as conveniently have been driven in a line 18 inches or more from the left extremity of former travel, as in any other part of the road, they ought to find for the defendant. *Held* erroneous, and that the questions involved in the ruling were questions of fact for the jury. *Sessions v. Newport*, 23 Vt. 9.

165. Whether a highway is sufficient, or not, is a question of fact for the jury. *Ib.* *Leicester v. Pittsford*, 6 Vt. 245. *Green v. Danby*, 12 Vt. 338. *Kelsey v. Glover*, 15 Vt. 708. *Cassedy v. Stockbridge*, 21 Vt. 391. *Willard v. Newbury*, 22 Vt. 458. *Hill v. New Haven*, 37 Vt. 510.

166. Many attempts have been made to turn the question into one of law for the court to decide, but they have been uniformly unsuccessful. *Poland, C. J.*, in *Hill v. New Haven*.

167. In actions against towns to recover for an injury occasioned by the insufficiency of a highway, it has long been the practical and received doctrine, that whether the road was out of repair under circumstances to place the town in fault; whether the injury happened from that cause; and whether the party injured conducted with due care and skill, are questions of fact, or mixed questions of law and fact, to be determined by the jury under proper instructions from the court. The evidence may, indeed, disclose facts of so decisive a character as to justify the court in directing a verdict upon the mere finding of those facts. But in ordinary cases, viz: those which admit of doubt as to the just liability of the town, such a variety of facts and circumstances will usually require to be weighed, that

the jury must be left, upon due consideration of the whole matter, to draw the ultimate conclusion. *Royce, J.*, in *Kelsey v. Glover*, 15 Vt. 714. *Davis, J.*, in *Rice v. Montpelier*, 19 Vt. 474. *Leicester v. Pittsford*, 6 Vt. 245.

168. Whether a good substantial railing was necessary, is a question of fact for the jury. (This consistent with *Holley v. Winooski Turnpike Co.*, 1 Aik. 74, which was decided as an issue of fact on a case stated.) *Leicester v. Pittsford*, 6 Vt. 245, 247.

169. Sufficiency of a highway is a question of fact. *Green v. Danby*, 12 Vt. 338. *Cassedy v. Stockbridge*, 21 Vt. 391. *Willard v. Newbury*, 22 Vt. 458. *Bagley v. Ludlow*, 41 Vt. 425.

170. The question whether a legal highway exists; the liability of towns for injuries received by those voluntarily leaving the traveled track and going upon the margin; their liability for latent defects, &c., may present questions of law for the court warranting the direction of a verdict. *Young v. Wheelock*, 18 Vt. 493. *Rice v. Montpelier*, 19 Vt. 470. *Whitney v. Essex*, 38 Vt. 270. *Prindle v. Fletcher*, 39 Vt. 255. *Morse v. Richmond*, 41 Vt. 435.

171. Under the events and circumstances that constituted and characterized the accident in question upon a highway;—*Held*, that no rigorous rule of law could be formulated by which it could be determined that a given width of traveled track in a certain depth of snow, and bounded by banks of a given height and slope, would constitute a highway in good and sufficient repair. *Durgin v. Danville*, 47 Vt. 95.

172. **Night travel.** The public have the right to travel the highways in the night as well as in the day time, and are often compelled to; and it is the duty of towns to keep their roads in a reasonable state of repair for travel both by night and day, and the public have a right to presume that they are so. *Pierpoint, C. J.*, in *Bagley v. Ludlow*, 41 Vt. 434—"in their surface, margin and muniments." So *held* in *Glidden v. Reading*, 38 Vt. 52.

173. In an action against a town to recover for an injury received by the plaintiff upon a highway by driving his team against a log in the highway, in a night "so dark that he could not see his horse," the court charged the jury, that the proper criterion of determining the sufficiency of the highway was not for the jury to place themselves in contemplation of the place and the log, in the afternoon previous to the accident, and say whether or not it was careless to permit the log to lie where it did, but to place themselves in contemplation of the place and the log, with reference to the circumstances as developed by the case,—such as the darkness, the turning round of the team, the manner in which the accident occurred, and the accident itself. *Held* correct. *Bagley v. Ludlow*, 41 Vt. 425.

174. The court cannot say, as matter of law, that "attempting to cross a bridge in a totally dark night, without a light," was want of proper care and diligence on the part of a traveler. This is exclusively a question of fact. *Swift v. Newbury*, 36 Vt. 355; and see *Barber v. Essex*, 27 Vt. 62.

175. **Passing teams.** Towns are under the statutory duty to provide for the safety of travelers passing teams going in the same direction, by keeping places, which naturally invite the attempt to pass, in good and sufficient repair. This duty is not confined to cases of absolute necessity, but, in this case, was extended to one who attempted to pass a team for the purpose of keeping in company with a companion who had driven past and gone ahead. *Mochler v. Shaftsbury*, 46 Vt. 580.

176. **Accident combining.** Towns are bound to construct their highways reasonably sufficient with reference to such accidents as should be expected to occur. *Lindsey v. Danville*, 45 Vt. 72.

177. Where a traveler upon a highway, in the exercise of ordinary care and prudence, receives an injury which is the combined result of accident and of the insufficiency of the highway, and the injury is attributable to such insufficiency conspiring with such accidental cause, the town is liable;—as, where a nut, fastening the tongue of a wagon to the axle-tree, came off, and the wagon was thereby run off a bank not guarded by a sufficient railing,—the traveler having exercised ordinary care and prudence in ascertaining the sufficiency of the nut and its fastening, and in other respects. *Hunt v. Pownal*, 9 Vt. 411; and see *Holley v. W. Turnpike Co.*, 1 Aik. 74.

178. Towns are bound to maintain their highways in such manner that they may be reasonably safe for the amount and kind of travel which may be fairly expected on them, and for such horses and carriages as are commonly used and as people may be expected to use on them (*Hodge v. Bennington*, 43 Vt. 450);—and so as to enable travelers to be reasonably safe from the consequences of such accidents as may be justly expected, occasionally, to occur on such roads;—as where a runaway horse was turned upon the plaintiff's team, by the projection of a tree-top into the highway. *Kelsey v. Glover*, 15 Vt. 708.

179. This principle applied to the case of a carriage insufficient in its construction. *Fletcher v. Barnett*, 43 Vt. 192.

180. Also, to the case of the breaking of an axle nearly severed by an old crack, and clearly unsafe for use upon the road,—the plaintiff having exercised "the care of a prudent man in respect to the soundness and sufficiency of the wagon." The rule in Massachusetts, which throws upon the traveler the risk of the suffi-

ciency of the horse, carriage, harness, &c. (*Murdock v. Warwick*, 4 Gray 178), has never been followed in this State; and the refusal to charge that the town was not bound to furnish a road sufficient for the safe passage of a wagon with an axle broken as above stated, was sustained in *Hodge v. Bennington*, 43 Vt. 450; and see *Fletcher v. Barnett*.

181. Applied, also, to the case of a horse slipping by reason of being smooth shod, and thus unable to hold back the load, whereby the team was thrust over an unguarded bank. *Allen v. Hancock*, 16 Vt. 230.

182. While the plaintiff was descending a steep hill in a highway with a wagon drawn by two horses, and loaded, his team was thrown out of the road and injured; and his testimony tended to prove that the highway was insufficient for want of some munition on the lower side to prevent teams from going off in case of accident, and that the injury was occasioned thereby. The defendant's evidence tended to prove that the plaintiff was in fault in attempting to descend the hill without chaining or confining his wheel, with his horses so smooth-shod behind that they could not hold back the load; and that, by reason of this, one of the horses slipped, which occasioned the going off the road, and the damage. The court charged the jury, that if the plaintiff was wanting in prudence and ordinary care in attempting to go down the hill at the time he did, with his horses shod as they were, and his wheel not confined, he could not recover although the road was insufficient; but that if he was not wanting in ordinary care and prudence in placing himself in that situation, under the circumstances, and the road was insufficient, he was entitled to recover, notwithstanding the slipping of the horse conspired with the insufficiency of the road in producing the result. *Held correct. Ib.*

183. **Measure of liability.** The duty of towns in the matter of keeping their highways in good and sufficient repair, as affecting their liability to pay damages for an injury caused by a defect in such highways, is not to be measured by the exercise of ordinary care and diligence. Nor, on the other hand, is a town liable in all cases and absolutely for damages resulting from such defect, as an insurer. The statute prescribes the duty to keep the highways in good and sufficient repair. If the town is chargeable with any fault in respect to this duty, then the liability attaches; and it is liable as an insurer against accidents and injuries caused by defects existing through any such fault of the town. *Barrett, J.*, in *Prindle v. Fletcher*, 39 Vt. 255.

184. **Latent defect.** The plaintiff was traveling upon a highway, when the ground gave way under his horse, through some latent defect under the ground which was not known

and was not discoverable, and which the authorities of the town could not have learned about, and thereby the horse was injured. *Held*, that the town was not liable. *Id.*

**185. Notice of defect.** The liability of a town for defects in a highway does not depend upon the town's having notice of such defect. *Bardwell v. Jamaica*, 15 Vt. 438; that is, where the defect is such as that it might or ought to have been known, and the defect made good. 39 Vt. 259.

**186. Defect suddenly happening.** When a sudden and unforeseen defect occurs in a highway, without fault on the part of the town, the town is not chargeable for the damage resulting from such defect, unless it has been in default in respect to getting seasonable knowledge of the defect; or, unless, having such knowledge, it was reasonably practicable to repair the defect, or to put up a warning or barrier to avoid it, before the happening of the accident. *Ozier v. Hinesburgh*, 44 Vt. 230.

**187. Damage special.** The "special damage" recoverable of a town under the statute (G. S. c. 25, s. 41), for injuries received through the insufficiency of a highway, includes every actionable injury. Under it, a father may recover in his own name for loss of service and expense of cure of his minor daughter. *Bailey v. Fairfield*, Brayt. 126.

**188.** And a husband for that of his wife. *Whitecomb v. Barre*, 37 Vt. 148.

**189. — direct.** In order to such recovery, the damage must not only be *special*, in the language of the statute, but *direct*, either to the person of the traveler, to his team, carriage, or other property, while he, or the property, was in a state of transition over the road or bridge; and *held*, that where the damages were only general, as where, by reason of the general badness and insufficiency of the road, the plaintiff did not attempt to travel the road, or, traveling it, could not do so as expeditiously and carry as large loads as he otherwise might and would have done, no action lay against the town therefor. *Baxter v. Winooski T. Co.*, 22 Vt. 114. 27 Vt. 457.

**190.** A town is liable for special damage occasioned by the insufficiency of a highway, only in those cases where the injury is direct to the person or property of the traveler, and where such insufficiency is the proximate or immediate and not the remote cause of it. *Id.* *Hyde v. Jamaica*, 27 Vt. 443.

**191.** While the plaintiff was driving his horse over a highway bridge, the horse broke through the bridge by reason of a defect in it, and became so fastened that he could not extricate himself without assistance. While the plaintiff was properly rendering such assistance, he was injured by the horse in his efforts to

extricate himself. *Held*, that the insufficiency of the bridge was the direct and proximate cause of the injury to the person of the plaintiff, and that the town was liable therefor. *Stickney v. Maidstone*, 30 Vt. 738.

**192. Plaintiff's negligence contributory.** In an action against a town to recover for an injury received through the insufficiency of a highway, the court charged that if the injury was occasioned in any degree, either in whole or in part, by the insufficiency of the highway, the plaintiff was entitled to recover. *Held* erroneous. *Noyes v. Morristown*, 1 Vt. 353.

**193.** If the injury in whole or in part was owing to the plaintiff's want of ordinary care or prudence, he cannot recover. *Briggs v. Guilford*, 8 Vt. 264. 24 Vt. 496. 27 Vt. 466.

**194.** In such action, when the question of contributory negligence is raised, a charge without qualification, that "if the accident would have happened the same if such want of care of the plaintiff had not existed, then such want of care is of no consequence in the case," would be erroneous. The test is not whether the accident would have occurred independently of such want of care and prudence, but whether such want of care and prudence contributed, in any degree, in point of fact, to the happening of the accident. If it did so contribute, the plaintiff cannot recover. If it did not, the right of recovery is not affected by it. *Walker v. Westfield*, 39 Vt. 246; and see *Hill v. New Haven*, 37 Vt. 507.

**195.** A bridge, which it was the duty of the defendant town to maintain, having been carried away by a flood, and the town having neglected for an unreasonable time to rebuild it, an old fordway was repaired by the highway surveyor and several others who were interested in having the stream passable while they were without a bridge. The plaintiff's intestate, a physician, undertook to pass from W to T over the highway connected with the fordway, knowing that he would be obliged on this route to ford the stream, instead of taking another road to T, of greater length, which was then in very bad condition, but passable. On arriving at the stream, which had been rising through the day and was then rapidly rising, the intestate, after observing the stream, attempted its passage along the fordway, sitting in his wagon drawn by one horse, and was drowned in the attempt. It was found and reported by the referee, that a person of ordinary prudence, merely desiring to make progress in his journey but actuated by no particular motives for haste, would not have so ventured to cross the stream at that time and place; but that if it was allowable, in determining the question of ordinary prudence, to take into consideration the situation and circumstances of the individual, and the motives which influenced

him to desire to proceed rapidly in his journey, and the sufficiency of those motives, then the referee found that a person of ordinary prudence, situated in every respect as the intestate there was, would have so attempted to cross the stream. *Held*, that the motive of the intestate in risking the passage, did not affect the question of ordinary prudence; and that the plaintiff could not recover upon the facts reported. *Hyde v. Jamaica*, 27 Vt. 448. *Redfield*, C. J., dissenting.

**196. Action and its incidents.** Action against two towns jointly, to recover damages caused by the insufficiency of a bridge between the two;—*Held* correct. *Peckham v. Burlington et al.*, Brayt. 184.

**197. Transitory.** An action against a town for an injury caused by the insufficiency of a highway is not local, so as that the action must be brought in the county where the injury happened. The statute has made no other actions strictly local, except ejectment and trespass on the freehold. *Hunt v. Pownal*, 9 Vt. 411.

**198. Declaration.** In such action, the injury cannot be alleged with a *continuando*, or on divers days and times. The injury sustained at any one time cannot be continued or repeated, and the injuries sustained on different days must, from their very nature, be distinct and independent. It is the *per quod* which is the *gravamen* of the action, not the insufficiency of the road. *Baxter v. Winooski T. Co.*, 22 Vt. 114.

**199.** In such action the declaration averred that the highway was "greatly insufficient and out of repair, and was then and there full of deep holes, excavations and pits," and that the plaintiff was injured "by reason of said insufficiency and want of repair." *Held*, that the general allegations of insufficiency, &c., were not confined to the specific defects enumerated, and that proof could be made that the real defect was the want of a proper barrier to prevent the traveler from driving or falling into an excavation. *Barber v. Essex*, 27 Vt. 62.

**200. Evidence.** The *opinions* of witnesses as to the sufficiency of a highway, are not admissible evidence. *Lester v. Pittsford*, 7 Vt. 158.

**201.** The dirt covering the plank of a culvert got washed off by a heavy rain and flood. The plaintiff's horse broke through the plank and broke his leg. In an action against the town, a witness, who was present and witnessed the accident and examined the culvert, testified that if the dirt had not been washed from the plank the injury would not have happened. *Held* inadmissible. *Crane v. Northfield*, 33 Vt. 124.

**202.** In an action against a town for an injury received by being thrown from a wagon in

crossing a water bar upon a highway;—*Held*, that, as tending to prove the condition of the highway, evidence was admissible as to the effect upon other carriages by crossing the bar, though not the same kind of carriage, nor driven at the same rate of speed, nor at a reasonable speed. Such effects are in the nature of experiments showing the condition of the road. *Kent v. Lincoln*, 32 Vt. 591. 41 Vt. 484. 39 Vt. 252.

**203. Burden of proof.** In such an action, the burden of proof is upon the plaintiff. He must make out a *prima facie* case, before the defendants can be put upon their defense. Proving merely that the road was out of repair does not entitle him to recover; but it is necessary further to show that he was injured thereby. It is not incumbent on him to negative the charge of negligence or imprudence on his part, such proof being properly matter of defense; but this proof is not necessary until a *prima facie* case is made out. It is also true, that if the proof be deficient the consequences fall where the *onus probandi* rests. *Phelps, J.*, in *Lester v. Pittsford*, 7 Vt. 158.

**204.** The exercise of ordinary care is not to be presumed, but must be proved as an affirmative fact, and the burden of proof is on the plaintiff. *Bennett, J.*, in *Hyde v. Jamaica*, 27 Vt. 465.

**205.** It is undoubtedly true, that the plaintiff is bound to make out a *prima facie* case of the exercise of proper care on his part, the burden of proof being upon him on this point, as well as others. But this is rather a negative than an affirmative proposition. The requisite is, rather, that he was not guilty of negligence than that he should prove any positive diligence; and after such negative evidence of the alleged fact as may be presumed to be in the power of the party, is shown, the burden of proof is changed upon the other side. *Redfield, C. J.*, in *Barber v. Essex*, 27 Vt. 69.

**206.** In order for the plaintiff to make a case upon which he can safely rest, it is necessary that he should submit a state and character of evidence upon which the jury would be authorized to find affirmatively, both that the defect in the road operated to produce the accident, and that no want of care on his part contributed to it. This is what he assumes, and this burden goes with him throughout the case, and in the end, he must be able to have the jury, upon the whole evidence, find affirmatively the same that was necessary to be established by his opening evidence, at the time he rested upon making his *prima facie* case. *Barrett, J.*, in *Walker v. Westfield*, 39 Vt. 258.

**207.** The plaintiff, in such case, is not bound to establish as a distinct affirmative point in the outset, that he was not guilty of carelessness or negligence. The defect in the highway

being conceded or proved, he is bound to give sufficient evidence to establish *prima facie* that he sustained an injury by reason of such defect; and this, necessarily, to a certain extent, shows negatively that it was not caused by any thing else. But if his evidence discloses nothing but that his conduct was proper and prudent, he is not bound to go further, until this has been impugned by some evidence on the other side. The true rule on this subject was laid down by *Phelps, J.*, in *Lester v. Pittsford* (*supra*, 203). *Poland, C. J.*, in *Hill v. New Haven*, 87 Vt. 507; and see *Powers v. Woodstock*, 38 Vt. 44.

208. That a bridge was out of repair and a traveler's horse was found dead near it, &c., affords no legal presumption, though in lack of evidence to the contrary, that he was killed by reason of the insufficiency of the bridge. Judgment reversed for such ruling,—the question being one of fact for the jury. *Yuran v. Randolph*, 6 Vt. 369.

209. Damages. In an action against a town for injuries to a wagon caused by a defect in a highway, loss of the use of the wagon, for so long a time as it necessarily took to repair it, is recoverable as damages. *Wheeler v. Townshend*, 42 Vt. 15.

210. In such action to recover for personal injuries the town is not entitled to have allowed, towards the damages, the sum received by the plaintiff of an insurance company for the same injury. *Harding v. Townshend*, 43 Vt. 536.

211. Notice of the injury. It is not necessary to aver in the declaration that the plaintiff within 30 days gave the notice required by G. S. c. 25, s. 42; but this is an essential part of the plaintiff's proof to perfect his right of action. *Kent v. Lincoln*, 32 Vt. 591. *Matthie v. Barton*, 40 Vt. 286; and see *Doyon v. School District*, 35 Vt. 520.

212. The defendant, under the general issue, may give evidence that such notice was not given; for this is but a denial of what the plaintiff is bound to prove to make out his right of action; and the case does not fall under G. S. c. 33, s. 15, requiring a special plea in cases where the special matter of defense operates to extinguish a right of action which once existed. *Matthie v. Barton*.

213. Where a married woman received a personal injury by reason of the insufficiency of a highway, a notice to the town of the claim of damages, signed by her alone, was held sufficient under the statute of 1870, No. 49. *Church v. Westminster*, 45 Vt. 380.

214. The written notice of injury upon a highway wholly omitted to state the place where the injury was received. Held, that such omission could not be supplied by an oral notice; and, *quære*, whether the selectmen

could waive such requirement of the statute. *Underhill v. Washington*, 46 Vt. 767.

215. Notice of the plaintiff's injury upon a highway and claim of damage indicated "the place where such injury was received," only as "on the road leading from Fairfield Center to East Fairfield." The distance between these points was four and a half miles. Held, that the place where, &c., was not sufficiently stated under Stat. 1870, No. 49, and that the notice was insufficient. *Lau v. Fairfield*, 46 Vt. 425.

216. Notice of an injury as sustained on "the Green River road," was held not sufficient to indicate the place where the injury was received,—it appearing that the road so denominated was about twenty miles long, extending some five miles through the defendant town. *Babcock v. Guilford*, 47 Vt. 519.

217. In actions for damages caused by the insufficiency, &c., of a bridge erected and maintained at the expense of two or more towns, notice must be given to each, and the action and judgment must be against all, or neither. *Brown v. Fairhaven*, 47 Vt. 386.

218. Notice of an injury received upon a highway, under the statutes of 1870 and 1874, should point as directly and plainly to the place where the injury was received as is reasonably practicable, having regard to its character and surroundings. In this case it was held not sufficient. *Reed v. Calais*, 48 Vt. 7. *Bean v. Concord*, *Id.*, 30.

219. In such action, the plaintiff offered to prove that he complained to one of the selectmen who told him to bring no suit and make no trouble;—that he had heard the road was bad, and that when the plaintiff had ascertained the extent of his injury the town would pay him;—that because of this, he gave no further notice. Held, not admissible, as tending to show the road out of repair, nor as a waiver of notice. *Wheelock v. Hardwick*, 48 Vt. 19.

220. Bereft of reason. There can be no arbitrary rule of law as to the length of time one shall be "bereft of his reason," to bring him within the proviso of the statute excusing him from giving notice of his injury upon a highway (G. S. c. 25, s. 42). If the injured person, after the primary effects of the injury have passed, and the physical system has had the time and opportunity to resume its normal condition, is still left in a state of insanity, insensibility, or otherwise deprived of his reason, and that condition is in its character fixed, then whether never, or in a shorter or longer time, and though within the statutory period for giving notice, his reason may return to him, the fact is established that by the injury he was "bereft of his reason," and he is excused by the statute from giving the notice. *Gonyeau v. Milton*, 48 Vt. 172.

## VII. RIGHTS OF LAND-OWNER, AND OF THE PUBLIC.

**221. Adjoining land.** The owner of land has no fee or right of soil in a highway or public common adjoining, unless the same is included within the boundaries of his grant; and when not so included, he cannot maintain trespass for a private appropriation thereof. *Ferre v. Doty*, 2 Vt. 378.

**222.** Where a highway passes between the land of A and B, the presumption, *prima facie*, is that each owns to the center of the road; yet this is only a presumption of fact, and not of law so as to become a rule of property, and may at all times be rebutted. It is, doubtless, founded upon the supposition that they originally owned the land taken for the highway equally. *Bennett, J., in Richardson v. Vt. Central R. Co.*, 25 Vt. 472.

**223.** The occupation of lands on the line of a highway for twenty years or more, without paper title shown, affords no legal presumption that the occupant's title extends to the center of the highway, or beyond the limits of his actual possession. *Hatch v. Vt. Central R. Co.*, 28 Vt. 142.

**224. Land covered by highway. Dictum.** The conveyance of land covered by a public road does not extinguish the grantor's right to share in the public easement. *Wilson v. Wilson*, 2 Vt. 68.

**225.** The owner of land through which a highway is established retains the fee of the soil embraced within its limits, with the full and exclusive right to its enjoyment in any manner not inconsistent with the enjoyment of the easement by the public for the purposes of a highway. *Holden v. Shattuck*, 34 Vt. 336. *Cole v. Drew*, 44 Vt. 49.

**226.** Thus, he may lawfully depasture his cattle upon it, or otherwise enjoy it, unless he is guilty of some fault through which the enjoyment of the public easement is impaired. *Ib.*

**227.** Where the owner of land over which a highway passes allows his cattle to feed or be in such highway, he is not liable for any accidental injury or damage they may do there, unless it appear that the circumstances and occasion of their being there, or that the character and habits of the animals, were such as to show carelessness on the part of the owner in reference to the convenience and safety of travelers on the highway. *Holden v. Shattuck*.

**228.** The defendant cut the grass growing in a highway crossing the plaintiff's land, by direction of the highway surveyor, because it wet the children's feet and clothes in passing to and from school. He then fed the grass to his horse. In trespass *qua. clau.*,—*Held*, that the grass belonged to the plaintiff; that the defend-

ant had the right to cut it, but by feeding it to his horse he became a trespasser *ab initio*. *Cole v. Drew*, 44 Vt. 49.

**229. Right of town in building and repairing.** As incident to the easement, or right of way, acquired by a town by the laying out of a highway, the town has the right of digging the soil and using the timber and other materials found within the limits of the high way, in a reasonable manner, for the purpose of making and repairing the road, or bridges upon it. *Felch v. Gilman*, 22 Vt. 38. *Baxter v. Winoski T. Co.*, 22 Vt. 114.

**230.** The damages are, or should be, assessed to the land holders with the expectation that the public may take materials from the highway for the purpose of building or repairing the road; and *ruled*, that the earth so dug may be lawfully carried beyond the land-owner's line, to be used on other contiguous parts of the highway. *Baxter v. Winoski T. Co. Cheever v. City of Burlington*, U. S. C. C. Dist. Vt. (1876.)

**231.** The owner of the fee of the land of a highway cannot maintain trespass against the proper town or village authorities, for the digging of a reservoir in the highway for water to be used in sprinkling the streets. By *Pierpoint, J.*: The power of the public over highways is not confined to their use for the sole purpose of travel, but embraces many things for the public convenience and health, such as laying water pipes, constructing drains, sewers, reservoirs, &c. *West v. Bancroft*, 32 Vt. 367.

**232. Prescription against the public.** On the laying out of a highway, it was so fenced as to leave part of the survey within the inclosure of the plaintiff over whose land the road was laid out, and he had continued in possession and occupied to the fence for more than 20 years thereafter. It was *held*, in 1850, while a statute corresponding to G. S. c. 24, s. 17, was in force, and while the statute of limitations, as in C. S. c. 61, was running as against the State, that the *non user* of the inclosed land by the public, and the constant use of it by the plaintiff under a claim of right, established in him a prescriptive right; and that the defendant, a selectman, was liable in trespass *qua. clau.* for proceeding, under a statute corresponding to G. S. c. 25, s. 66, to remove the fence back upon the line of the original survey. *Knight v. Heaton*, 22 Vt. 480.

**233. Action for disturbance, &c.** For the interruption of an easement merely, the action must be case. For an injury to the right of soil in a highway, the action may be trespass, though the same act may impede the use of the easement. *Wilson v. Wilson*, 2 Vt. 68.

**234. Law of the road.** It is ordinarily the duty of a person on horseback to give the

traveled path to one who is traveling in a wagon, or other vehicle, sanctioned by common consent and immemorial usage. *Washburn v. Tracy*, 2 D. Chip. 128.

# HOMESTEAD.

1. **As connected with the dwelling.** Under the homestead act, (C. S. c. 65 s. 1,) the homestead does not include a distinct and separate parcel of land, not adjoining or contiguous to the house lot, although used as tillage and woodland in connection with the house lot; but applies only to the house and the land connected with the house. *Mills v. Grant*, 36 Vt. 269. *True v. Morrill*, 28 Vt. 672.

2. A blacksmith shop, not used as such, and an unused water privilege, both on the opposite side of the highway from the dwelling house and barn, but possessed and occupied in connection with the whole premises, and the whole worth less than \$500, were held to be part of the homestead; and, *semble*, if the housekeeper had been a blacksmith by trade and had used the shop in his business, the decision would be the same. *West River Bank v. Gale*, 42 Vt. 27.

3. —**with residence.** As the homestead act stood in 1857, nothing short of actual residence upon premises intended for a homestead gave them the character of a homestead, so as to cut off the right of the owner to alienate or mortgage them without his wife joining in the deed. *Spaulding v. Crane*, 46 Vt. 292.

4. The language of the earlier homestead acts (*occupied by such person as a homestead*; C. S. c. 65, s. 1) implies a personal occupancy by the housekeeper, and that he should live and have his home there. *True v. Morrill*, 28 Vt. 672. *Davis v. Andrews*, 30 Vt. 678.

5. Under this act, a piece of land upon which the party never resided, though he had a house upon it occupied by a tenant, cannot be treated as such homestead, although he had no other dwelling house, and was intending to move upon the premises at some future time. *True v. Morrill*.

6. So, where the owner of a homestead moved from it with his family in October, 1856, leasing it for 5 years from the next April, and the lessee took immediate possession, and the owner resided a mile and a half distant;—*Held*, that in January, 1857, there was no such homestead right as required the wife to join in a deed with the husband in order to pass the title. *Davis v. Andrews*, 30 Vt. 678.

7. By G. S. c. 68, s. 1, the words are—*used or kept*, instead of *occupied*. This distinction taken in *West River Bank v. Gale*, 42 Vt. 27.

8. Where a housekeeper, in the fall of 1865, removed from his homestead for a temporary purpose, not intending to abandon the premises as his homestead, but intending to return and resume his living there as soon as such temporary purpose was served, and he preserved that intent during his absence, and, by an accidental injury, was further detained from returning until April 1, 1867, and the premises in the interim had been attached;—*Held*, that the premises were “used or kept as a homestead” during all this time, and remained exempt from attachment. *Ib.*

9. **Liberal construction.** The homestead exemption is humane in its character, and the statute should receive a liberal construction in view of the objects aimed at by it. *Jewett v. Guyer*, 38 Vt. 218. *True v. Morrill*, 28 Vt. 674. *McClary v. Bizby*, 36 Vt. 254.

10. **Tenancy in common.** The widow and minor children of a deceased householder and head of a family are entitled to a full homestead right of \$500, in his share of lands held as tenant in common. *McClary v. Bizby*. *Danforth v. Beattie*, 43 Vt. 138.

11. **Equitable estates.** The homestead act applies to an equitable as well as to a legal ownership; to an incumbered as well as to an unincumbered estate. *Morgan v. Stearns*, 41 Vt. 398. *Doane v. Doane*, 46 Vt. 485.

12. **For what debts holden.** Under the homestead act of 1849 (C. S. c. 65), the homestead of a deceased person is holden for the same debts as before his decease—that is, for debts contracted before Dec. 1, 1850, or before the purchase of the homestead. *Simonds v. Powers*, 28 Vt. 354. *Perrin v. Sargeant*, 33 Vt. 84.

13. Under this act, a homestead is exempt from attachment for a debt which accrued after the purchase and after the record of the deed, although it accrued before the housekeeper had taken the occupancy, where he was in the occupancy when the attachment was made. *West River Bank v. Gale*, 42 Vt. 27. *Lamb v. Mason*, 45 Vt. 500. 46 Vt. 298.

14. **Yearly products.** *Held*, that the yearly products of the homestead remain exempt from attachment and execution, although the debtor has received an equal or greater amount from other portions of his possessions. *Jewett v. Guyer*, 38 Vt. 209.

15. In determining the question between an execution creditor and the purchaser of certain hay, whether the hay was the product of the vendor's homestead which had not been set out;—*Held*, that it was to be determined on the same principles as if the question were between the execution creditor and the debtor, on the appointment of commissioners under the statute. *Ib.*

16. **Wife's right.** Under the earlier home-

stead acts;—*Held*, that the wife had but an inchoate lien, contingent on her surviving her husband, and not a *de facto* title in the homestead premises; and that the sole deed of the husband passed the title for his lifetime, and conveyed the land and the homestead right as to all persons, except the wife in case she should happen to survive him. *Hove v. Adams*, 28 Vt. 541. *Davis v. Andrews*, 30 Vt. 678. *Jewett v. Brock*, 32 Vt. 65. 36 Vt. 260.

17. The sole deed by a married man of the homestead, or any interest therein, is, under the statute of 1860 (G. S. c. 68, s. 10), absolutely void to convey it—both as to himself, and as to his wife and children. *Abell v. Lothrop*, 47 Vt. 375. (1875.) *Day v. Adams*, 42 Vt. 516.

18. The spirit of the homestead act and all its provisions indicate that the husband should not have the power by will to devise it away from his wife and minor children. *Meech v. Meech*, 37 Vt. 414.

19. A mortgage by husband and wife of land of which a part is occupied as a homestead, though not set out, is valid as to the homestead, although, as to the residue, void as to creditors. *Danforth v. Beattie*, 43 Vt. 188.

20. Under the original homestead act (C. S. c. 65);—*Held*, that the children of the deceased housekeeper, not of the family of the widow, could not, as against her while occupying the homestead as her family home, assert their respective several rights, and thus share with her in the joint use and in the rents received, nor have partition, nor compel the tenant in possession to hold of them in respect to their several proportionate shares in the estate. *Keyes v. Hill*, 30 Vt. 759.

21. Probate court. An appeal lies from the decision of the probate court setting out a homestead to the widow. *True v. Morrill*, 28 Vt. 672.

22. The stat. 1855, No. 14, requiring dower to be first set out and then the homestead, was directory merely as to the order of time, but imperative that the value of the widow's share of the homestead should be deducted from the dower. Where one full third of the estate was set out as dower, and afterwards the widow's homestead was set out in the same dower lands;—*Held*, that this was a substantial compliance with the statute. *Doane v. Doane*, 33 Vt. 649. (G. S. c. 68, s. 6, Stat. 1866, No. 33.)

23. Under the act of 1856, No. 23, providing that there shall be no homestead right in an estate, the assets of which shall exceed \$500 after paying all debts and charges of administration;—*Held*, that the sum assigned to the widow, and her dower, should not be reckoned as part of such assets. *Chaplin v. Sawyer*, 35 Vt. 286.

24. In an appeal from the probate court for

setting out a homestead without making it subject to debts claimed to be chargeable upon it;—*Held*, that the time when such debts were contracted may be shown by other evidence than the report of the commissioners. Their duty is merely to allow all legal claims presented. *Perrin v. Sargeant*, 33 Vt. 84. See *University of Vt. v. Baxter*, 43 Vt. 645.

25. Chancery. The act of 1857, No. 28, authorizing proceedings in chancery in respect to homesteads, applies as well to homesteads left by deceased persons, as to those of persons in life; and the power of the court of chancery does not depend upon an adjudication of the probate court that such homestead right exists. (G. S. c. 68, s. 13.) *Chaplin v. Sawyer*, 35 Vt. 286.

26. In a bill to arrest proceedings of a creditor of the husband to get the occupancy of the homestead, the wife and minor children are proper parties to join with the husband as complainants. *Abell v. Lothrop*, 47 Vt. 375.

27. Levy of execution. Where an execution is levied upon land in which there is a homestead, the levy is irregular unless the homestead is first set out. *Fairbanks v. Deveraux*, 48 Vt. 550.

## HOUSE (CASTLE).

**Maxim.** The idea embodied in the expression, "a man's house is his castle," is not that, as his *property*, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity is, that it is sacred for the protection of his person, and of his family. An assault on the house can be regarded as an assault on the person, only in case the purpose of such assault be injury to the person of the occupant or members of his family, and, in order to accomplish this, the assailant attacks the castle in order to reach the inmates. In this view it is, that it is said and settled that, in such case, the inmate need not flee from his house in order to escape being injured by the assailant, but may meet him at the threshold and prevent him from breaking in, by any means rendered necessary by the exigency; and upon the same ground and reason as one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault. *State v. Patterson*, 45 Vt. 308.



## HUSBAND AND WIFE.

## I. RIGHTS AND POWERS OF HUSBAND.

1. *As to wife's property.*
2. *To act for her.*

## II. DUTIES AND LIABILITIES OF HUSBAND.

## III. RIGHTS AND POWERS OF WIFE.

1. *As agent of her husband.*
2. *As to her own property.*
3. *Disabilities.*

## IV. DEALINGS BETWEEN HUSBAND AND WIFE.

## V. CONVEYANCES BY OR TO THEM.

## VI. SUITS BY, AGAINST, OR BETWEEN THEM.

## VII. WITNESSES AND EVIDENCE.

## I. RIGHTS AND POWERS OF HUSBAND.

1. *As to wife's property.*

1. **Personal chattels.** The wife's personal property in possession vests absolutely in the husband upon the marriage; and both the property and possession of that earned by her after marriage become those of the husband. For an injury done to such property, after marriage, the wife cannot join. Such joinder is cause of demurrer, motion in arrest, or of error. *Rawlins v. Rounds*, 27 Vt. 17.

2. **Trespass by husband and wife for the taking of a horse.**—"the proper goods and chattels of the said L R," (the wife). Declaration held ill on general demurrer. *Id.* See *post*, 103.

3. **Distributive share.** The distributive share of a *feme covert* in an estate consisting of specific personal chattels, after a decree of distribution, vests absolutely in the husband, and may be reached by his creditors by trustee process. *Parks v. Cushman*, 9 Vt. 320. 10 Vt. 451. 11 Vt. 363. 32 Vt. 775. (Changed by Stat. 1867, No. 21.)

4. An administrator cannot be held as trustee of a husband, for a distributive share of the estate belonging to the wife, before a decree of distribution. *Probate Court v. Niles*, 33 Vt. 775;—nor after. *Short v. Moore*, 10 Vt. 446.

5. **Lands.** Where lands descend to a married woman, her husband, on and at the death of her ancestor, acquires an interest therein, either during coverture, or for his own life as tenant by the curtesy, as the case may be, which is immediately subject to attachment and levy of execution for his debts. *Hyde v. Barney*, 17 Vt. 280. *Mattocks v. Stearns*, 9 Vt. 326. (Now changed by statute. G. S. c. 71, s. 18.)

6. Where real estate was conveyed to one in trust for a man and his wife, and her heirs;—*Held*, that, upon her death, the husband took the benefit of the trust by survivorship, and that the rents and profits in the hands of the trustee, received after the death of the wife,

were subject to attachment by trustee process for the husband's debts. *Davis v. Davis*, 30 Vt. 440.

7. Rents from the wife's real estate during coverture belong to the husband, and do not survive to the wife; but on his decease are assets in the hands of his administrator, and must be collected by him. *Shaw v. Partridge*, 17 Vt. 626. (Now changed by statute.)

8. The possession of land belonging to a married woman, upon which she and her husband reside, is the possession of the husband alone; and, therefore, where her title depends upon a continuous possession, his acts and declarations, while in possession, showing the character and extent thereof and limiting the claim of the wife, are admissible against such title;—as, that a piece of land, fenced in and occupied with that of his wife, did not belong to him, but to an adjoining proprietor. *Holton v. Whitney*, 28 Vt. 448.

9. Where a husband possessed and claimed land in right of his wife only, and after his death she continued the possession in the same manner, and claimed the land as her own;—*Held*, that she, or her grantee, was entitled to claim that such possession of the husband endured to her benefit, and to add it to her own possession to make up the period of 15 years' adverse possession. *Holton v. Whitney*, 30 Vt. 405.

10. The husband is entitled to the possession and occupancy of his wife's real estate, and while in possession in the exercise of such his marital rights, though they live together on the land, it is the sole and exclusive possession of the husband; and so, also, as to the personal property on the farm in use by him. *Bowen v. Amaden*, 47 Vt. 569.

11. **Chose in action.** The husband must do some positive act to reduce the wife's choses in action to possession, before they become his property; his custody and possession are not of themselves a reduction to possession. *Barber v. Slade*, 30 Vt. 191. *Holmes v. Holmes*, 28 Vt. 765.

12. The facts that certain promissory notes were all the property that a woman had; that she so informed her husband before marriage; that he, at her desire, procured her wedding dress and other wedding preparations, and was at the whole expense of furnishing the house; that after their marriage she handed him the notes, requesting him to keep them, and that he did keep them with his other papers until after her death; and that he was at great expense for her during her last sickness,—were held to constitute no reduction of the notes to possession by the husband, nor to give any lien upon them, but that they passed to her administrator. *Holmes v. Holmes*, 28 Vt. 765. 30 Vt. 194. *Id.*, 215. 34 Vt. 260. 40 Vt. 602.

13. If the husband appoints an attorney to collect the money upon his wife's chose, and the attorney receives the money, her right of survivorship is gone, and she cannot join in a suit to recover the money of the attorney. The husband alone can sue for it. *Hill v. Royce*, 17 Vt. 190. 27 Vt. 567.

14. Before the statute of Nov. 22, 1870, No. 31, the choses in action of a married woman, dying intestate and without issue, and not reduced to possession by the husband, were distributable wholly to her heirs, as in case of real estate, and in no part to her surviving husband. *Holmes v. Holmes*, 28 Vt. 765. 30 Vt. 215. 40 Vt. 602. (*Davis v. Burnham*, 27 Vt. 562.)

15. So long as any act remains to be done by the husband to bring the avails of his wife's choses in action to his beneficial use, the wife's right of survivorship remains. *Roberts v. Lund*, 45 Vt. 82.

16. An equitable title to lands, under a contract of purchase by a single woman, is not a mere chose in action which, upon her marriage, her husband can control. *Gould v. Gould*, 29 Vt. 504.

### 2. To act for her.

17. A deed of gift to a wife, if delivered to her husband and accepted by him, is a delivery to and acceptance by her, and her refusal apart from her husband can be of no consequence. *Brackett v. Wait*, 6 Vt. 411.

18. The notice required, by G. S. c. 25, s. 42, to be given to the selectmen of an injury upon a highway and claim of satisfaction therefor, before bringing suit, when given by a husband alone for an injury to his wife, is sufficient for such case. *Barton v. Montpelier*, 30 Vt. 650. *Babcock v. Guilford*, 47 Vt. 519.

19. In an action by husband and wife against a town for an injury to the wife on a highway while riding with her husband;—*Held*, that the negligence of the husband which contributed to the injury was attributable to the wife, the same as if she had been wholly acting for herself. *Carlisle v. Sheldon*, 38 Vt. 440.

20. A gave a mortgage, signed by himself and wife, of their homestead, to secure A's note of \$500 towards a contract for the purchase by A of a farm, under which contract A took and held possession for one year, when the bargain was mutually given up, upon A's agreeing to pay \$200 for the past use of the farm and that the mortgage should stand as a security for that sum. On a bill against A and his wife to foreclose for the \$200;—*Held*, that A had authority, as to his wife, to make this agreement, and a decree of foreclosure passed against both. *Wood v. Adams*, 35 Vt. 300.

## II. DUTIES AND LIABILITIES OF HUSBAND.

21. **Necessaries.** A husband is liable for articles procured by and for his wife, while living with him, which are suitable to his circumstances and station in life—as, a plate of mineral teeth—if he permits her to keep the articles after knowledge that she had so procured them. *Gilman v. Andrus*, 28 Vt. 241.

22. A husband is liable for necessaries furnished, on his credit, to his wife, while they live apart as well as when they cohabit, and especially in a case when they live apart by his consent. His assent in such cases will be presumed, unless the contrary appear. *Frost v. Willis*, 13 Vt. 202.

23. A wife voluntarily left her husband, but for what cause did not appear, and for two years had worked at different places, taking care of herself, when she engaged for the defendant who settled with and paid her for her services—her earnings being needed for and applied to her personal necessities, and the husband at no time interfering, or dissenting. In an action by the husband to recover for such services;—*Held*, that he must be taken to have assented to such course of dealing, and that he could not recover. *Norcross v. Rodgers*, 30 Vt. 588.

24. **Wife deserting.** Where a wife refuses to live with her husband and deserts him in violation of her duty, and without reasonable or just cause, she cannot bind him to pay for necessaries furnished her by a party who knows they live separate and apart. *Brown v. Mudgett*, 40 Vt. 68.

25. **On whose credit.** A wife, living with her husband, purchased necessities of the plaintiff, but desired the plaintiff not to call on her husband, as she wished to pay for the goods herself. The goods were charged to the husband. *Held*, that no fraud, or collusion, or desire of concealment is fairly inferable from this, nor that the goods were furnished on the credit of the wife. *Day v. Burnham*, 36 Vt. 37; and *held*, that a subsequent promise by the husband to pay was a ratification of the purchase, though made before he knew of such request of the wife. *Id.*

26. The plaintiff furnished necessary medical service to the defendant's wife, by her procurement and upon her credit alone, he knowing the relations of the parties and all other facts bearing upon the question, and nothing happening subsequently to authorize a transfer of such credit to the defendant. *Held*, that the plaintiff had chosen his debtor by the credit given to the wife, and that the defendant was not liable for the services. *Carter v. Howard*, 39 Vt. 106. *Bugbee v. Blood*, 48 Vt. 497.

27. **Credit unauthorized.** The defendant's wife, while separated and living apart from him, purchased at the plaintiffs' store a

bill of goods on the defendant's credit, but without his knowledge, she saying he was sick and would call on a day named and pay for them. She was before unknown to the plaintiffs, and had never traded with them before, and the plaintiffs were ignorant of the separation. They knew the defendant, and had previously sold him goods on credit. The goods were such as are usually purchased for family use, and the amount was reasonable with reference to the defendant's circumstances; but he was in no immediate want of the goods, and they were not taken to his house, and it did not appear what disposition she made of them, nor that they were necessary for her reasonable comfort and support. *Held*, that it was not necessary for the defendant to have forbidden the plaintiffs from trading with the wife on his credit; that it was a clear case of unauthorized credit, and that defendant was not liable to pay for the goods. *Stevens v. Story*, 43 Vt. 327.

**28. Prohibition.** In order to recover against a husband for goods sold to his wife on his credit, after a prohibition by the husband to the plaintiff, against such trading, unless the trade has been ratified by the articles going to the husband's use with his knowledge that they were procured on his credit, the plaintiff must show affirmatively, not only that the articles were suitable to the husband's circumstances in life and were needed for present use, but that the husband had so neglected his duty in the matter of supplying them, that it was necessary for some one else to furnish them in order to supply the then wants of the wife, or wife and children. Of the wife's power to this extent, as his agent *ex necessitate*, the husband's prohibition cannot divest her. *Woodard v. Barnes*, 43 Vt. 330. 46 Vt. 335.

**29. Attorney's fees.** A husband is not liable to an attorney for professional services rendered his wife in defending against the husband's petition for a divorce, nor in procuring a divorce on her petition. *Wing v. Hurlburt*. 15 Vt. 607.

### III. RIGHTS AND POWERS OF WIFE.

#### 1. As agent of her husband.

**30.** The power of a wife to bind her husband by her contracts is founded upon the sole ground of agency, she having, as wife, no original and inherent power to bind him by any contract made by her. *Sawyer v. Cutting*, 23 Vt. 486.

**31.** The wife, whether the husband is absent or at home, sick or in health, is not to be presumed his agent generally, nor to be intrusted with any authority in relation to his affairs, other than that which it is usual and customary to confer upon a wife. *Ib.*

**32.** A wife is not, *prima facie*, her husband's agent for leasing his lands, or lending his horses, or watches, because this does not come within the ordinary scope of her business. *Green v. Sperry*, 16 Vt. 390.

**33.** A husband left home for an absence of some months, leaving his stock of cattle, &c., in the charge of his wife,—the minor sons to assist her. During his absence, and after he had been away two months, his hay and cattle were attached, and, by consent of the wife, the officer fed the hay to the cattle while under such attachment. The husband sued the officer in trover for the hay so fed out. *Held*, that, under the circumstances, the wife was so far the agent of her husband in that business, that her consent bound him. *Felker v. Emerson*, 16 Vt. 653. 23 Vt. 491.

**34.** An arrangement between a wife and the debtor of her husband, that such debtor's payment of a certain debt of the husband shall operate as a payment of his promissory note to the husband, is not within the ordinary powers of a wife in the management of the domestic affairs of her husband, and does not bind him unless assented to; and this, although the husband was sick at the time and wholly incapable of transacting business, and so continued till his death, and had no other person to transact his business. *Sawyer v. Cutting*, 23 Vt. 486.

**35.** The plaintiff, entitled to receive and control the rents and profits of land held by his wife in dower, gave to the defendant, her son, in the occupation of the land, a writing, saying: "Your mother thinks it is time for her to receive the rents and profits of her thirds, and I have no objection to her doing so. You will therefore make your payments to her as you and she can agree, and her receipt to you shall be as good and safe for you as though signed by me." *Held*, that this created not merely an agency in the wife to receive the rents in behalf of the plaintiff, but was the yielding of his marital right of control, and conferred upon the wife a power coupled with an interest, to be exercised at her will until revoked, and to her use, not to his; and authorized the defendant to make arrangements with the wife for the payment of rents, in repairs which were to some extent beneficial to the life estate. *Cheney v. Pierce*, 38 Vt. 515.

**36.** Where the defendant, in his absence from the State, left his wife to keep house and manage for him at home what might be necessary to be done—it was *held*, on the facts stated, that her agency, apparent and in fact, extended to the borrowing of money to pay a debt contracted by the defendant for a set of grave-stones for a child, although the defendant had sent her money to pay that debt, but she had prudently expended the money in the purchase of necessities for the family; and that the de-

defendant was liable to pay for the money so borrowed. *Meador v. Page*, 89 Vt. 306.

**37. Wife's admissions.** The admissions of a wife do not bind her husband, unless made in the execution of an agency created by him. Thus, her admission that she had received payment of a debt due her husband is not admissible, without proving that the husband had made her his agent to receive payment. *Gilson v. Gilson*, 16 Vt. 464.

**38. Wife's gift.** Where a wife, without asking leave of her husband, gave to her old and needy brother a frock, claimed to be worth \$5;—*Held*, that, by the common law and common custom of Vermont, a wife has the legal right to give such a reasonable charity as this, without asking leave; it being a reasonable and moderate gift, and fully within the means of the husband and the reasonable rights of the wife; and that the husband could not annul the gift. *Spencer v. Storrs*, 38 Vt. 156.

## 2. As to her own property.

**39.** Where a wife contracted a debt before her marriage, and, after her marriage, paid it out of what was her own funds before marriage, and such payment was not disaffirmed by her husband in reasonable time;—*Held*, that he could not recover it back,—least of all, in the action of book account. *Hall v. Eaton*, 12 Vt. 510.

**40.** An agreement of the defendant with a married woman to convey to her a parcel of land, upon her paying him a note due from her husband, was, after tender of performance on her part, decreed to be specifically executed; and *held*, that it was no excuse or defense for the defendant, that the husband had contracted for the purchase of the residue of the same tract of land, and had become insolvent and unable to perform his contract; nor that the conveyance of this parcel alone would work a detriment to the residue; nor that the orators had a remedy at law for damages. *Washburn v. Dewey*, 17 Vt. 92.

**41. Husband's equity.** The oratrix, while unmarried, had contracted to purchase a parcel of land, and had paid the larger part of the price, and had gone into possession, the vendor retaining the title as security for the unpaid purchase money. While so in possession she married the defendant, and he, without her knowledge or consent, paid the balance of the price, and induced the vendor to convey directly to him. On a bill in equity, the chancellor decreed that the defendant convey the premises to a trustee "for the sole use and benefit" of the oratrix—thus depriving the defendant of his interest as husband in the estate. On appeal, this decree was modified by directing a conveyance to the oratrix, through the interven-

tion of a trustee, upon her paying the defendant that part of the purchase money paid by him. *Gould v. Gould*, 29 Vt. 504.

**42. Wife's pledge.** A wife living apart from her husband, he not providing for her, may pledge her own estate for payment for necessities furnished her upon her credit. *Frary v. Booth*, 37 Vt. 78.

**43. Sole trader.** Where a wife, with the consent of her husband, carries on business in her own name as sole trader, or otherwise, the property and proceeds of the business may, in equity, be held by the wife's creditors for her debts contracted in that business, against any claim or right of the husband, and, in most cases, against his creditors; and she may charge the same for such debts. *Partridge v. Stocker*, 36 Vt. 108. *Frary v. Booth*.

**44. Will.** A married woman, with the express consent of her husband, may dispose of her estate by will; and, *quære*, whether since the statute expressly excepts from the right of making wills persons not of full age and sound mind, married women are not included—the language of the statute of 1821 being, "every person, infants, idiots, and persons of non-sane memory only, excepted," &c. *Fisher v. Kimball*, 17 Vt. 323. See *Morton v. Onion*, 45 Vt. 145. (By G. S. c. 71, s. 17, express power is given to married women to devise their lands; and by stat. 1870, No. 31, to bequeath their personalty.)

**45. Note.** A promissory note to husband and wife, upon a consideration moving from the wife, as where given on purchase of her property, survives to the wife, and does not pass to his administrator. *Richardson v. Daggett*, 4 Vt. 336.

**46. Execution.** The lands of a married woman can be legally set off on execution in satisfaction of her debts contracted before marriage;—as where the judgment and execution were against the husband and wife. *Fox v. Hatch*, 14 Vt. 340.

**47. Bond.** A bond was given to husband and wife, for a consideration moving from the husband, conditioned for the delivery of certain specific articles to them yearly during their natural lives for their support, the one-half to be discontinued on the death of either obligee. *Held*, that after the death of the husband, the wife had at least an equitable interest in the bond, and had power to control and cancel it. *Briggs v. Beach*, 18 Vt. 115.

**48. Statutory exemption.** Under C. S. c. 58, s. 15, exempting from attachment and execution the "rents, issues and profits" of the wife's land for the husband's debts;—*Held*, that the yearly products, such as hay, &c., were not exempt. *Bruce v. Thompson*, 26 Vt. 741. (By G. S. c. 71, s. 18, the word "profits" is changed to *products*.)

**49. Wife's equity.** The property acquired by a wife, whether by gift, devise or inheritance, and whether before or during coverture, is regarded in equity as her's and not her husband's; and if that right has not been expressly and formally waived, or forfeited by misconduct, it will be protected in equity against the husband, his assignees and creditors, to the extent of a suitable provision for her, the amount resting in the discretion of the court. *Barron v. Barron*, 24 Vt. 375.

**50. Note, &c.** Where the consideration of a promissory note executed to a married woman consists of her property, or proceeds from her as the meritorious cause, it becomes her chose in action which survives to her on the death of her husband, or passes to her administrator on her death, unless reduced to actual possession by the husband before her death. *Stearns v. Stearns*, 30 Vt. 213. *Bartlett v. Boyd*, 34 Vt. 260; and see *Richardson v. Daggett*, 4 Vt. 336. *Driggs v. Abbott*, 27 Vt. 580. *Holmes v. Holmes*, 28 Vt. 765.

**51.** The same is true of any express promise to the wife, upon like consideration. *Driggs v. Abbott*.

**52.** A promissory note made payable to a married woman "for value received," imports, *prima facie*, that the consideration proceeded from her, or her real or personal estate, and is her chose in action. *Stearns v. Stearns*. *Bartlett v. Boyd*.

**53. Separate estate.** The right of the wife to her separate property is recognized, both at law and in equity, whether such property was acquired before or during coverture, and, in the latter case, whether the acquisition is the result of gift, or inheritance, or is the product of her own personal earnings. In every such case she will hold against the husband and his heirs, and generally against his creditors, so long as the husband allows the wife to keep the property separate from the general mass of his own estate, although his own name may be used in the formal conduct of the business, unless, in the case of creditors, this may lead to a false credit on the part of the husband. *Redfield, C. J.*, in *Richardson v. Merrill*, 32 Vt. 27. *Richardson v. Wait*, 39 Vt. 535. *Porter v. Bank of Rutland*, 19 Vt. 410. *Caldwell v. Renfrew*, 33 Vt. 213. *Cardell v. Ryder*, 35 Vt. 47. *Albee v. Cole*, 39 Vt. 319. *Child v. Pearl*, 43 Vt. 224. *Curtis v. Hapgood*, *Id.*, 228.

**54. — under settlement.** Where the funds of a married woman were in the hands of a trustee under a settlement, to be retained and managed by him for her sole and separate use and free of all claim or right of control or disposition by her husband;—*Held*, that payments to the husband, unless by her express authority or consent, or unless such payments came to

her use, could not be charged against her by the trustee. *Tucker v. Bradley*, 33 Vt. 324.

**55. Mortgage to wife.** The husband's covenant in a warranty deed cannot be set up as against the separate right of his wife in a mortgage of the same premises, previously executed to her. *Bartlett v. Boyd*, 34 Vt. 256.

**56. — by wife.** A mortgage, given by a married woman to secure the payment of money borrowed to pay towards the purchase of the mortgaged property, was held valid against the husband and the children, after her decease. *Buchanan v. Chamberlin*, cited in *Frarj v. Booth*, 37 Vt. 84.

**57. Power of management.** The English rule in equity, that a *feme covert* has the same power of charging or appropriating her *separate* estate as if she were a *feme sole*, unless there be some restriction in the instrument by which she is invested with the estate, is adopted, to the extent, at least, that she may so charge it for her own benefit. *Frarj v. Booth*, 37 Vt. 78.

**58.** A wife left her husband in Canada in 1847, and returned to her former home in Vermont and resided there ever after. In 1853 a farm was devised to her, but not expressed in the will to be for her separate use, which she controlled and managed without any interposition or claim by her husband, and without any contribution or offer of aid by him towards the support of the wife and children. Upon her sole credit, she purchased of the orator necessities for the support of herself and children, he relying on her right and interest in the property given her by the will, and, in 1857, she gave her notes for the amount and a mortgage upon the farm to secure them. In 1858 she obtained a divorce from her husband, and afterwards executed a mortgage of the same property to another party. On a bill by the first mortgagee to foreclose;—*Held*, that the conduct of the husband was a practical and continuing negation of any right or interest in the property by virtue of his marital rights, and an effectual appropriation of it to the sole and separate use of the wife, and gave her the right to make the mortgage;—and it was sustained as against the wife and the subsequent mortgagee. *Id.*

**59.** In property held by a married woman to her sole and separate use, the husband has neither the equitable nor the legal right, as against the wife. *Child v. Pearl*, 43 Vt. 224.

**60.** The administrator of the wife can maintain any proper action at law against the husband for the enforcement of her rights of property. *Roberts v. Lund*, 45 Vt. 82. *Caldwell v. Renfrew*, 33 Vt. 213. *Albee v. Cole*, 39 Vt. 319.

**61.** The right to reduce to possession the wife's property that comes to the husband by virtue of the marital relation, does not attach to property set apart to her sole and separate use,—as, that which comes to her during cov-

erture by inheritance, or distribution. (Act of 1867, No. 21.) *White v. Waite*, 47 Vt. 502.

62. A *feme covert* leased a cow, which was her separate property, and, during the running of the lease, sold the cow with her husband's consent,—the purchaser to take the cow from the lessee at the end of the lease, of which sale the lessee had no notice. The defendant attached the cow, while in the lessee's possession, upon a writ against the husband, and, in an action of trover by the purchaser, was *held* liable therefor. *Richardson v. Wait*, 39 Vt. 535.

63. **Deposit in bank.** A gift to a married woman, the niece of the donor, by a deposit made in a savings bank in the name of the donee, was *held* to be to the sole and separate use of the donee, and that it did not vest in the husband. *Howard v. Savings Bank*, 40 Vt. 597.

### 3. Disabilities.

64. **At law.** A promissory note given by a married woman is absolutely void at law. If chargeable upon her separate estate, this is only in equity, and commissioners upon her estate have no jurisdiction to allow it. *Brown v. Sumner*, 31 Vt. 671.

65. A married woman cannot authorize her husband to make a contract which will bind her at law; nor can she, though with her husband's consent, make a contract binding her at law, although the effect of the contract be to increase her estate after her death. *Davis v. Burnham*, 27 Vt. 562. *Ingram v. Nedd*, 44 Vt. 462.

66. The plaintiff agreed with the intestate and her then husband, to apply for a pension for her, on account of the services of her father in the American Revolution, and, if he succeeded, to receive a specified portion of it for his services. The pension was obtained and paid to her administrator soon after her death. *Held*, that the plaintiff could not recover at law against her estate, either the compensation agreed, nor upon a *quantum meruit*. *Davis v. Burnham*.

## IV. DEALINGS BETWEEN HUSBAND AND WIFE.

67. **Ante-nuptial agreement.** In case of a parol agreement between husband and wife before marriage, that her then personal property should remain to her sole and separate use, it will belong to her upon the husband's death, although it may have come into his possession during coverture, and been again put out on securities taken in the wife's name. *Flowers v. Kent*, Brayt. 238.

68. An ante-nuptial agreement, made between the parties without the intervention of trustees, was *held* to be incomplete and to con-

stitute, at law, only an agreement to make a suitable marriage settlement, and that it was inoperative as to creditors of the husband. *Bruce v. Thompson*, 26 Vt. 741.

69. An ante-nuptial contract by which the wife is to retain the entire interest and control of her property, the husband to have no interest in or control over it, and the husband's subsequent receipt of such property, as agent of his wife, to be held for her use and benefit, operate as an abandonment and surrender to his wife of all such marital rights, as to the property, as he would otherwise have had; and, hence, the right of the wife to this property, as her sole and separate property, is perfect and absolute as against the husband. *Albee v. Cole*, 39 Vt. 319.

70. In such case, if he appropriate such property to himself, for the purpose of depriving his wife and children of it, it is a conversion in law and in fact. *Id.*

71. An agreement made by the husband, before marriage, that the property of his intended wife shall remain hers after marriage, prevents the vesting of the property in him by the subsequent marriage, and such agreement need not be in writing;—so *held*, and that the woman, after a divorce, could recover in trover for such property sold by her husband, during coverture, to the defendant, though without notice of her title. *Child v. Pearl*, 43 Vt. 224.

72. **Post-nuptial dealings.** The husband may surrender to the wife the right to her personal property, which the law gives him by reason of the marriage. This he may do by an ante-nuptial contract to that effect; also by allowing her to claim and control, for a long time, property given her, during coverture, as her separate property, and refraining to exercise the right which the law gives him to take from her such property and use it as his own, and by making gifts himself to the wife. *Bent v. Bent*, 44 Vt. 555.

73. A promissory note executed by a husband to his wife during coverture is void, and cannot be enforced even for the benefit and in the name of a third person, as bearer, to whom the husband has afterwards promised to pay it. *Sweat v. Hall*, 8 Vt. 187.

74. A woman seized in fee of several parcels of land, married, and then joined with her husband in a mortgage of a part of them to secure his debt. They afterwards sold the whole of the lands subject to this mortgage, which their grantee agreed to pay; and the balance of the purchase money, not exceeding the value of her reversionary interest in the lands, was secured to a trustee for her separate use. *Held*, that this was lawful and proper to be done, and furnished no ground for the allegation of a fraudulent intent. *Burns v. Brown*, 15 Vt. 174.

75. Upon the receipt of property by the husband from the wife, after marriage, if he shall, for sufficient reasons, contract with the wife that she may possess and enjoy separately such property bequeathed to, or inherited by her, or such as she may be the meritorious cause of acquiring, equity will uphold such post-nuptial agreement, where the claims of creditors will not be prejudiced by so doing. *Pinney v. Fellows*, 15 Vt. 525.

76. An agreement between husband and wife made during coverture, even in case of a gift from the husband, may be enforced by her in equity, if so far carried into effect as to separate the property from the residue of the husband's estate, and place it in the name or exclusive control of the wife. *Cardell v. Ryder*, 35 Vt. 47; and see *Richardson v. Merrill*, 32 Vt. 28.

77. Courts of equity, for many purposes, treat husband and wife as distinct persons, capable of contracting with each other and of having separate estates, debts and interests; and, as a general rule, whenever a contract would be good at law if made with trustees for the wife, such contract, when made with each other without the intervention of trustees, will be sustained in equity; and the husband may be held as trustee of the wife, and the wife be entitled to the privileges of a creditor of the husband. *Barron v. Barron*, 24 Vt. 375.

78. A post-nuptial agreement between husband and wife, without trustees, was sustained in equity in behalf of the wife against the husband and all others claiming under him, not creditors at the time of the agreement. *Id.* 37 Vt. 89.

79. The husband is competent to act as trustee of his wife's property, as well as any other person, if duly appointed; and he will be sometimes regarded as such, with a view to the protection of her separate property against his creditors, without any appointment whatever. *Porter v. Bank of Rutland*, 19 Vt. 410. 24 Vt. 392.

80. The intervention of a trustee is not necessary to the validity of a trust to the separate use of a married woman. Such estate may exist without the fact or fiction of a trustee, and be directly reached by execution out of the court of chancery. *Barrett, J., in Frary v. Booth*, 37 Vt. 88. *Porter v. Bank of Rutland*.

81. The legal title of a wife was recognized in a court of law, as existing against the effect of coverture, by reason of an understanding between husband and wife after marriage, rather implied than expressed, that certain property, which would otherwise belong to the husband, should remain and be the sole and separate property of the wife. *Child v. Pearl*, 43 Vt. 229; and see *Bent v. Bent*, 44 Vt. 555. *Cald-*

*well v. Renfrew*, 33 Vt. 213. *Richardson v. Wait*, 39 Vt. 535. *Curtis v. Hapgood*, 48 Vt. 228.

82. Such legal title was allowed to prevail against the husband's creditors in *Richardson v. Wait and Curtis v. Hapgood*.

83. The expenditure of money and labor by a husband in the repairs and improvement of his wife's real estate during coverture, creates no debt against her or her estate; and *debitatur*, whether any equitable claim can arise in such case, which a court of equity would enforce. *Pierce v. Pierce*, 25 Vt. 511. *White v. Hildreth*, 32 Vt. 265. *Webster v. Hildreth*, 33 Vt. 457.

84. If a husband improve his wife's land without any agreement with her, through trustees or otherwise, that his money and labor expended thereon shall vest in him any interest in the land, or entitle him to any claim against or compensation from her property, he acquires thereby no right or claim to the land or to compensation which his creditors can reach by attachment, or by the aid of a court of equity. *Webster v. Hildreth*.

85. Nor can the lessee of the premises, in such case, who covenants to pay the rent to the wife, be held as trustee of the husband, although he joins with his wife in making the lease. *White v. Hildreth*, 32 Vt. 265.

86. Where a husband had suffered his wife to set up and carry on a millinery business in her own name, and at her own discretion, and not at his expense, and she made the purchases on her own credit;—*Held*, that he could not assign the goods to a creditor of his own who had knowledge of the manner in which the business was conducted, so as to create a lien thereon against the equitable creditors of the wife, who had supplied her with goods in said business. *Partridge v. Stocker*, 36 Vt. 108.

#### V. CONVEYANCES BY OR TO THEM.

87. **Acknowledgment.** A deed by husband and wife of the wife's lands, though not acknowledged by the wife separate from her husband, is good to convey the right of the husband, and furnishes a consideration for a note given therefor. *Knappen v. Wooster*, Brat. 50.

88. Where the deed of a *feme covert*, executed in another state, of lands in this state, was not acknowledged by her according to the laws of this state, the court refused to receive the deed in evidence in an action of covenant brought against her after the death of her husband. *Sumner v. Wentworth*, 1 Tyl. 42.

89. Under former statutes, unless the acknowledgment by a wife of the deed of her lands was certified to have been "separately from her husband," that is, away from his actual presence, the deed was "utterly void," as to her. *Pratt v. Battels*, 28 Vt. 685.

**90. Covenants.** A married woman is not liable upon her covenants in a deed. *Sawyer v. Little*, 4 Vt. 414.

**91. Power of attorney.** A married woman cannot, either separately, or jointly with her husband, execute a valid power of attorney to convey her lands. *Sumner v. Conant*, 10 Vt. 9.

**92. Statute.** Any conveyance by a husband of his interest, as husband, in the real estate of his wife—as, a mortgage—is invalid, unless made by deed executed by the wife jointly with the husband, as required by G. S. c. 71, s. 18; and this objection may be made by the husband himself. *Peck v. Walton*, 26 Vt. 82.

**93.** The statute prescribing that “a husband and wife may, by their joint deed, convey the real estate of the wife, &c.” (G. S. c. 65, s. 2), and other statutes authorizing, in special cases, a conveyance by the sole deed of the wife (G. S. c. 71), are enabling and not disabling or restrictive acts, and do not trench upon the scope of equitable jurisdiction and interposition, in reference to the rights, liabilities and duties of married women in respect to their property and contracts, which before existed. *Prary v. Booth*, 37 Vt. 78.

**94. Peculiar estate.** A conveyance to husband and wife vests in them a peculiar estate, not corresponding with a tenancy in common, nor fully with a joint tenancy, but approaching much nearer the latter than the former. They have but one seisin and title and each owns the whole, being accounted but one person in law; and, as in joint tenancy, the whole estate, upon the death of either, goes to the survivor. *Brownson v. Hull*, 16 Vt. 309. 38 Vt. 550. *Davis v. Davis*, 30 Vt. 440.

**95.** The statute of 1797, providing that a conveyance to two or more shall be construed to create a tenancy in common, and not a joint tenancy, unless, &c., does not affect conveyances to husband and wife. *Brownson v. Hull*.

**96.** Where a conveyance of lands was to husband and wife, and the same were set off on execution during the husband's life for his debts;—*Held*, that the wife, surviving him, could recover the lands in ejectment. *Ib.*

#### VI. SUITS BY, AGAINST, OR BETWEEN THEM.

**97. Wife cannot sue alone.** A married woman cannot bring a bill alone, nor by any person but her husband, as next friend, unless he is *civiliter mortuus*, or where she claims adverse to him;—in which case, he should be made defendant. Plea in abatement sustained for non-joinder of husband as orator. *Bradley v. Emerson*, 7 Vt. 369.

**98. Her distributive share.** An action at law does not lie to recover the distributive

share of a married woman in an intestate estate. *Howard v. Brown*, 11 Vt. 361.

**99. Joinder of wife as plaintiff.** If the property or service of a wife be the meritorious cause of action, and an express promise of payment be made to her, she may be joined with her husband in an action to enforce payment; but, in such case, the joint action must be founded on the promise;—book account, or *indebitatus assumpsit*, in the name of both, will not lie. At the same time, the husband may, if he so elect, sue alone. *Gay v. Rogers*, 18 Vt. 342. 24 Vt. 91. 27 Vt. 19. 27 Vt. 582.

**100.** Where a woman before her marriage became surety for the defendant, and the plaintiff, after his marriage with her, paid the debt;—*Held*, that a suit for reimbursement was properly brought in the name of the husband alone. *Little v. Keyes*, 24 Vt. 118. In no case must the wife be joined, except where the cause of action would survive to her. *Isham, J. Ib.*

**101.** Under a deed to husband and wife for their lives and the life of the survivor of them, the husband may, without joining the wife, recover in ejectment for himself and wife to the extent of the interest of both. *Park v. Pratt*, 38 Vt. 545.

**102.** Husband and wife may join in an action for injury to a close which they own jointly, and a description of the premises as “the plaintiffs' close” is an allegation, in effect, that the close was theirs jointly. In such case, the allegation of matter of aggravation merely, although of injuries to the husband alone, does not make the declaration bad on motion in arrest. *Armstrong v. Colby*, 47 Vt. 359.

**103.** Husband and wife may sue jointly at law for the conversion of the wife's sole and separate chattels. *White v. Waite*, 47 Vt. 502.

**104. Against wife as sole.** In 1812, a husband, being a citizen of the United States, left this State and ever afterwards resided in Canada, leaving his wife here, for whom he had furnished no support, and she, in his absence, had transacted business as a *feme sole*, and, as such, upon her own credit, purchased of the plaintiff, in 1816, certain goods. *Held*, that she was not subject to a suit therefor, as a *feme sole*. *Robinson v. Reynolds*, 1 Aik. 174.

**105. Limitations.** A promise by a husband to pay a debt of the wife contracted before marriage, or part payment by him of such debt, does not, in a suit against the husband and wife, remove the bar of the statute of limitations. *Powers v. Southgate*, 15 Vt. 471.

**106.** To an action of book account against husband and wife, on an account against the wife before her marriage, the defense was the statute of limitations. Within the six years the wife, after marriage, had rendered services for the plaintiff for which he had given credit on the account, the same having been received,



by express consent of both defendants, to apply in part payment of the account. *Held*, that no new promise could be thereby implied as against the wife, because she was incapable of contracting; and that no promise of the husband could be implied which would affect the rights of the wife; and that this action, based on the continuing liability of the wife, was barred. *Farrar v. Bessey*, 24 Vt. 89.

107. **Ante-nuptial debt.** A parol agreement of a husband to pay the ante-nuptial debt of his wife, cannot be enforced after her death. *Cole v. Shurtleff*, 41 Vt. 811.

108. His liability as husband for such debt could be enforced only by a joint action against the two during coverture, and ceases at her death. *Id.*

109. This liability, as husband, to pay in that right, affords no consideration for a special promise to pay, but the debt and the parties remain as they were before, and the existing liability is not affected by the special promise. *Id.* *Russell v. Buck*, 11 Vt. 166.

110. **Wife's tort.** Husband and wife are not jointly liable for the torts or frauds of the wife, where the substantive basis of the tort is the contract of the wife;—as, where by the false and fraudulent representations of the wife the plaintiffs were induced to sell and deliver goods to her. *Woodward v. Barnes*, 46 Vt. 332.

111. The mere wrongful detention of property by a wife is not her tort, but her husband's; but where she destroys the property, or consumes it, independently of her husband, this is a conversion by her, and an action lies therefor against both. *Shaw v. Hallihan*, 46 Vt. 389.

112. — **crime.** Under an indictment against a husband and wife charging them jointly with having in their possession certain burglar's tools with intent to use them for burglarious purposes, under G. S. c. 118, s. 8;—*Held*, that the possession had by the wife while her husband was with her was *prima facie* innocent, as under the coercion of her husband; but that she was responsible for her possession during her husband's absence, though such possession was by his command given before he left. *State v. Potter*, 42 Vt. 495.

113. *Held*, that such possession of the wife was also the possession of the husband during his absence, and such as to warrant a joint conviction, if he with her planned the burglary in which the tools were to be used, and he passed them to her for the purpose of committing the burglary, and she kept them and attempted to use them for that purpose, though in his absence. *Id.*

114. **Suits between them.** In chancery, whenever the interests of husband and wife are conflicting, they may sue each other as if they were sole and unmarried. *Porter v. Bank of Rutland*, 19 Vt. 410.

115. Partition of lands under the statute cannot be had between husband and wife; and a judgment of partition in such case, although upon their joint petition, is void. *Hove v. Blanden*, 21 Vt. 315.

#### VII. WITNESSES AND EVIDENCE.

116. On the trial of an appeal from an order of removal of a husband and wife, the man testified that he was lawfully married to the woman. *Held*, that the woman could not be admitted to testify that she had a former husband living, nor could that be proved by reputation. *Poultney v. Fairhaven*, Brayt. 185.

117. During coverture, the wife cannot be a witness where the husband has an interest; nor, after his death, can she testify to conversations which passed between them during coverture, which are to be kept inviolable as family confidential conversations,—as, to contradict the testimony which he gave on a former trial. *Edgell v. Bennett*, 7 Vt. 584.

118. A private conversation between husband and wife tending to prove the admission of a crime, but overheard by a witness in another room, is not a protected confidential communication. *State v. Center*, 35 Vt. 378.

119. The admissions of a wife, made after her marriage, in reference to business transacted by her before her marriage, are not admissible in evidence for the defendant in a suit brought by her husband. *Churchill v. Smith*, 16 Vt. 560.

120. **Book account.** The statute which authorizes each party to testify in the action of book account, does not make the wife of either party competent, not being herself a party. *Carr v. Cornell*, 4 Vt. 116. 18 Vt. 344.

121. Under the statute providing for the examination on oath of "all the parties" in an action of book account;—*Held*, that in such action, where husband and wife are both parties, the wife, as well as the husband, is a competent witness before the auditor. *Gay v. Rogers*, 18 Vt. 342. *Andrus v. Foster*, 17 Vt. 556.

122. In an action of book account by husband and wife to recover for services of the wife before marriage, the husband is a witness, as well as the wife; and in case of her decease after one trial, he may testify to what she testified to on that trial. *Perry v. Whitney*, 30 Vt. 390.

123. **Former testimony.** Where an action by husband and wife survived on the wife's death to, and was prosecuted by, her administrator;—*Held*, that her testimony given on a former trial could be proved. *Earl v. Tupper*, 45 Vt. 275.

124. **Probate appeal—Wife a party.** Where a wife appealed from the probate of a

will and her husband was joined with her in the appeal, she being an heir-at-law of the estate, but he being neither an heir, nor a legatee or devisee;—*Held*, that she was a competent witness on the trial of the appeal. *Robinson v. Hutchinson*, 31 Vt. 443; and see *Rut. & Bur. R. Co. v. Lincoln*, 29 Vt. 206.

125. Stat. 1852. (G. S. c. 36, s. 24.) "No person shall be disqualified as a witness in any civil suit or proceeding, at law or in equity, by reason of his interest in the event of the same, as a party or otherwise." This statute does not remove the incompetency arising from a rule of policy, which forbids the husband and wife testifying for or against each other; and where the husband is living and a party to the suit, and the wife is not a party, she is not a competent witness. *Peck, J., in Carpenter v. Moore*, 43 Vt. 394; and see *Sargeant v. Seward*, 81 Vt. 509.

126. Thus, on a trial of a petition for a divorce, neither party can testify. *Manchester v. Manchester*, 24 Vt. 649. (Changed, in part, by Stat. 1870, No. 27. Stat. 1876, No. 77.)

127. Nor is the wife a witness for the husband in a common law suit, where he is a party. *Sargeant v. Seward*, 31 Vt. 509;—though he may be prosecuting as an administrator, having no other interest. *Cram v. Cram*, 33 Vt. 15. *Davis v. Davis*, 48 Vt. 502.

128. Nor is the wife a witness on the probate of a will where her husband is an heir to the estate, though he is not a party of record to the suit. *Carpenter v. Moore*, 43 Vt. 392.

129. Nor is the husband a witness, though not a party to the record, where the wife is directly interested in the event of the suit, though she is not a party to the record. *Wheeler v. Wheeler*, 47 Vt. 637.

130. But where the husband is not a party to the suit, either real or nominal, but interested only collaterally in the event of the suit, as by being bail for costs, or in like manner, the wife, though not a party, is not incompetent by reason of the marital relation. *Peck, J., in Carpenter v. Moore*, 43 Vt. 394.

131. Thus, a wife is a competent witness in a suit against an estate of which she is an heir, though her husband had signed the appeal bond with the administrator, and had given a bond to the administrator to indemnify him against any liability on account of the suit, the administrator having abandoned the defense which was made by the heirs in his name,—it not appearing that her testimony would violate any confidence between her and her husband. *Rut. & Bur. R. Co. v. Lincoln*, 29 Vt. 206.

132. In a suit in favor of an infant, brought by his father and natural guardian, the wife of

such guardian is a competent witness. The real party, in such case, is the infant, and the guardian, or *prochein ami*, is merely a manager or conductor of the suit for the infant. *Bonett v. Stowell*, 37 Vt. 258. See *Brown v. Hull*, 16 Vt. 673.

133. The widow of one who, when living, was either a party to or interested in the suit, is a competent witness, if her testimony does not involve the disclosure of matters of confidence between her and her deceased husband, nor affect his character. *Smith v. Potter*, 27 Vt. 304. *Edgell v. Bennett*, 7 Vt. 534.

134. The wife of the principal debtor, after his default and on a hearing before a commissioner upon a disclosure of the trustee, was held not to be a competent witness against the trustee. *Brown v. Burrington*, 36 Vt. 40.

135. A suit was discontinued by death of the defendant after he had fully testified, and the same claim was presented to commissioners of his estate, and an appeal taken. On trial of the appeal;—*Held*, that the testimony so given was proper evidence for the administrator, although by the death of such defendant his widow had become a competent witness, and testified. *Mathewson v. Sargeant*, 36 Vt. 142.

136. Where wife is agent. Under G. S. c. 36, s. 27, allowing a wife to testify in cases where her husband is a party when "the transaction was had and conducted by her as agent for her husband;"—*Held*, that she could not testify to a contract made by her for the hiring out of their minor son, without proof of authority from the husband. In what cases she may be treated as such agent, without proof of express authority, discussed. *Orcutt v. Cook*, 37 Vt. 515. See *Town v. Lamphire*, 37 Vt. 52.

137. Where a wife kept and made entries on her husband's books from memoranda kept by him;—*Held*, that she was not such "agent," as to be a witness for him to prove the state of the accounts and the loss of the book. *Estabrooks v. Prentiss*, 34 Vt. 457.

138. Under this statute, a wife is a witness for her husband in a business transaction conducted by her solely, and as his agent, although he "was generally at home and might have known in relation to it." *Lunay v. Vantyne*, 40 Vt. 501.

139. Where a man leaves his wife at home during his temporary absence, as for a day, without any special charge, or any other charge or agency than any married woman living and keeping house with her husband would have in such case, she is not such an agent of her husband as to be a witness for him, under the statute, as to matters transpiring during his absence. *Bates v. Cilley*, 47 Vt. 1.

I.

INFANT.

- I. AGE;—DISABILITIES IN GENERAL.
- II. HIS CONTRACTS.
- III. HIS TORTS.
- IV. ACTIONS BY AND AGAINST.

I. AGE;—DISABILITIES IN GENERAL.

1. **Age of majority.** The age of majority of females in this State, fixed by the constitution as uniformly construed, and for every purpose, is eighteen years. *Sparhawk v. Buell*, 9 Vt. 41. *Young v. Davis*, Brayt. 124.

2. **Emancipation.** The emancipation of an infant by his father, does not enlarge or affect the infant's capacity to make a contract; it only releases him from his father's control. *Person v. Chase*, 37 Vt. 647.

3. **Confessions.** The confessions of a minor are evidence against him, but should be weighed by the jury in reference to his age and understanding, and capacity to judge of his rights. *Mather v. Clark*, 2 Aik. 209.

4. **Serving writ.** An infant cannot be specially authorized to serve a writ, by the magistrate signing it. *Harvey v. Hall*, 22 Vt. 211.

5. But he may be specially deputed by the sheriff to serve a particular writ, under G. S. c. 12, s. 8. *Barrett v. Seward*, 22 Vt. 176. *Poland, J.*, dissenting.

6. **Defending suit.** An infant is legally incapable of appearing for himself and defending his suit, or of appointing any attorney for such purpose. *Starbird v. Moore*, 21 Vt. 529. *Somers v. Rogers*, 26 Vt. 585.

7. **Making will.** An infant cannot, under Vermont statutes, make a will,—not even a soldier's will. *Goodell v. Pike*, 40 Vt. 319.

II. HIS CONTRACTS.

8. **Void.** A promise of marriage made by an infant is void. *Pool v. Pratt*, 1 D. Chip. 252.

9. **Voidable.** The tendency of modern decisions is, to hold the acts, deeds and contracts of an infant as voidable merely. *Kellogg, J.*, in *Person v. Chase*, 37 Vt. 648. *Bigelow v. Kinney*, 3 Vt. 358.

10. A recognizance entered into by an infant is not void, but voidable only. *Patchin v. Cromack*, 13 Vt. 380.

11. A judgment against an infant is not void, but voidable. *Barber v. Graves*, 18 Vt. 290.

12. All contracts of an infant, except for necessities, whether executed or not executed, may be avoided by him, unless he has ratified them after arriving at full age. *Abell v. Warren*, 4 Vt 149. *Price v. Furman*, 27 Vt. 268. *Person v. Chase*, 37 Vt. 647.

13. An absolute gift of chattels by an infant can be revoked or avoided by him, or by his administrator. *Person v. Chase*.

14. The plaintiff, an infant, agreed to work for the defendant one month for \$15,—\$5 to be paid in cash and \$10 in fulled cloth of one F, for which the defendant was to give an order on F. The plaintiff performed the service, and the defendant afterwards paid him the \$5 and gave him the order on F, which was not collected. *Held*, that the plaintiff could avoid the contract as to the order, and recover for his services on a *quantum meruit*, deducting the \$5 received. *Abell v. Warren*, 4 Vt. 149.

15. An infant having executed a release to a proposed witness; but upon a secret agreement which left the witness still interested;—*Held*, that though the transaction was an attempted fraud upon the court, yet the infant was not bound by the release. *Walker v. Ferrin*, 4 Vt. 523.

16. An accord with satisfaction being but a contract, an infant is not bound thereby beyond the amount received. *Bromley v. School District*, 47 Vt. 381.

17. **Conditions of avoidance.** An infant may avoid an executory contract, although he has received the consideration; but if he has executed the contract on his part by the payment of money, or the delivery of property, or the rendering of services, he cannot disaffirm the contract and recover back what he has paid, without restoring to the other party what he has received from him. *Farr v. Sumner*, 12 Vt. 28. *Taft v. Pike*, 14 Vt. 405.

18. If an infant receive a deed of land and execute notes and a mortgage for the purchase money, he cannot avoid the notes, or mortgage, and yet claim under the deed. *Weed v. Beebe*, 21 Vt. 495. *Bigelow v. Kinney*, 3 Vt. 353. *Richardson v. Boright*, 9 Vt. 368.

19. Where a contract is avoided by an infant, he may recover back whatever he has paid or delivered on it. *Price v. Furman*, 27 Vt. 268.

20. In order to the avoidance and rescission of a contract by reason of infancy, the infant must offer to restore the consideration received, if it be in his possession and control; but if he cannot restore it, as, if he has disposed of it

during his minority, he may still avoid the contract. Nor can it be objected to the offer to return the consideration received, that it has been injured, or depreciated in value. *Ib.* *Wiser v. Lockwood*, 42 Vt. 720.

21. Where an infant contracts to serve for a certain term, and quits before he has performed the whole service, he may, in the action of book account or general assumpsit, recover what, under all the circumstances, his services were worth, taking into consideration any disappointment, amounting to an injury, which the other party sustains by the avoiding of the contract; and if the other party was injured more than the services were worth, the infant can recover nothing. *Thomas v. Dike*, 11 Vt. 273. 27 Vt. 761. 31 Vt. 642. *Hoxie v. Lincoln*, 25 Vt. 206.

22. The plaintiff, an infant, agreed to work for the defendant until she should become of age, the defendant agreeing to clothe her, school her, and pay a certain sum at her majority. The defendant failed to clothe and school her, according to his contract, and by mutual consent she quit the defendant's service before her majority. *Held*, that the plaintiff was entitled to recover what her services were worth, without any deduction for damage to the defendant for so leaving his service. *Meeker v. Hurd*, 31 Vt. 639.

23. The plaintiff, an infant, procured the defendant to sign a note for him, and, to induce the defendant to do so, turned out a stove, with leave to the defendant to take it when he pleased. Before any act of revocation, the defendant took the stove away. *Held*, in trespass therefor, that the defendant could justify by license, notwithstanding the plaintiff's infancy. *Hoyt v. Chapin*, 6 Vt. 42.

24. **Becoming of age—Effect on contract.** Every act of an infant, which is merely voidable, he must disaffirm in a reasonable time on becoming of full age, or he will be bound by it. *Bigelow v. Kinney*, 3 Vt. 353. *Richardson v. Boright*, 9 Vt. 368.

25. A person on becoming of age cannot affirm in part, and at the same time avoid in part, an entire contract made by him during his infancy. By affirming it in part he affirms it wholly. *Morrill v. Aden*, 19 Vt. 505.

26. Where an infant received a deed of land, paid part of the purchase money and gave an obligation to pay the balance, but no mortgage, and on being sued for the balance defeated the action by pleading his infancy, but still retained the land, and after full age conveyed the same to a third person who had knowledge of the facts;—*Held*, that the vendor had a lien upon the land, distinct from the ordinary vendor's lien, which he could enforce in equity for payment of such balance, without repaying or offering to repay

what he had received. *Weed v. Beebe*, 21 Vt. 495.

27. The plaintiff, while a minor, contracted to labor for the defendant for one year, but left his service, without cause, before the expiration of the year but about a month after he became of age. *Held*, that such continuance in service after full age was a ratification of the entire contract, and that he could not recover for his services. *Forsyth v. Hastings*, 27 Vt. 646.

28. An infant lessee, becoming of age before the expiration of his term, continued to occupy the premises to the end of the term. *Held*, that this was a ratification of the tenancy, and bound him to the provisions of the lease. *Baxter v. Bush*, 29 Vt. 465.

29. An infant widow, entitled to dower in an estate, conveyed all her interest in the estate by a quit-claim deed to an heir of the estate, and received \$100 as consideration therefor. After she became of age, she neither affirmed nor revoked said deed, but prosecuted her suit for her share in the estate, and never offered, nor had the ability, to return the consideration received for the deed. *Held*, that her right to recover was not affected by the deed. *Wiser v. Lockwood*, 42 Vt. 720.

30. **Infant husband.** A husband, although an infant, is equally liable with his wife for her debts contracted before marriage. *Cole v. Seeley*, 25 Vt. 220.

31. **Necessaries.** Whether articles furnished to an infant are of a name and quality coming within the denomination of necessaries, is exclusively a question of law; but the jury are to judge to what extent the articles of that denomination were necessary in the particular case. *Bent v. Manning*, 10 Vt. 225.

32. It is indeed questionable, whether our courts might not now consider money, to a certain extent, necessary to be furnished to an infant, under certain circumstances. *Redfield, J. Ib.*

33. Under ordinary circumstances, a course of collegiate education is not necessaries, for which an infant is chargeable; otherwise, as to a good common school education. *Middlebury College v. Chandler*, 16 Vt. 683.

34. The promissory note of an infant, given for necessaries, will bind him, if the circumstances be such that the consideration may be inquired into; as, if suit upon it be brought by the original payee. *Bradley v. Pratt*, 23 Vt. 378.

35. The defendant, an infant, being indebted to A for necessaries, gave his note therefor, by A's request, to the plaintiff, to whom A was indebted. To an action on the note the defendant pleaded his infancy;—replication, that the note was given for necessaries;—judgment for the plaintiff, upon the above facts, for the amount of the note and interest. *Ib.*

36. There is no general rule exempting infants from the payment of interest on their overdue debts; and interest was so allowed. *Ib.*, overruling *dictum contra* in *Taft v. Pike*, 14 Vt. 405.

37. In an action against an infant to recover for services and disbursements, as his attorney, in a suit brought by him;—*Held*, that although a lawsuit might be necessary for an infant, *prima facie* it was not; and that in this, as in all cases, the infancy being a *prima facie* defense, the burden is on the plaintiff to rebut the defense by proof that the contract was for necessities. *Thrall v. Wright*, 38 Vt. 494.

38. An infant is liable, as trustee, for an indebtedness to the principal debtor for necessities. *Wilder v. Eldridge*, 17 Vt. 226. *Scotfield v. White*, 29 Vt. 330.

39. An infant, being a single woman, contracted a debt for necessities, and afterwards married an infant. Both were sued and service was made upon the husband only, there being a *non est* return as to the wife. *Held*, that the husband was liable in the action. *Cole v. Seeley*, 25 Vt. 230.

### III. HIS TORTS.

40. An infant is liable in an action *ex delicto* for an actual and willful fraud, only in cases in which the form of action does not suppose that a contract has existed; but where the *gravamen* of the fraud consists in a transaction which really originated in contract, the plea of infancy is a good defense. *Kellogg, J.*, in *Gilson v. Spear*, 38 Vt. 315.

41. *Held*, that to an action on the case for deceit in the sale of a horse, by fraudulently concealing the unsoundness of the horse and falsely affirming that the horse was sound, a plea of infancy was a good defense, though the plaintiff offered to return the horse. *Ib.*, 311.

42. So, for a false and deceitful warranty, infancy is a defense, whatever be the form of action. *West v. Moore*, 14 Vt. 447. *Morrill v. Aden*, 19 Vt. 505.

43. The defendant, an infant, hired the plaintiff's horse to go to B (23 miles), and back the same day. He returned by a circuitous route, nearly doubling the distance, stopping on the way from 8 o'clock in the evening until 4 o'clock the next morning, and leaving the horse exposed during the whole night without shelter or covering, and returned the morning following the hiring. From the overdriving and exposure the horse died. *Held*, that this was a departure from the object of the bailment and amounted to a conversion of the property, and that the defendant was liable in trover therefor, as much as if he had taken the horse in the first instance without permission. But (by *Redfield, J.*), if the defendant had

kept within the terms of the bailment, his infancy would have protected him, whether he neglected to take proper care of the horse, or to drive him moderately. *Towne v. Wiley*, 23 Vt. 355.

44. Where property is bailed to a minor, and he uses it for a different purpose from that for which it was bailed, the bailment is thereby determined, and he is liable in trover. *Green v. Sperry*, 16 Vt. 390; and see *Baxter v. Bush*, 29 Vt. 465.

45. An infant is answerable, *civiliter*, for injuries committed by him—as a trespass—although done by command of his father. *Humphrey v. Douglass*, 10 Vt. 71.

46. An action of assumpsit for money had and received lies against an infant for money taken by him tortiously—as where he embezzles or steals it; and in such action, a debt due the infant may be attached by trustee process. *Elwell v. Martin*, 32 Vt. 217.

47. **Breach of trust.** A breach of his trust by an executor is not protected by his infancy. *Loop v. Loop*, 1 Vt. 177.

48. **Trustee.** An infant may be held chargeable as trustee for specific goods and chattels of the principal debtor in his hands. *Wilder v. Eldridge*, 17 Vt. 226. *Scotfield v. White*, 29 Vt. 330.

See NEGLIGENCE, 19-21.

### IV. ACTIONS BY AND AGAINST.

49. **Suit by infant—Next friend.** An infant may, in this State, sue by *prochein ami*, although he has a guardian. *Thomas v. Dike*, 11 Vt. 273.

50. In a bastardy prosecution by a minor, commenced not by guardian or next friend, the county court, after a motion to dismiss for this cause, allowed a *prochein ami* to enter and prosecute. *Held* correct. *Coomes v. Knapp*, 11 Vt. 543.

51. A *prochein ami*, or guardian by whom a suit in behalf of an infant is prosecuted, is merely a manager or conductor of the suit, and is not a party for any purpose. The infant is the real party. Thus, a petition to vacate a judgment in such case need not be served on the *next friend* or guardian, nor need he be named in it. *Brown v. Hull*, 16 Vt. 673.

52. So, the wife of the *next friend* or guardian may be a witness for the infant plaintiff. *Bonett v. Stowell*, 37 Vt. 258.

53. So, under the statute requiring a recognition for costs "by some person other than the plaintiff," the *prochein ami* may recognize. *Duffy v. Pinard*, 41 Vt. 297.

54. **Suit against—Guardian.** If an infant be sued without notice to his guardian, the writ will not for this cause abate, but the court will

order the guardian to be cited in. *Potter v. Wright*, Brayt. 21. 11 Vt. 547.

55. It is as necessary that an infant summoned as trustee should defend by guardian, as in other cases. *Wilder v. Eldridge* 17 Vt. 226.

56. An infant was summoned as trustee, but no guardian was cited in, nor was any appointed. He made disclosure after he became of age, by which it appeared that after service of the process, but during his minority, he had restored to the principal debtor the property which he held in trust. *Held*, that he was not chargeable as trustee. *Ib.*

57. Where an infant becomes party to a trustee process as claimant, it seems that he should be regarded as a party defending rather than a party suing, or prosecuting, and should appear by guardian, and not by *prochein ami*. *Keeler v. Fassett*, 21 Vt. 539.

58. **Attorney—Error.** An infant is legally incapable of appearing for himself and defending his suit in court, or of appointing an attorney to appear and defend for him. Any such appearance, or defense, amounts to nothing in contemplation of law. A judgment against him in such case, in the higher courts, will be corrected by writ of error; if before a justice, it will be set aside on *audita querela*. *Starbird v. Moore*, 21 Vt. 529.

59. A rule of court was, that "all dilatory pleas shall be filed on or before the third day of the term at which the action is entered." As applied to the case of an infant defendant, the time prescribed by the rule dates from the appointment of a guardian *ad litem* to defend; for an infant is incapable of appearing by himself, or of appointing an attorney. *Fall River Foundry Co. v. Doty*, 42 Vt. 412.

60. An infant cannot appear and defend by attorney, and a judgment rendered against him, in such case, will be reversed on writ of error. If there are several defendants, all should join in the writ of error, and the judgment will be reversed as to all, the judgment being entire. *Somers v. Rogers*, 26 Vt. 585. 14 Vt. 77.

61. A judgment rendered against an infant who appears by attorney, is not void, but voidable. On an appeal from such a judgment by the infant defendant, the county court refused to dismiss the appeal on the motion of his guardian *ad litem*. *Held* correct. *Barber v. Graves*, 18 Vt. 290.

62. On a writ of error to reverse a judgment for the cause of infancy, the court only vacates the judgment. It does not set aside the proceedings altogether, but remands the cause for further proceedings. *Ib.*

63. **Audita querela.** An infant, sued before a justice, appeared and defended by an attorney and appealed from the judgment against him, but became of age while the cause

was pending in the county court. The attorney withdrew his appearance, and judgment was rendered against the defendant by default. *Held*, that such judgment could not be set aside on *audita querela*, because the party, after becoming of age, had suitable opportunity to appear and make defense. *Blackmer v. Dow*, 18 Vt. 298.

64. A justice judgment against an infant will not be set aside, on *audita querela*, on account of his infancy, where his father and natural guardian was sued jointly with him, and appeared and defended the suit. *Wrisley v. Kenyon*, 28 Vt. 5. *Priest v. Hamilton*, 2 Tyl. 50.

65. **Notice to guardian.** An infant is bound by the decree of the probate court in the distribution of an estate, where his guardian was notified and defended. *Robinson v. Swift*, 3 Vt. 288. 28 Vt. 7.

66. **Joinder of infant defendant.** In an action upon a joint contract of two or more, where one is an infant, the infant need not be joined. But if joined, and his infancy be urged in defense, the jury may find a verdict for the infant and against the others, or the plaintiff may enter a *nolle prosequi* as to him, and proceed as to the others. *Allen v. Butler*, 9 Vt. 122.

67. **Pleading and evidence.** Infancy may be given in evidence under the general issue in assumpsit. *Kimball v. Lamson*, 2 Vt. 138. This rule is not changed by G. S. c. 83, s. 15. *Thrall v. Wright*, 38 Vt. 494.

## INJUNCTION.

1. **Granting injunction.** Parties within the jurisdiction of the court of chancery may be enjoined from doing those acts, in another State, which would subject them to an injunction if done in this State. *Vt. & Canada R. Co. v. Vt. Central R. Co.*, before *Royce*, Chancellor. 46 Vt. 792.

2. In a proper case, it is entirely competent for a court of chancery to restrain a party within the jurisdiction of this State, from pursuing an action commenced in a court of law in a sister State; but, from courtesy and policy, this power should not be exercised where such court of law has a concurrent jurisdiction which it first assumed and exercised over the subject matter, unless there be some peculiar equitable ground for so doing. The mere preference of the orator to have the matter determined by his own domestic tribunal, is not a sufficient ground for such interference. *Bank of Bellows Falls v. Rut. & Bur. R. Co.*, 28 Vt. 470.

3. The inability of the court to enforce an

injunction, is a good reason for not granting it; as, where the defendant resides out of the State and has no property within it subject to sequestration. *Ib.*

4. The ground on which courts of equity intervene, either by injunction or by the appointment of a receiver, in cases where there are conflicting claims as to the right and possession of property, is, that it seems necessary in order to the preservation of the property which is the subject matter of the litigation, pending the controversy. *Cheever v. Rut. & Bur. R. Co.*, 39 Vt. 658, before *Barrett*, Chancellor.

5. Where the right of possession is in litigation, a court of equity will not, by preliminary injunction, transfer possession from one party to the other. *Ib.*

6. **Injunction damages.** If, upon granting an injunction, the chancellor makes no order as to the damages occasioned thereby, and requires no bond to secure them, no damages are recoverable. *Sturges v. Knapp*, 38 Vt. 486.

7. If, upon granting an injunction, the chancellor makes an order for the payment of the damages occasioned thereby, the court of chancery, in the absence of all statutory provisions or rules on the subject, has full power to ascertain the damages by a reference, though an injunction bond be given. The proceedings are based upon the order, and not upon the bond. *Ib.*

8. Where an injunction bond was given, and there was no evidence of the character and extent of the order as to securing the damages, outside the terms of the bond;—*Held* (*Poland and Pierpoint*, J. J., dissenting), that the court of chancery could not, upon dissolution of the injunction, award damages in excess of the penalty of the bond. *Ib.*

9. The appointment of a receiver, on the granting of an injunction, does not deprive a party of his damages occasioned by the injunction during the continuance of the receivership, but the net receipts of the receiver should be applied in reduction of the damages. *Ib.*

10. The trustees of the bondholders of a railroad company leased the road. Certain bondholders, for themselves and others who might join, brought a bill against the trustees and lessee to set aside the lease, and procured an injunction and the appointment of a receiver. The injunction was afterwards dissolved and possession restored. On the assessment of injunction damages;—*Held*, that the lessee was thereby released from all obligation to pay rents during the receivership, and, therefore, the orators should be charged with the loss thereof, to be accounted for by the trustees to those bondholders who did not participate in the suit. *Ib.*

11. Sundry items claimed as damages occa-

sioned by an injunction of a railroad company, considered. *Ib.*

12. Counsel fees in resisting an application for an injunction, and like fees for defending the suit upon its merits, are not allowable as damages on the dissolution of the injunction. *Ib.*

13. On a former appeal from chancery, the amount of the liability of the orators for certain injunction damages was fixed by the decision at \$30,000, being the penalty of the injunction bond, and a mandate was issued to the court of chancery to enter a decree accordingly. The mandate not having ordered any interest to be computed in the meantime on such damages;—*Held*, that the decree afterwards rendered for that sum, with interest from the date of that decree, was according to the mandate, and it was affirmed. *Sturges v. Knapp*, 36 Vt. 439.

14. Where a decree in chancery ordered the payment to the defendants of a certain sum as injunction damages, with interest from the date of the decree, and the defendants appealed for the refusal of the court to allow interest prior to that date;—*Held*, on an affirmance of the decree, that the payment of the decree had been prevented by the act of the defendants in appealing, and that interest should be computed only from the time that the cause should thereafter reach the court of chancery. *Ib.*; and that it reached the court of chancery at the next regular term after the mandate had been received by the clerk of the court. *S. C.*, 38 Vt. 540.

15. **Injunction must be obeyed.** Although an injunction be irregularly obtained, it is still an order of the court, and must be discharged before it can be disobeyed; and mere impropriety in using the injunction, or a delay beyond the next term of the court to have the subpoena served, does not operate as a dissolution or discharge of the injunction. *Hove v. Willard*, 40 Vt. 654.

16. A writ of injunction, until dissolved, must be obeyed, no matter how unreasonable in its terms or unjust in its operation. *Stimpson v. Putnam*, 41 Vt. 288, in chancery. *Steele*, Chancellor.

17. **Process to enforce.** A proceeding for contempt in the violation of an injunction is not only to punish the guilty party, but also, and perhaps chiefly, to cause restitution to the party injured. *Ib.*

18. In this case, the injunction was against the removal of certain machinery intended and understood to have been embraced in a mortgage; and the chancellor *held*, that it was not necessary, in this proceeding for a contempt, that the mortgage should be reformed; and ordered the payment of damages to the petitioner, and a fine to the State, to be enforced by imprisonment. *Ib.*

19. Also, upon an affidavit that the petitioner had good reason to believe and did believe that the defendant was about to abscond and remove from the State—in which case the petitioner would be remediless—the process to show cause was issued as an attachment against the body. *Ib.*

20. Sundry orders and processes set out in *haec verba. Ib.*

21. Notice to the defendant's solicitor, of which the defendant has no knowledge, that an injunction will be applied for, on a day named, to restrain the defendant from doing a certain act, will not subject the defendant to process of contempt for doing the act before the day named, though the injunction be granted according to such notice; and *quære*, whether one can be guilty of violating an injunction in anticipation. *Greenleaf v. Leach*, 20 Vt. 281.

22. **Appeal.** No appeal lies from a final order of the court of chancery, declaring a party in contempt for disobeying an injunction. *Vilas v. Burton*, 27 Vt. 56.

23. **Court protects its officers.** Where the regularity or validity of the processes of the court of chancery is brought in question, the court always interferes to vindicate its officers from suits in other courts, and exercises its discretion, in such cases, where its officers are charged with irregularity or excess of their own, in executing the process of the court. A resort to a law court, in such cases, may be treated as a contempt. *Peck v. Crane*, 25 Vt. 146.

24. Pending a cause in chancery, a writ of sequestration was issued, as an attachment under the statute (G. S. c. 29, s. 24), and was served by the sheriff, who was sued for alleged misconduct in executing the writ; whereupon an injunction was issued in the main suit, to restrain the suit at law against the sheriff, and from the granting of such injunction an appeal was taken. *Held*, (1), that an appeal lay in such case; (2), that, in order to granting the injunction, it was not necessary that a bill should have been first filed for that purpose; (3), that the writ, although given by statute, should be treated like other writs of sequestration issued under the general powers of the court, and to aid the court in carrying into effect its final decrees; (4), that the validity of the writ, and the regularity of its execution, were to be judged of by the court of chancery, and all redress at law must be under the permission of the court of chancery; (5), that the sheriff, while serving the process of the court, became its officer and was entitled to its protection, as if specially appointed; and the supreme court refused to vacate the preliminary injunction, and remanded the case. *Ib.*

25. **Receivers.** Whenever the court of chancery has appointed a receiver or manager,

his possession is the possession of the court for the benefit of the parties to the suit, and may not be disturbed without leave of the court. Whoever disturbs such possession is held guilty of a contempt, and liable to be imprisoned for such contempt. If any person claims a right paramount to that of the receiver, or manager, he must, before he presumes to take any steps of his own motion, apply to the court of chancery for leave to assert his right against the receiver or manager. *Vt. & Canada R. Co. v. Vt. Central R. Co.*, before *Royce*, Chancellor, 46 Vt. 792.

26. The petitioner, the Central Vermont Railroad Company, a corporation, was, by appointment of the court of chancery, receiver and manager of the Vt. Central R. Co. and of the Vt. & Canada R. Co. In the course of business, large amounts due the petitioner from the earnings of these two roads had accumulated in the hands of corporations and parties in other States. The Vt. & Canada R. Co. brought suit in Massachusetts against the trustees of the Vt. Central R. Co., and attached such funds by trustee process. The petitioner prayed for an order enjoining the Vt. & Canada R. Co. from prosecuting said suit and for a release of such attachment. The order was granted. *Ib.*

## INNKEEPER.

1. **Definition.** Keeping a house openly for the entertainment and accommodation of travelers and others for a reward, is keeping an inn, whether licensed or not, and whether or not liquors or wines are sold there. *State v. Stone*, 6 Vt. 295.

2. **Statutes.** Under former statutes, now repealed, no person could keep an inn or house of entertainment, unless nominated by the town authorities and licensed by the court. He was otherwise subject to indictment, if he kept a house of entertainment for travelers, though he kept no spirits or wine, and though he had license to keep a victualing house, and though the town authorities had refused to approbate a sufficient number of innkeepers to accommodate the public. *Ib.*

3. Under former statutes, now repealed, limiting the amount of recovery, in an action on book or verbal contract, to \$1.50 for liquors sold by an innkeeper;—*Held*, that any excess beyond that sum was not recoverable by application upon the account of the other party, though such was the mutual expectation of the parties in their dealings. *Wood v. Barney*, 2 Vt. 369. *Peters v. Slack*, 18 Vt. 590.

4. **Relation of guest and innkeeper, and measure of innkeeper's liability.** The liability of an innkeeper for the safe keeping of



the goods of his guest, is more severe than that of any other bailee, with the single exception of common carriers. He is not responsible to the same extent as common carriers, but the loss of goods, while at the inn, will be presumptive evidence of negligence on the part of the innkeeper or his domestics. He may, if he can, repel such presumption, and show that there was no negligence whatever, and that the loss was occasioned by inevitable casualty or superior force. *McDaniels v. Robinson*, 26 Vt. 316. *Merritt v. Claghorn*, 23 Vt. 177.

5. While the plaintiff was a guest at the defendant's inn, his horses were destroyed by the burning of the barn where they were stabled—the fire being the work of an incendiary, as supposed. It was conceded, that "there was no negligence, in point of fact, in the defendant or his servants in the care of the barn and property." *Held*, that the plaintiff could not recover. *Merritt v. Claghorn*.

6. An innkeeper may, by special contract, increase or restrict his general responsibility for the goods of his guest. *McDaniels v. Robinson*, 26 Vt. 316.

7. A traveler who puts up his horse with its equipage, as carriage, harness, &c., at an inn, becomes a guest *quoad* the horse and its equipage, and the innkeeper is responsible therefor as innkeeper, although the traveler may take his meals and lodge elsewhere; and, *quare*, whether this responsibility in such case extends to the traveler's luggage, or other property, left with the innkeeper at the same time. *Ib.* (8. C., 28 Vt. 387.)

8. Where one becomes a guest at an inn by leaving his horse for keep, and takes a room in the inn and a part of his meals and lodgings there, the relation continues during the personal absence of the guest while taking his meals and lodging elsewhere, but retaining his room and intending to return to the inn. In such case;—*Held*, that the innkeeper would be responsible, as such, for the safe keeping of a bag of gold delivered to him at the inn by the guest, at evening, when starting out to lodge elsewhere, but intending to return to the inn the next morning. *Ib.*

9. Although an innkeeper may, under peculiar circumstances, be excused for the loss of the goods of his guest, when stolen "by a burglarious entry from without," yet this can be only by proof of some of the circumstances ordinarily attending the breaking of a house securely fastened, and that it was without any fault or negligence on his part. *Ib.*

10. The plaintiff put up at the defendant's inn, with his horse, wagon, &c. After some days' stay as a guest, the plaintiff left with the defendant a bag of gold for safe keeping over night, and immediately left the inn, then intending to terminate his personal stay at the

inn, and not to return as a personal guest, but did not take away the horse, wagon, and their appendages. *Held*, that, as to the bag of gold, the relation of innkeeper and guest did not exist, and that the defendant was not liable, as innkeeper, for the loss thereof, the jury having found that the delivery of the bag of gold was a distinct transaction, disconnected in consideration, and in fact, from the delivery and keeping of the horse. *McDaniels v. Robinson*, 28 Vt. 387.

11. The plaintiff, a minor, went with his father, with his father's horse and wagon, to the defendant's inn to attend the trial there of a suit brought by the defendant against the father. On their arrival, the horse and wagon were delivered to the defendant's servant to be put up and taken care of, and the plaintiff and his father entered the inn where the defendant was in charge, and took off their overcoats in the presence of the defendant. In due time, the father called for dinner for himself and the plaintiff, which was had, and they remained until evening, when the bill for the entertainment and feed of themselves and horse was paid by the father, and they left. *Held*, that the relation of guest and innkeeper was thereby created between the plaintiff and defendant. *Read v. Amidon*, 41 Vt. 15.

12. Such guest, on entering the inn, took off his overcoat and gloves, not delivering them to the innkeeper, nor to any of his servants, nor calling his attention to them; but the guest folded up his coat and laid it on a bench in the room, with his gloves under the coat. In an action against the innkeeper for the loss of the gloves;—*Held*, that it was a question for the jury, whether the plaintiff was so careless in his disposition of the gloves, as to exonerate the innkeeper. *Ib.*

A guest at an inn is bound to use reasonable care and prudence in respect to the safety of his goods, so as not to expose them to unnecessary danger of loss. *Ib.*

## INSANE PERSON.

1. **His torts.** A lunatic is liable, civilly, for his tort. In trover against the defendant for killing an ox which the plaintiff had bailed to him;—*Held*, that it was no defense that the defendant was insane when he killed the ox, and that the plaintiff knew him to be insane when he bailed the ox to him. *Morse v. Crawford*, 17 Vt. 499.

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2. **Divorce.** Insanity is a full defense for all acts which by the statute are grounds of granting a divorce; as, adultery. *Nichols v. Nichols*, 81 Vt. 338.

**3. Contracts.** An administrator may show the insanity of his intestate, in avoidance of his contract. *Lazell v. Pinnick*, 1. Tyl. 247.

**4.** If one make a contract with a lunatic and under it furnish him money and render services, which, however, prove of no benefit to him, no recovery can be had of him therefor, although the party acted in good faith, supposing him to be sane, provided the party was put upon inquiry and acted negligently. *Lincoln v. Buckmaster*, 32 Vt. 652.

**5.** The defendant, being under guardianship as an insane person, on account of some mismanagement of his property, hired the plaintiff to do his housework, and she did it for a year. The defendant managed his farm, property and household affairs without interference of his guardian, who recognized this contract. After the guardian's death, the plaintiff brought suit for her labor. *Held*, that the defendant was liable. *Blaindell v. Holmes*, 48 Vt. 492.

**6. Insurance.** The insured took his own life by shooting himself. His policy of life insurance had a proviso that it should "be void and of no effect" if he "shall commit suicide." In an action by his administrator upon the policy, the supreme court declared the law as follows: "To warrant a recovery, it is not enough for the jury to find that the mind of the deceased was so impaired that he was incapable of distinguishing between right and wrong, but they must be satisfied that his mind was so overthrown that he had no power to resist the insane impulse to take his life, so that the act was the direct and immediate consequence and result of his insanity; in short, that the taking of his life was an insane act, in respect to which his reason was powerless." *Hathaway v. National Life Ins. Co.*, 48 Vt. 335. **INSURANCE**, 18.

**7. Marriage.** Marriages of lunatics and idiots, and other marriages not declared to be absolutely void by statute, were intended to be valid unless avoided by the process provided by the statute, although, when so avoided, they would be void from the beginning. (G. S. c. 70, ss. 1-2-3.) *Wiser v. Lockwood*, 42 Vt. 720.

**8.** A female infant was married to a man who was at the time insane, and ever remained so until his death, leaving her surviving. They had cohabited as husband and wife. *Held*, that she was entitled to a share in his estate as his widow. *Ib.*

**9. Domicile.** The guardian of an insane person may appoint the place of his ward's residence, and change and determine his domicile. *Anderson v. Anderson*, 42 Vt. 350.

**10.** By G. S. c. 48, s. 17, administration of the estate of an inhabitant of this State shall be granted, and his estate settled, "in the probate district in which he shall have resided at the

time of his death." A resided with his family and did business in Woodstock, and was there taken insane, and was sent to the insane asylum at Brattleboro, in June, 1856, when a guardian was appointed, who proceeded to settle up the ward's affairs at Woodstock, and at the request of the ward's wife, removed the family to Montpelier, in another probate district, to reside for an indefinite time, or until the ward should die or recover, taking with the family the ward's furniture and effects, and the family resided in Montpelier until the death of the ward in August 1868,—the guardian in the meantime supporting the ward in the asylum. Administration of the ward's estate was granted in the probate district embracing Montpelier, and, on appeal to the county court, the decree of the probate court was affirmed. *Held*, that the personal presence of the ward at Montpelier was not necessary to constitute his domicile there, under the circumstances, and the judgment of the county court was affirmed. *Ib.*

**11. Inquisition—Guardianship.** An inquisition and adjudication of lunacy is only presumptive evidence of the fact, and, on an appeal, the fact may be traversed and tried by a jury. *Shumway v. Shumway*, 2 Vt. 339.

**12.** It is not a bar to the allowance of a will, that it was made after the testator had been adjudged insane upon an inquisition, and while he was under guardianship, as such. *Robinson v. Robinson*, 39 Vt. 267.

**13.** Where a resident of this State was taken to an inebriate asylum in Massachusetts, and a citizen of that State was there appointed his guardian;—*Held*, that that did not of itself put an end to an agency in behalf of such person, before existing, as respects property in this State not given into the custody of the guardian; since it does not follow from an adjudication of insanity, that the insanity is necessarily of that character which disqualifies the person from entering into a valid contract. *Motley v. Head*, 43 Vt. 633.

**14.** One under guardianship as an insane person, applied for a discharge, and an examination was had, but the report of the examining justices was not made until after the death of the ward. Upon the filing of the report, the probate court decreed that the guardianship be discharged. *Held*, that the whole proceedings after the death were void. *Fairchild v. Bascomb*, 35 Vt. 398.

**15.** Exceptions do not lie to the decision of the county court in proceedings under the act of 1870, No. 33, entitled "An act for the relief of the families of insane persons." *Stiles v. Windsor*, 45 Vt. 520.

**16. Action.** Plea in abatement, that the plaintiff was insane and was under guardianship;—*Held* sufficient. *Collard v. Crane*, Brayt. 18.

17. A suit in behalf of an insane person, under guardianship, must be brought by the guardian in behalf of his ward. *Holden v. Scanlin*, 30 Vt. 177. *Lincoln v. Thrall*, 34 Vt. 110.

## INSOLVENCY.

1. **Effect of foreign insolvent laws.** A discharge, under the insolvent acts of another State, is no bar to an action in this State upon the same contract, though such acts were in existence when the contract was made, and both parties were then, and at the time of such discharge, and are now, citizens of such other State—such acts being unconstitutional, as impairing the obligation of contracts. *Herring v. Selding*, 2 Aik. 12. *Perdy v. Walker*, Brayt. 37.

2. The plaintiff, resident in Vermont, through his factors in New York sold goods there to the defendant, resident in Massachusetts, and took the defendant's note therefor payable in New York. *Held*, that the plaintiff was not affected by insolvent proceedings against the defendant in Massachusetts to which the plaintiff had not assented—as, by the presentation of his claim to the commissioners for allowance. *Blackman v. Green*, 24 Vt. 17.

3. A promissory note was executed in Canada, the maker and payee being both residents of Canada, and was made payable generally. The maker went into bankruptcy in Canada, and the note was there presented and allowed in bankruptcy. Afterwards, but before the bankrupt's discharge, and after maturity of the note, it was indorsed in this State for value to the plaintiff, a resident of this State, who was ignorant of the proceedings in bankruptcy, and of any defense to the note. *Held*, that the final discharge of the bankrupt was a defense to the note in the hands of the plaintiff. *Peck v. Hibbard*, 26 Vt. 698.

4. The defendant became indebted to the plaintiff on a contract made in Vermont and to be there performed, both being then residents of Vermont. Afterwards both became and remained resident citizens of Massachusetts, and there the plaintiff obtained a judgment for his debt. Afterwards he brought suit in Vermont on said judgment by attachment of the defendant's property therein, pending which, proceedings in insolvency were instituted in Massachusetts, under which the defendant got his discharge,—the insolvent act providing for the discharge of all provable debts “due to any person resident in Massachusetts at the time of the first publication of notice,” &c. *Held*, that whether the debt be treated as the original indebtedness, or the judgment, it was discharged

by the insolvency proceedings in Massachusetts, and that they were a bar to this action. *Hall v. Winchell*, 38 Vt. 588.

5. The assignee of an insolvent under the insolvent laws of another State, cannot, in this State, maintain an action in his own name to recover a non-negotiable debt due the insolvent, although the statutes of that State expressly provide that he may do so, and although all the parties reside there. *Fisk v. Brackett*, 32 Vt. 798; and see *Pickering v. Fisk*, 6 Vt. 102.

## INSURANCE.

### I. FIRE INSURANCE.

### II. LIFE INSURANCE.

### I. FIRE INSURANCE.

1. **The representation.** Where a fact material to the risk is suppressed in the application for a policy of fire insurance, the receipt of subsequent premiums, without knowledge of the suppressed fact, does not validate the policy. *Held*, that such knowledge is not necessarily proved by the fact that an agent of the insurance company visited the premises, under a resolution appointing him “to go and examine the factories as to their safety and internal construction.” *Allen v. Vt. Mutual Ins. Co.*, 12 Vt. 366.

2. In contracts of insurance, parol representations or concealments, materially affecting the risk, may avoid the policy, when in other contracts like representations would not have a like effect. But in regard to other incidents of a contract of insurance, the same rules of construction apply as to other contracts. *Farmers' M. F. Ins. Co. v. Marshall*, 29 Vt. 23.

3. By the charter of the Vt. Mutual Fire Ins. Co. it was provided, that when the insured had any less interest than a fee simple in the buildings, &c., insured, the policy should be void unless the true title was expressed in the application. In this case, the insured had an equitable fee simple in the property, but by a deed defective as a formal conveyance of legal title. In his application he represented the property generally as “his.” *Held* (1), that such equitable title was as much an insurable interest as a strictly legal title; (2), that it was truly represented in the application as “his,” meaning a fee simple; (3), that the “less estate,” as expressed in the charter, meant an estate of less duration than a fee simple,—as, an estate for life, for years, &c. *Swift v. Vt. Mutual Fire Ins. Co.*, 18 Vt. 305.

4. A policy of insurance provided that, “if the interest or property insured be leasehold, or that of mortgage, or any other interest not

in fee simple in case of real estate, or absolute as to personal property, such must be made known to this company and expressed in the policy." In an insurance by two, whose interests combined made up the whole interest;—*Held*, that it was not necessary that the interest of each in the property should be defined. *Rankin v. Andes Ins. Co.*, 47 Vt. 144.

**5. Alienation.** Where a policy of fire insurance was, by its terms, made void if the property should be "alienated by sale or otherwise," and the insured executed a conveyance and took a reconveyance of the title simultaneously, leaving, by a construction of both instruments as one, a mere contingent interest in the first grantee, or naked right to purchase and appropriate the property on payment of a certain sum at a certain time, unaccompanied by possession or right of possession in the meantime;—*Held*, that this was not such an alienation as avoided the policy. *Tittlemore v. Vt. Mutual F. Ins. Co.*, 20 Vt. 546.

**6.** Where a policy of fire insurance was issued to a mercantile firm upon goods, &c., in their store, and one of the partners died, after which the survivor (the plaintiff) according to a provision in the partnership articles, but of which the insurance company (the defendant) had no knowledge, took the goods at a price stipulated, as his own, and added to the stock and continued the business in his own name, and the goods were then burned;—*Held*, that under the policy he could recover for all the goods in the store at the death of his partner, but could not recover for the goods added to the stock after such death. *Wood v. Rutland & Addison Ins. Co.*, 31 Vt. 552.

**7.** But where, in such case, the plaintiff, after the death of his partner, informed the agent of the defendant of the facts, and was informed by the agent that no change in the policy nor further action by the plaintiff in respect thereto was necessary, and the agent then verbally agreed that the policy should apply to cover all the goods, and the defendant, being informed of such understanding and agreement with the agent, assented thereto, and collected the assessments thereafter laid until the loss;—*Held*, that upon a declaration setting forth all such facts, the plaintiff was entitled to recover the entire loss,—there being nothing in the defendant's charter, by-laws, or the policy, as to the alienation of goods, nor any provisions as to how the policy should be confirmed to a vendee, or that it should be in writing. *Id.*

**8. Ratification.** A fire insurance policy upon buildings was issued running to the insured, his heirs and assigns, upon the payment of a premium covering the whole term of the insurance. The charter and by-laws of the insurance company, incorporated into the

policy, provided that the policy should become void upon an alienation of the property; but that the alienee, having the policy assigned to him, might have it ratified and confirmed to him upon application to the directors with their consent within 30 days after such alienation, &c.; and that it should be void until such confirmation. The buildings were conveyed and the policy assigned Nov. 11, and the buildings burned Nov. 19, and on the 20th the assignee applied to have the policy ratified and confirmed to him, which the directors refused. Upon a bill in chancery by the assignee against the company;—*Held*, that the right to refuse a confirmation was not arbitrary, and as there was no cause to refuse to ratify the assignment, beyond the fact of the loss which was insured against, the assignee was entitled to have the same ratified, and a decree was directed to be entered in his favor for the amount of the loss. *Boynton v. Farmers', &c., Ins. Co.*, 43 Vt. 256.

**9. Agent.** One P, assuming to act as agent of an insurance company, procured from the defendant an application for insurance and forwarded it to the company, upon which the company issued a policy. P was then in treaty for an appointment as agent, and such agency was soon after conferred by the company and a bond taken from him, bearing date previous to the date of the policy, reciting that P "is appointed agent," &c., and binding him, with surety, to faithful performance of his duty as such agent. *Held*, that these acts of the company were a ratification of P's agency in procuring the application. *Farmers' M. F. Ins. Co., v. Marshall*, 29 Vt. 28.

**10.** As to the authority of a soliciting insurance agent to bind his principal by particular representations, this is said to depend upon the fact whether a given representation was really calculated to impose upon a careful and prudent man as to his authority. *Id.*

**11. Right to sue.** A person who has acquired title, by levy of execution, to premises insured by the execution debtor against fire, is not entitled to the proceeds of the policy, in case of a loss. The contract of insurance is in general confined to the parties to it. *Plimpton v. Farmers', &c., Ins. Co.*, 43 Vt. 497.

**12. Service of writ.** G. S. c. 87, ss. 5—9, providing for the appointment of attorneys in this State by foreign insurance companies to receive service of process, apply only to such companies as make contracts of insurance within this State. Their purpose was to provide, by service of process on such attorney, a method for obtaining jurisdiction over the company, in cases where the court already had jurisdiction of the cause of action, and not to provide means for obtaining jurisdiction of a cause of action, where no such jurisdiction

before existed. *Sawyer v. North American Life Ins. Co.*, 46 Vt. 697.

13. **Limitation of suit.** A stipulation in a policy of insurance that no action shall be sustainable upon it unless commenced within twelve months after the loss, is binding, and bars a suit commenced after that time, although a prior suit was commenced within that time and failed without the plaintiff's fault. *Wilson v. Ftna Ins. Co.*, 27 Vt. 99.

14. A cause of action upon a policy of insurance, which has become barred by suffering the time to expire which is fixed, in the charter of the company, as a limitation for the commencement of an action for a loss, is not revived by an acknowledgment, or a new promise. *Williams v. Vt. Mutual F. Ins. Co.*, 20 Vt. 222.

15. Section 7 of the act incorporating the Vt. Mutual Fire Ins. Co., limiting the time for the bringing of an action after a loss, applies as well to the case where the directors wholly disallow the claim, as where they disallow it only in part. *Dutton v. Vt. Mutual Fire Ins. Co.*, 17 Vt. 369.

16. **Jurisdiction—Premium note.** An insurance premium note, payable in such proportions and at such times as the directors may require, is a promissory note for the full sum payable by instalments, and the jurisdiction of the court, in a suit upon it, is determined by the amount of the note, and not by the assessments made and due upon it—they not being "indorsements" to be "deducted." *Washington Co. Ins. Co. v. Miller*, 26 Vt. 77. *Farmers' Ins. Co. v. Marshall*, 20 Vt. 23. *Windham Co. Ins. Co. v. Pierce*, 36 Vt. 16.

## II. LIFE INSURANCE.

17. **Construction of policy.** An entry upon the margin of a life insurance policy, issued as a "paid up policy" in exchange for an endowment policy upon which two annual premiums had been paid, partly by two notes, was as follows: "This policy is conditional on the interest on the two notes given in part payment for two premiums paid on No. 10,608 being paid in advance." *Held*, (1), that this marginal entry was part of the policy, the same as though inserted in the body of it; (2), that the interest on the two notes became practically a premium upon the policy, payable according to the terms of the notes, viz.: annually in advance; (3), that the non-payment, in advance, of the second year's interest worked a forfeiture of the policy from that date. *Patch v. Phoenix Ins. Co.*, 44 Vt. 481.

18. **Suicide clause.** A policy of life insurance contained a provision to become void, if the insured "shall die by suicide." He did die by shooting himself, but it was claimed that this was the result of his insanity. As to the

degree of insanity which would excuse the act and save the policy, the court said: "It does not follow, because we can see that an insane man knows that if he blows his brains out it will kill him, and that he does that act for that purpose, that therefore the act was that of a sane mind, voluntarily and deliberately done"; and adopted the language of *Hunt, J.*, in *Life Ins. Co. v. Terry*, 15 Wallace's R. 580;—and said further: "It is not enough for the jury to find that the mind of the deceased was so impaired that he was incapable of distinguishing between right and wrong, but they must be satisfied that his mind was so overthrown that he had no power to resist the insane impulse to take his life, so that the act was the direct and immediate consequence and result of his insanity; in short, that the taking of his life was an insane act, in respect to which his reason was powerless." *Hathaway v. National Life Ins. Co.*, 48 Vt. 385. **INSANE PERSON**, 6.

19. **Evidence.** Suicide, like any other extraordinary and unnatural act, has a tendency to show insanity. *Id.*

## INTEREST.

1. **When, and when not, recoverable.** Interest is allowed, whenever there is a contract to pay it, either express or implied; or where the party is legally in default. In the latter case, compensation in damages, equal to the interest, may be allowed. *Hauzhurst v. Hovey*, 26 Vt. 544, 547. *Evarts v. Nason*, 11 Vt. 122. *Pawlet v. Sandgate*, 19 Vt. 621.

2. Except where there is an express contract for interest, it is only recoverable as damages for the detention of the money which the party ought to pay. *Abbott v. Wilmot*, 22 Vt. 437.

3. Where there is no express contract to pay interest, no implied contract to pay it arises, and it is not recoverable, except where the party has neglected to make payment after it was his duty to do so. *Evans v. Beckwith*, 37 Vt. 385. *Brainerd v. Champlain Tr. Co.*, 29 Vt. 154. *Sprague v. Sprague*, 30 Vt. 488.

4. It is well settled in this State, that if the contract is silent on the subject of interest, but does not by implication exclude it, the law implies that interest is to be paid on money due and payable under the contract, from the time the money becomes payable and should be paid. *Barrett, J.*, in *Vt. & Can. R. Co. v. Vt. Central R. Co.*, 34 Vt. 65.

5. In this State, the general rule is that interest is given after the debt is due, without any special contract to pay. The cases where interest is not given must appear to stand upon some special reason for withholding it. *Poland*,

C. J., in *Sumner v. Beebe*, 87 Vt. 562. LIMITATIONS, 35.

6. The law will always imply a contract to pay interest upon a debt payable on demand, after demand made, by way of damages for the delay. *Gleason v. Briggs*, 28 Vt. 135.

7. In an action for goods sold by a merchant in London to a merchant in Montreal, where there was a running account, and no stipulation as to time of payment or as to interest, nor demand of payment was proved, interest was allowed to be cast only from the service of the writ. *Houghton v. Hagar*, Brayt. 183. 19 Vt. 631.

8. According to general usage and the course of decisions in this State, interest is allowed upon a merchant's accounts after the expiration of the understood or usual time of credit. *Raymond v. Isham*, 8 Vt. 258. 2 Vt. 536.

9. Where a party agrees to pay money after his return from A, he is entitled to a reasonable time, after his return, to make the payment, before being chargeable with interest. *Abbott v. Wilnot*, 22 Vt. 437.

10. In a case where a party is not entitled to interest by any contract, and he receives his money without making any claim for interest, it is very difficult to see upon what ground he can afterwards make a claim for it. Long silence without claim, after payment of the principal, is ample evidence of a waiver of such claim. *Ib.*

11. A mutual attempt at settlement of accounts may fairly enough, perhaps, be regarded as a demand or claim of payment, upon both sides, for what should happen to be due, so as to warrant the allowance of interest from that date. *Gleason v. Briggs*, 28 Vt. 135.

12. Interest was refused to an administrator upon his account, under special circumstances, and where sufficient funds of the estate might have been subject to his control. *Everts v. Nason*, 11 Vt. 122.

13. So, where all presumption of any understanding that interest should be paid was rebutted—as, where services were rendered from time to time for many years, without time of payment agreed upon, and not charged nor presented until after the death of the debtor, interest was refused, except from and after such death. *Newell v. Keith*, 11 Vt. 214.

14. The decree upon a creditor's bill was, that certain property of the intestate debtor in the hands of the defendant should be brought into a course of administration, as assets of his estate. Held, that the defendant should not be charged with interest upon the value, the property not having been disposed of by him. *Morse v. Slason*, 16 Vt. 319.

15. A mere depositary of money, like a trustee, receiver, bailee, or stake-holder, is not

chargeable with interest unless upon contract to pay it, or as damages for a wrongful neglect to pay over when demanded. *Haswell v. Farm. & Mech. Bank*, 26 Vt. 100.

16. An agent receiving money for his principal, or an attorney for his client, is not liable for interest thereon, unless he has received special instructions to remit as fast as collected, or is in default by neglecting to render an account. *Hauzhurst v. Hovey*, 26 Vt. 544.

17. The plaintiffs had for several years sold to the defendant large quantities of wood, which, it was understood, would be and which were settled and paid for in the winters following the several deliveries, neither party expecting interest to be paid to the time of such annual settlements. At two or three of these annual settlements, the plaintiffs had omitted to present an account of a certain lot of wood previously delivered, and, in consequence thereof, it remained unpaid for,—the defendant supposing at each settlement that he had paid for all the wood previously delivered. Held, that the plaintiffs were not entitled to interest upon their claim during the time they so omitted to present it. *Brainerd v. Champlain Tr. Co.*, 29 Vt. 154. 30 Vt. 295.

18. A bond to pay a certain sum on the death of a third person, draws interest from the death, without demand—the event being equally ascertainable by both parties. *Sumner v. Beebe*, 87 Vt. 562.

19. On running accounts. It is settled in Vermont, in cases of ordinary running book accounts not controlled by special contract, express or implied, and unaffected by any special circumstances requiring the case to be made an exception to the rule, as being clearly inequitable, that the rule of computing the interest is by making annual rests, and allowing simple interest thereafter on the balance in favor of the party to whom it may be due. *Langdon v. Castleton*, 30 Vt. 285. *Spencer v. Woodbridge*, 38 Vt. 492. *Bates v. Starr*, 2 Vt. 536. *Wood v. Smith*, 23 Vt. 706. *Birchard v. Knapp*, 31 Vt. 679. *Goodnow v. Parsons*, 36 Vt. 46. *Davis v. Smith*, 48 Vt. 52.

20. Any custom in one's business to compute interest otherwise, as semi-annually (*Wood v. Smith*), or by adding interest to the principal at the end of each year (*Birchard v. Knapp*), will not vary this rule, unless known to the other party and in some way assented to. *Ib.* *Goodnow v. Parsons*.

21. A neglect to present a bill and to demand payment forms no exception to this rule. *Langdon v. Castleton*. *Spencer v. Woodbridge*. *Williams v. Finney*, 16 Vt. 297.

22. In computing interest upon accounts, with annual rests, the first rest, in the absence of evidence of a different understanding, is to be made at the end of one year from the com-

mencement of the account, and so from year to year. *Carpenter v. Welch*, 40 Vt. 251.

23. No custom of merchants, however uniform or long standing, will justify a court, in this State, in allowing interest upon interest on a running account. *Wheelock v. Moultons*, 18 Vt. 490.

24. **Annual interest.** Parties cannot stipulate in advance for compound, or annual, interest, to be reckoned for a succession of years,—that is, where the contract postpones the payment of both principal and interest for several years. This, if not usurious, would be oppressive and illegal. But the interest may be made payable at any time short of the time fixed for payment of the principal. *Catlin v. Lyman*, 16 Vt. 44.

25. A promissory note payable in (say) ten years from date “with annual interest,” imposes the same legal obligation as where payable *with interest annually*. When such interest falls due, suit may be brought for it immediately, and a recovery be had for that, with interest thereon from the day it fell due, as damages for the delay. *Id.*

26. Interest upon a contract for the payment of interest annually, or with annual interest, is to be cast upon that interest after the same falls due, down to the time when the contract is actually paid. *Rule*, 1 Aik. 410. *Austin v. Imus*, 23 Vt. 286.

LIMITATIONS, 34.

27. **Rate.** The courts of this State are governed by our own law in construing and enforcing contracts made in other States and countries, unless it be shown that the *lex loci* requires a different rule;—as, in the allowance of interest according to our own law after the expiration of an agreed credit. *Porter v. Munger*, 22 Vt. 191. 34 Vt. 65.

28. The rate of interest, whether interest is stipulated in the contract or is given by way of damages for the non-performance, is the interest of the place of payment. *Peck v. Mayo*, 14 Vt. 33.

29. Where a promissory note was made in Canada and indorsed in Vermont (in both which places the rate of interest was six *per cent*), and was payable at a day certain in New York (where the rate of interest was seven *per cent*), and was not paid when due;—*Held*, in an action against the indorser, that he was liable to the same extent as the maker; and that seven *per cent* interest was recoverable, as damages, from the maturity of the note. *Id.*

30. **Advance payment.** The reception of interest in advance, upon a note past due, is *prima facie* evidence of a valid contract to give time of payment, since, as a general proposition, a party receiving the consideration is bound to perform the thing for which the consideration was paid and received. *People's Bank v. Pearsons*, 30 Vt. 711.

## INTERPLEADER.

1. **When the bill lies.** In order to justify a bill of interpleader, there should be either some specific chattel, or some definite sum of money, to which different parties in the same right, or in privity of estate, make claim, and the person bringing the bill should be a mere stakeholder, having no interest in the matter, so that, when the court decrees an interpleader, he may step out of the case altogether. It is requisite, too, that the party should otherwise be in danger of paying the money, or the value of the chattel, more than once. *Lincoln v. Rutland & Burlington R. Co.*, 24 Vt. 639.

2. **Instances.** Where a claim was allowed by commissioners of an estate, and the creditor had brought an action on the administrator's bond for the allowance, and the heirs of the estate claimed that the allowance was obtained by fraud, and were instituting proceedings to set it aside and for a distribution of the sum among the heirs;—*Held*, that these facts furnished no ground for a bill of interpleader by the administrator, and, on demurrer, such a bill was dismissed. *Id.*

3. The orator, maker of a negotiable promissory note, had been adjudged trustee of the payee upon his own disclosure, and was afterwards sued upon the note by one claiming it as indorsee, who was not a party to the trustee proceedings. The orator thereupon brought his bill of interpleader against the plaintiff in that judgment, and such indorsee. *Held*, that as the right to the fund had been determined against him by the judgment, he did not occupy such position, as a stakeholder, as to maintain the bill; and on demurrer it was dismissed. *Holmes v. Clark*, 46 Vt. 22.

4. A railroad company had deposited in a bank, according to the statute, the amount of an award of commissioners for land damages. The company, before having done much upon the land, was enjoined by other parties from further work upon it. The company thereupon forbade the bank to pay the deposit to the landowner. The landowner demanded it of the bank. *Held*, a proper case for a bill of interpleader in behalf of the bank. *National Bank v. West River R. Co.*, 46 Vt. 633.

5. **Procedure.** To a bill of interpleader one of the defendants demurred. The other appeared, but, without demurrer or answer, confessed the allegations of the bill. The court overruled the demurrer, and thereupon, without other decree, ordered and decreed that the fund belonged to the demurrant and that the same be paid to him. From this decree the orator and the other defendant appealed. *Held* irregular and erroneous every way; that upon sustaining the bill, the court should have ordered the fund paid into court, and have dismissed

the orator as a party further, with his costs to be paid out of the fund, and then have proceeded to hear the case, as between the defendants, upon the issues formed, or to be formed, as ordered. *Ib.*

6. The defendants in a bill of interpleader stand before the court, as hostile claimants, to litigate the questions of right pending between them, to the same intents as if the one had brought a bill against the other predicated upon the same matter and for the same purposes. Hence, they may settle the controversy as between themselves, without regard to the orator. *Horton v. Baptist Church, &c.*, 34 Vt. 309.

7. **Parties.** C bought of H, after the death of the wife of H, a promissory note payable to such wife, or bearer, which was her separate property, and by law passed to the heirs. C bought the note under circumstances (as set forth in the case) calculated to excite suspicion as to the ownership of H. In a bill of interpleader brought by the maker of the note against C and the administrator of the wife of H;—*Held*, that H was not a necessary party. *Gill v. Cook*, 42 Vt. 140.

## INTOXICATING LIQUORS.

### I. CONSTITUTIONAL QUESTIONS.

1. *Act dependent on popular vote.*
2. *General powers of legislature.*
3. *Instances.*

### II. DEFINITIONS.

### III. LICENSE ACTS.

### IV. PROHIBITORY ACTS.

1. *Particular offenses.*
2. *Complaint and prosecution.*
3. *Search and seizure.*
4. *Replevin of liquors seized.*
5. *Trial, evidence, &c.*

### V. EFFECT ON CONTRACTS.

1. *As to town officers.*
2. *As to other persons.*

### I. CONSTITUTIONAL QUESTIONS.

1. *Act dependent on popular vote.*

1. The liquor licensing act of Oct. 31, 1844, was held not to be unconstitutional by reason of requiring a license to sell to be obtained from commissioners elected by the people of the several counties, otherwise such sale to be unlawful. *Bancroft v. Dumas*, 21 Vt. 456.

2. Held, that the act of Nov. 3, 1846, for the licensing of innkeepers, &c., was not unconstitutional by reason of prohibiting the sale of intoxicating liquors unless licensed by the assistant judges of the county court, and mak-

ing their power to license depend upon an approving vote of the voters of the several counties. *Ib.* 22 Vt. 74. 26 Vt. 861.

3. By the liquor act of 1852, it was provided that the act should come in force on the 2nd Tuesday of March, 1853,—with a proviso, that meetings of the freemen of the State should be holden on the 2nd Tuesday of February, 1853, to vote upon "their judgment and choice in regard to this act," and "if a majority of the ballots shall be *No*, then this act shall take effect in December, 1853." Held, that the act was constitutional, and by its terms came in force on the 2nd Tuesday of March, 1853,—the only thing conditional or contingent being, that, in the event of an adverse vote, the operation of the act should be suspended until the day last named. *State v. Parker*, 26 Vt. 357.

4. The popular vote upon this act having been "*Yes*;"—Held, that the respondent was properly convicted of an offence under it, committed before December, 1853. *Ib.*

### 2. General powers of legislature.

5. The legislature has constitutional power to pass a law prohibiting the traffic in intoxicating liquor for the purposes of drinking, and subjecting it to seizure, forfeiture and destruction. The seizure clause of the act of 1852, sections 12 and 13 (G. S. c. 94, s. 22), is valid. *Lincoln v. Smith*, 27 Vt. 328. *Gill v. Parker*, 31 Vt. 610.

6. The laws relating to the sale, &c., of intoxicating liquors come fairly within the regulation of the internal police of the State, which, by the constitution, is expressly given to the legislature. *State v. Conlin*, 27 Vt. 318. *In re Dougherty*, 27 Vt. 325. *Lincoln v. Smith*.

### 3. Instances.

7. G. S. c. 94, s. 33, authorizing the arrest, without warrant, of a person found intoxicated, &c., his detention in custody, examination, &c., discussed, and held constitutional. *In re Powers*, 25 Vt. 261.

8. A warrant issued upon the disclosure of a person arrested for intoxication, under G. S. c. 94, s. 33, and a trial and conviction of the party charged, were held constitutional and valid. *State v. Conlin*, 27 Vt. 318. *In re Dougherty*, 27 Vt. 325.

9. The provision of the liquor act of 1852, that it shall not be necessary to aver a former conviction in order to an increase of the penalty, extends to all modes of prosecution under the act, in all courts; and is constitutional. *State v. Freeman*, 27 Vt. 523.

10. There is no constitutional objection to the passage of a law, that the presumption of innocence may be overcome by a contrary pre-



sumption founded upon the experience of human conduct, and of enacting what evidence shall be sufficient to overcome such presumption of innocence;—as, that the possession of intoxicating liquor shall furnish probable cause for seizure, and, unexplained, of condemnation, as intended for unlawful sale. *Lincoln v. Smith*, 27 Vt. 328.

11. A complaint in the form prescribed in the liquor act, that the respondent "became a dealer in intoxicating liquors without having license therefor," &c., was held to sufficiently inform the accused of "the cause and nature of his accusation," as required by section 10 of the Declaration of Rights. *State v. Comstock*, 27 Vt. 553.

12. The legislature may prescribe the form of an indictment in a given case, provided they violate no constitutional provision. (Applied to forms given in the liquor acts.) *Id.*

13. The liquor act of 1852, No. 24, s. 8, is unconstitutional, so far as it authorizes the agent appointed by the county commissioner to purchase liquors at the expense of the town for which he is appointed, without its assent, express or implied, and where he gives no indemnity to the town for the faithful execution of his agency. *Atkins v. Randolph*, 31 Vt. 226. *Bennett, J.*, dissenting.

14. The manufacture of cider-brandy within this State, although for one's own use, or for sale in accordance with law, is prohibited by G. S. c. 94; and such prohibition is not in conflict with any provision of the constitution. *State v. Lovell*, 47 Vt. 493.

15. Stat. 1869, No. 4, authorizing suit against a person illegally selling liquors for an injury done by a person becoming intoxicated thereby, is constitutional. It is a civil suit, requiring only the same measure of proof as in other civil cases. *Stanton v. Simpson*, 48 Vt. 628.

## II. DEFINITIONS.

16. The words *rum*, *brandy*, *gin*, in and of themselves, import them to be spirituous liquors. *State v. Munger*, 15 Vt. 290.

17. Whether *ale* is intoxicating or not, is not a question of law, but of fact. It may be submitted to the jury without evidence, since everybody understands that it is intoxicating, and comes within the provisions of the statute prohibiting the sale of all intoxicating liquor, as it is understood that brandy is intoxicating, or that gunpowder is explosive. The jury may act upon such common knowledge. It is possible that ale may be manufactured with so small a proportion of intoxicating properties, as not to come within the class denominated intoxicating liquors. If so, this must form an exception to the general rule, and if a respond-

ent would avail himself of such a fact, it is incumbent upon him to prove it. *State v. Barron*, 37 Vt. 57.

18. The words "same offense," as used in section 18 of the liquor act of 1852—"former conviction of the *same offense*"—mean a *similar* offense. *In re Dougherty*, 27 Vt. 325.

19. "Place of public resort," as used in G. S. c. 94, s. 1—what is, and evidence of same. *State v. Pratt*, 34 Vt. 323.

20. An "habitual drunkard," as used in G. S. c. 94, s. 1, is one who is in the habit of getting drunk, or one who commonly, or frequently, is drunk; not that he is constantly or universally drunk. *Id.*

21. The word "intoxicated," as used in G. S. c. 94, s. 10, has its ordinary signification and means intoxicated or drunk by the drinking of intoxicating spirituous liquors; and held, that a complaint charging, in the words of the act, that the respondent "became and was found intoxicated" was sufficient, without alleging upon what he became intoxicated. *State v. Kelley*, 47 Vt. 294.

22. The offense of "dealing in the sale of spirituous liquors," under R. S. c. 83, s. 23, and under the license law of 1846, is accomplished by a single sale. *State v. Chandler*, 15 Vt. 425. *State v. Clark*, 23 Vt. 293. *State v. Bugbee*, 22 Vt. 32. *State v. Paddock*, 24 Vt. 312.

23. In order to constitute one a dealer in spirituous liquors under the act of 1846, it is not necessary that he should do the business in person, nor that it be done in his presence, or by his express command. If the liquor is kept for sale and sold with his consent, it is sufficient. And this applies to a general agent, who has such superintendence and control over the clerks and servants as the owner would have had, if present or superintending. *State v. Dow*, 21 Vt. 484.

24. "Selling, furnishing, or giving away" intoxicating liquors are all equally violations of the liquor act, and but different forms of committing the same legal offense; and a conviction for violating the statute in one form is available to double the penalty on a second conviction for a violation in another form. *State v. Haynes*, and *State v. Remlee*, 36 Vt. 667.

25. Under a count for furnishing intoxicating liquors, a conviction may be had for giving it away—giving being one mode of furnishing; and, *quære*, whether selling is not also a mode of furnishing; but where an indictment contains distinct counts for selling, and like counts for giving away, there can be no conviction for giving away under the count for selling, nor *vice versa*. *State v. Freeman*, 27 Vt. 523.

## III. LICENSE ACTS.

26. **Indictment.** In an indictment for selling liquors by small measure, without license, the negation of license must be broad enough to cover all the sources from which a license might have been lawfully obtained. *State v. Sommers*, 3 Vt. 156. (1830.) Where the averment was, "not having a license to sell said liquors as aforesaid," this was held to refer to the time of the sale, and was sufficient. *State v. Munger*, 15 Vt. 290. *State v. Whitney*, 15 Vt. 298. (1843.)

27. In an indictment for selling spirituous liquors by the small measure, without license, it is sufficient to allege that they were sold to "divers persons," without naming them, or averring that they were unknown. *State v. Munger*.

28. It is not necessary to charge the offense as *vi et armis*. This would be absurd. *Ib.* *State v. Whitney*, 15 Vt. 298.

29. On trial of an indictment for violation of the license act of 1846;—*Held*, that it was not error to allow the prosecutor to introduce evidence of more offenses than there were counts in the indictment. The putting of the prosecutor to his election is matter of practice, resting in the sound discretion of the court; and all that the prisoner can claim is, that the election should be made before he is called on for his defense. *State v. Smith*, 22 Vt. 74. 28 Vt. 14.

30. Under the same act;—*Held*, that one who, as the mere servant and gratuitous assistant of another, sold intoxicating liquors, neither having a license therefor, was subject to indictment for selling. *State v. Bugbee*, 22 Vt. 32.

31. Sufficiency of an indictment for selling or furnishing intoxicating liquors without a license, under C. S. c. 87, s. 7. See *State v. Woodward*, 25 Vt. 616.

32. In a prosecution for selling liquor without license, it is not a bar to the prosecution that the respondent has been indicted and convicted for a like offense since the date of the offense now proved, unless it appear to have been for the same act of selling. *State v. Ainsworth*, 11 Vt. 91.

33. Upon a general conviction for being a dealer in intoxicating liquor without having license therefor;—*Held*, that the penalty must be for a single sale. *State v. Comstock*, 27 Vt. 553.

34. Sale of liquors in Massachusetts by a licensed manufacturer—construction given to the Massachusetts act. *Barnard v. Houghton*, 34 Vt. 264.

## IV. PROHIBITORY ACTS.

## 1. Particular offenses.

35. The respondent, a citizen of New Hampshire, where was his only place of business, there sold to a resident of Vermont part of a cask of brandy, then at a railroad depot in Vermont, and then *in transitu* from New York to the respondent in New Hampshire; and it was also agreed that the purchaser should take the cask from the depot and take from it what he might wish, and then return the cask and the residue of the brandy to the respondent in New Hampshire, and the quantity taken should then be ascertained and paid for. The purchaser did accordingly. *Held*, that the respondent, having made the delivery in Vermont, was guilty of an offense against the liquor act of 1852. *State v. Comings*, 28 Vt. 508.

36. A sale of intoxicating liquors in this State, without delivery, would be no sufficient ground of conviction for an offense; but it would be so far illegal as to render the contract void. *Redfield*, C. J. *Ib.*, 512.

37. The keeping or transporting of intoxicating liquors in this State, with the intent of selling them in another State contrary to the laws of that State, is not a violation of any law of this State. *Harrison v. Nichols*, 31 Vt. 709.

38. The sale of liquors imported in accordance with the laws of the U. S., while remaining in the original packages in which they were imported, is not prohibited by the laws of this State. *Jones v. Hard*, 32 Vt. 481.

39. The act prohibiting the traffic in intoxicating liquors does not apply to medicinal preparations composed in part of alcohol, such as bitters and tinctures, which are made and sold in good faith for their true and legitimate use, to prevent or cure disease, although, if used in sufficient quantities, they will produce intoxication. But *aliter* with intoxicating drinks intended to be sold and used as a beverage, but disguised by some tincture or preparation so as to have, to some extent, the taste, flavor or appearance of medicines or bitters. *Russell v. Sloan*, 33 Vt. 656.

40. The owner of intoxicating liquors, not intended to be disposed of in this State contrary to law, may maintain trespass for the unauthorized taking thereof by a stranger; whether so, in case they were intended for sale contrary to law, was not decided. *Harrison v. Nichols*, 31 Vt. 709. (G. S. c. 94, s. 82.)

41. **Inn-keeper.** An inn-keeper, equally with any other head of a family, may furnish his own family or household with such food and beverage as he judges fit and proper for their sustenance and refreshment, including intoxicating liquor. *State v. Jones*, 39 Vt. 370.

42. Where the respondent, an inn-keeper, employed W four days as a hostler, who took care of the stables, was up nights, and to whom, on three several occasions after so sitting up, the respondent furnished whiskey at the bar, which W there drank;—*Held*, that W was to be treated as a domestic servant or employee of the respondent, and for the time being as constituting a part of the respondent's family or household; and, upon the hypothesis that the respondent furnished the liquor in consideration that W was in his employ, and that he furnished it gratuitously, as he did, or would, W's meals and lodgings, this was not a violation of the liquor law. *Id.*

43. The respondent, an inn-keeper, had a dancing party at his tavern and hired and furnished musicians for the occasion, and, at intervals, furnished them with whiskey at his tavern bar, without pay, which was drunk by them at the bar. *Held*, that this was an act of furnishing in violation of the liquor act. *Id.*

44. A hotel keeper has no right to furnish his mere boarders with intoxicating liquor. *State v. Intox. Liquor*, 44 Vt. 208.

45. Town agent. The sale of intoxicating liquors to a town agent authorized to sell, and impliedly to buy for the purposes of his agency, is not a violation of the liquor act of 1852. The seller is not responsible for the uses to which the agent put the liquors, or the intent with which he purchased them. *Street v. Hall*, 29 Vt. 165.

46. A town agent for selling intoxicating liquors for medicinal, chemical and mechanical purposes only, is subject to indictment for selling or giving away such liquors for general purposes of drinking, notwithstanding he has given the bond provided by the statute for the faithful discharge of his duties. *State v. Parks*, 29 Vt. 70.

47. It is incumbent on a town liquor agent, under G. S. c. 94, to sell no liquor unless upon an application for an authorized purpose, and upon a representation reasonably inducing the belief that it is wanted for such purpose only; and if he sells without such application and representation, and without inquiry, and the liquor is in fact wanted and used for drink, and not for a lawful purpose, he is guilty of a violation of the law—as much so, as if he were not agent. *State v. Fisher*, 35 Vt. 584.

48. In an action against a town liquor agent where the question was whether a particular sale was illegal;—*Held*, that the book of sales which he kept, showing other sales to the same party, was evidence against him, as tending to show his acquaintance with the party, the frequency of his calls, and the extent of his purchases, &c. *Stanton v. Simpson*, 48 Vt. 628.

49. Intoxicating liquor held by town officers

in contravention of the statute, is as liable to seizure and forfeiture as that held by other persons for like purposes. *Plainfield v. Batchelder*, 44 Vt. 9.

50. Single call. Where liquor is furnished in answer to a single call, at the same time, and by a single act, it constitutes but one act of furnishing and the party incurs but one penalty, notwithstanding the person to whom it is furnished allows another to partake of it with him, and it may be drunk by more than one person. But where the liquor is furnished on a single call, or more, if it be done at different times and by separate acts, no matter how closely these several acts may follow each other in point of time, each act of furnishing constitutes a separate offense, and subjects the party to a separate penalty, whether the liquor be drunk by the same person, or by different persons. *State v. Barron*, 37 Vt. 57.

51. Cider. The sale of cider at a grocery, or other place of public resort, is prohibited by G. S. c. 94, s. 18, although not made to an habitual drunkard. *State v. Preston*, 48 Vt. 12.

## 2. Complaint and prosecution.

52. Complaint. Under the liquor act of 1852 (as under G. S. c. 94), upon a single count in an indictment, information, or complaint, for selling, furnishing, or giving away intoxicating liquor without authority, a conviction can be had for any number of offenses proved. *State v. Freeman*, 27 Vt. 523.

53. In a prosecution under G. S. c. 94 containing a single count for selling, omitting the words "at divers times" contained in the form (s. 28), a conviction may be had for one offense, but for one only. *State v. Jones*, 39 Vt. 370.

54. An information under G. S. c. 94, s. 9, charging that the respondent "did, at divers times, sell, furnish and give away intoxicating liquor," &c., was *held* not objectionable for duplicity, but good on demurrer. *State v. Brown*, 36 Vt. 560.

55. In prosecutions under this section, following the prescribed form of complaint, it is the rule in this State, that the accused is entitled, on his request, to a specification of the offenses for which the government claims a conviction. *Redfield, C. J.*, in *State v. Conklin*, 27 Vt. 323, and in *State v. Freeman*, 27 Vt. 525. *Prout, J.*, in *State v. Bacon*, 41 Vt. 582. *Wilson, J.*, in *State v. Rowe*, 43 Vt. 267.

56. Such specification, as to its specific character, is a matter of discretion with the court, to be exercised with reference to the circumstances of the case; and where it was not shown that the prosecutor could be more specific, or that the accused was misled or prejudiced by the form or generality of the

specification;—*Held*, that there was no error of the court in refusing to order a more minute specification, according to the request of the accused, and in trying the case upon the specification furnished. *State v. Bacon*, 41 Vt. 536.

57. A complaint alleging that the respondent "was found in such a state of intoxication by the use of intoxicating liquor as to break and disturb the public peace," was *held* sufficient as a complaint that he was "found intoxicated," under G. S. c. 94, s. 10. *State v. Devitt*, 47 Vt. 287.

58. A complaint under G. S. c. 94, s. 18, for keeping "intoxicating liquors" with intent to sell, &c., was *held* sufficient without naming the particular kinds of liquor. *State v. Reynolds*, 47 Vt. 297.

59. The form of complaint prescribed by G. S. c. 94, s. 28, against one as a manufacturer of intoxicating liquor, was *held* sufficient. *State v. Lovell*, 47 Vt. 498.

60. Further, as to sufficiency of complaints in liquor prosecutions, see *CRIMES*, 199, 200, 206, 207, 209.

61. **Amendment.** The supreme court refused, as matter of discretion and to establish a reasonable precedent in like cases, to allow an amendment in a complaint for liquor selling, under G. S. c. 94, s. 30, not moved for in the county court. *State v. Kennedy*, 36 Vt. 568.

62. **Mittimus.** Where one is convicted for the illegal sale of intoxicating liquors, it is not important whether, in the record and the mittimus, this is called a crime, or an offense, or neither. *Howard, ex parte*, 26 Vt. 205.

63. **Disclosure.** A prosecution under G. S. c. 94, s. 33, upon a warrant issued upon the disclosure of a person found intoxicated, may be tried before the same justice and in the town where such intoxicated person was arrested and made his disclosure, although the respondent resides in another town, and the offense of furnishing the intoxicating liquor was committed in such other town. *State v. Hoffman*, 46 Vt. 176.

64. In such prosecution, the offenses provable do not extend beyond what the person found intoxicated is bound to disclose; that is, not beyond the sale, or sales, &c., of the liquor which produced the intoxication. *Id.*

65. One who is convicted of being found intoxicated, in a prosecution under G. S. c. 94, s. 10, cannot be compelled to disclose in that prosecution of whom he purchased the liquor which produced the intoxication. It is only where an arrest is made, under section 33, of a person then in a state of intoxication, that such disclosure can be compelled. *In re Pierce*, 46 Vt. 374.

### 3. Search and seizure.

66. **Complaint.** A complaint for search and seizure of intoxicating liquors under G. S. c. 94, should be in writing, but need not be signed by the complainants,—the form given being followed. *Gill v. Parker*, 31 Vt. 610.

67. In a liquor seizure complaint, the names of the complainants were not inserted in the body of the complaint—the allegation being, "come legal voters," &c.—but the signatures of three persons were subscribed thereto. *Held* sufficient. *State v. Intoxicating Liquor*, 44 Vt. 208.

68. In the jurat to such complaint, following the signatures of three persons, the affiants were described as the persons "above named." *Held* sufficient, although the full names were given in one place and the initials of the given names in the other. *Id.*

69. In a liquor seizure case, the State's attorney, without the consent or knowledge of the persons who had signed and sworn to the complaint, but in the presence of the justice and before warrant given to the officer for service, erased in the complaint the word "occupied," and interlined, instead, the word "owned"; but immediately after, erased the word "owned" and retraced with his pen the word "occupied," intending to restore it. *Held*, that this did not alter the complaint in fact, or effect. *Id.*

70. The form of the complaint and warrant for seizure of intoxicating liquors is adapted as well to sec. 1 as to sec. 22 of G. S. c. 94, and applies alike to liquors intended for illegal sale, and for illegal distribution. *State v. Drew*, 38 Vt. 387.

71. — as to place. A search warrant which so described the place to be searched as to leave no discretion to the officer in respect to what place he would search, but directed him in that respect and did not leave him to direct himself, was *held* sufficient. *State v. Intox. Liquor*, 44 Vt. 208.

72. A complaint and warrant for the search and seizure of intoxicating liquors were *held* sufficient, which described the place as "the dwelling house of Russel H. Lincoln of Shrewsbury, in the county of Rutland," and the thing as "intoxicating liquor"; and *held*, that it was not necessary to give the name of the owner or keeper, or of the person intending to sell, the statute only acting upon the place to be searched, and the thing to be searched for. *Lincoln v. Smith*, 27 Vt. 328.

73. The words "building or place," as used in G. S. c. 94, s. 22, authorizing a search and seizure of intoxicating liquors, must receive a reasonable interpretation; not so broad as to encourage a looseness of procedure, nor so narrow as to prevent the search of the entire prem-

ises occupied and used by a person in the ordinary course of his business. *State v. Drew*, 38 Vt. 387.

74. "The American Hotel, and the barns, sheds and other outbuildings adjacent thereto, in Burlington, and forming a part of the premises of said hotel," was held to be a sufficient description of the place to be searched. *Ib.*

75. A complaint for search and seizure alleged that "intoxicating liquor is by S. J. Loop kept or deposited in his shop, store or office on the corner of Evelyn and Freight streets in the village of Rutland, in the town of Rutland, and the cellar connected therewith, and in the store, rooms and cellar occupied by Landon & Huntoon, in the same building, and by S. J. Loop then and there intended for sale"; and the warrant accompanying the complaint commanded the search of "the premises above described, to wit,"—and then described them as in the complaint. Held, that the warrant was good as against Loop, and warranted the seizure of any liquors kept by him in either apartment specified. *Loop v. Williams*, 47 Vt. 407.

76. **Warrant — Deputation.** A justice may authorize any suitable person to serve a warrant for search and seizure of intoxicating liquors. (G. S. c. 31, s. 35.) *Perkins v. Gibbs*, 29 Vt. 848.

77. **Power and duty of officer.** The officer serving such warrant may, of necessity, take the cask containing the liquor. *Ib.*

*Note.*—By later Act of 1869, No. 4, such casks or vessels are subject to forfeiture.

78. The officer seizing the liquor is bound, in keeping it, to use (as in the case of property attached) "the utmost care and diligence of prudent men in the case of their own goods"; and that is sufficiently alleged in this case by the averment that the defendant kept the liquor "in a safe, suitable and proper place, to wit, the store of A. B." *Ib.*

79. An officer serving a warrant for the seizure of intoxicating liquor, may seize for either of the alternative causes named in his precept and the complaint it follows,—*sale, furnishing, gift or distribution*—as the case may present itself to him upon appearance; but the court is not confined by the return, to a trial of the case under this limitation, and may condemn for the same, or for either of the other alternative causes, as the case presents itself upon proof. *State v. Drew*, 38 Vt. 387.

80. **Notice.** Under the search and seizure provisions of G. S. c. 94, notice to the keeper of the liquors is all the statute requires, and, if so given, the owner is bound by the proceedings, whether he has actual notice or not. *Johnson v. Williams*, 48 Vt. 565.

81. **Claimant.** In a liquor seizure case claimants appeared, and, after objecting to the sufficiency of the service of notice, remained

before the court and made claim. Held, that the proceedings thereafter were well founded upon the voluntary stay of the claimants. *State v. Intox. Liquor*, 44 Vt. 208.

82. The taxation of costs against a claimant, in such case, was held to be proper, either under the general laws as to costs, or under the Act of 1870, which, as relating to the remedy, applied to cases then pending. *Ib.*

83. By the Act of 1868, No. 88, no jury trial was allowed in the city court of Burlington, "except in civil actions." Held, that a claimant of liquor seized under G. S. c. 94, s. 22, was not entitled in that court to a jury, it not being a civil action. *State v. Liquor, Ray*, claimant. 43 Vt. 297.

84. **Effect of adjudication.** Proceedings for the forfeiture of intoxicating liquors under the provisions of G. S. c. 94, are in the nature of proceedings *in rem*, and, if regular and the justice has jurisdiction of the subject matter, they fix the status of the property as to all the world, and are conclusive upon the owner. *Johnson v. Williams*, 48 Vt. 565.

85. A regular adjudication of forfeiture of the liquors terminates the owner's legal interest therein; and any subsequent misfeasance in relation thereto works him no injury of which he can complain. *Johnson v. Perkins*, 48 Vt. 572.

#### 4. Replevin of liquors seized.

86. The replevin of intoxicating liquor under G. S. c. 94, ss. 40, 41, is of the 3d class under G. S. c. 35, s. 13, and requires the giving of the bond prescribed in c. 35, s. 2. *Thurber v. Richmond*, 46 Vt. 395.

87. Where, in such case, the action was dismissed for want of a proper replevin bond;—Held, that the defendant was entitled to judgment for a return, and damages for the taking by the replevin, and an order on the replevying officer that he return the liquor to the defendant at the place whence he removed it. *Ib.* (G. S. c. 35, ss. 16-26.)

88. In replevin of intoxicating liquor seized under G. S. c. 94, the plea of *not guilty* is the general issue as in other cases by G. S. c. 35, s. 14, and puts in issue every material fact, as well the property in the liquors as the taking and detention. *Plainfield v. Batchelder*, 44 Vt. 9. *Loop v. Williams*, 47 Vt. 407.

89. Where the liquors so seized are replevied, and the same have been condemned in the seizure proceedings, the seizing officer, defendant in the replevin, though but a deputized officer, is entitled to judgment for damages and costs, and a return of the liquors to him, or to such officer as shall have warrant or authority to hold or destroy the same under the seizure proceedings. *Loop v. Williams*.

90. In replevin of intoxicating liquors;—*Held*, that the record of confiscation in a seizure proceeding was the proper and only legitimate evidence of that adjudication. *Plainfield v. Batchelder*, 44 Vt. 9.

91. In the record of a seizure case, the liquor was described as *gin*. *Held*, in a subsequent replevin suit for 2 bbls. of *whiskey*, that the identity of the article in the two cases could be proved by parol. *Ib.*

##### 5. Trial, evidence, etc.

92. The facts that R, the claimant of liquor seized, kept the "Stanton House," which was supplied with conveniences for selling liquors, and that a former seizure had been made at the same house while R kept it, were *held* proper evidence in a seizure case for condemnation of the liquor. *State v. Intox. Liquor*, 44 Vt. 208.

93. Assessment rolls made by assessors under U. S. laws, and entries of collectors under the same laws, showing that R had paid the special tax as a retail liquor dealer, were *held* proper evidence to prove that the liquors in his possession were intended for sale. *Ib.*

94. The marking of liquors to C, "Plattsburgh via Burlington", while C lived at Burlington and kept a grocery there, in connection with the quantity of the liquors, and the fact that they were found at Burlington when seized, were *held* to tend to prove that they were got for an unlawful purpose, and were subject to seizure and condemnation. *Ib.*

95. It cannot be presumed, without proof, that the sale of intoxicating liquors is prohibited by the laws of another State, such sales being good at common law. *Tuttle v. Holland*, 48 Vt. 542.

96. In a prosecution under G. S. c. 94, against a manufacturer of intoxicating liquor, a witness was *held* not privileged from answering the question whether he had purchased liquors of the respondent. *State v. Peterson*, 41 Vt. 504.

97. The conviction for being a common seller of intoxicating liquor, is a merger of all distinct acts of sale down to the filing of the complaint, and a bar to a further prosecution therefor. *State v. Nutt*, 28 Vt. 598.

98. In a prosecution for selling intoxicating liquors, a former conviction of the same offense may be given in evidence under the plea of not guilty; but if pleaded in bar, it may be replied that the conviction was for another offense than the one charged. *State v. Conklin*, 27 Vt. 818.

99. Records of former convictions under the Liquor Act need not be offered to the jury, but only to the court to affect the sentence. But these should be offered in the county court, and ought not to be received in the supreme court, for the fact of identity may be in ques-

tion, and this would be for the jury. *State v. Haynes*, 35 Vt. 570. *S. C.*, 36 Vt. 667. See *State v. Freeman*, 27 Vt. 523.

100. The respondent pleaded guilty to sundry offenses of liquor selling, without specifying the times when committed, and was convicted. On a second prosecution for like offenses laid at an earlier date;—*Held*, that G. S. c. 94, ss. 87, 88, made that record conclusive that the offenses charged in that case were committed on the day set forth in the complaint in that case; and that the respondent could not prove by parol that the offenses charged in the second case were intended to be and were embraced in his former plea. *State v. Haynes*, 35 Vt. 565.

101. In a prosecution against the keeper of a public house for furnishing intoxicating liquors contrary to G. S. c. 94, the government had proved by several witnesses that they had drunk liquor in rooms in the respondent's house, on public occasions, when invited by persons occupying such rooms, but did not know who provided the liquor. The respondent offered to ask, on cross-examination, if it was not the habit of gentlemen, in traveling about the country, to carry spirituous liquors in bottles with them. *Held*, that the evidence offered was inadmissible, as being too remote and indefinite; if it had been confined to guests of this house, it might have been otherwise, as tending to rebut the inference that it was obtained of the proprietor in the house. *State v. Barron*, 37 Vt. 57.

102. In such prosecution, the government offered to prove that the respondent had got his two clerks out of the way, so that they could not be subpœnaed. The officer having the subpœna for these witnesses testified "that he heard that the clerks were not there, and he did not look for them—understood they had gone to Boston." *Held*, that the offer was proper, but that the evidence given was inadmissible, and that the jury should have been instructed to lay it entirely out of the case. *Ib.*

103. The question, "Is strong beer reputed to be intoxicating?"—was *held* inadmissible. *State v. Peterson*, 41 Vt. 504.

##### Corpus delicti. CRIMES, 228.

104. Appeal. On an appeal from the judgment of a justice upon a complaint for selling, &c., intoxicating liquor, a trial and conviction may be had for distinct offences not attempted to be proved on the trial before the justice, to the extent of the original jurisdiction of the justice under that complaint. *State v. Remelee*, 35 Vt. 562.

105. A specification filed in the city court of Burlington in a liquor prosecution under G. S. c. 94, s. 9, having passed with the record of the appeal, as part thereof, to the county court, and no amendment thereof or new specification

having been filed in the county court;—*Held*, on trial in the county court, that the proof of offenses was limited by the specification filed in the city court. *State v. Rowe*, 43 Vt. 265.

**106. Recognizance** The recognizance required by G. S. c. 94, s. 16, to be given on an appeal, "conditioned that the respondent will prosecute his appeal to effect, and pay all costs, fines and forfeitures, and undergo all penalties that may be awarded against him," is not a recognizance for the personal appearance of the respondent in the appellate court. Hence, the justice before whom the recognizance was taken, has no authority, by G. S. c. 124, s. 16, to issue a warrant to apprehend the respondent and commit him to jail in discharge of his surety. *Morrill v. Thurston*, 46 Vt. 732.

**107.** Such recognizance is forfeited by the default of appearance in the county court on calling the party and his surety. This is a failure to prosecute the appeal, and it is not necessary, in order to hold the surety, that the State should obtain a judgment in that proceeding against the principal, which he had failed to pay. *State v. Nichols*, 48 Vt. 91.

#### V. EFFECT ON CONTRACTS.

##### 1. As to towns and town officers.

**108. Town agency.** The agent for selling liquor under G. S. c. 94, is not an instrument of the town but is an officer of the law. *Plainfield v. Batchelder*, 44 Vt. 9.

**109.** Since the act of 1868, No. 15, imposing the duty of purchasing liquors for the town agency upon the selectmen, the agent cannot bind the town by his purchases of liquors as agent, but the selectmen may make him their special agent for that purpose, or might ratify his unauthorized purchases. *Barton v. Pittsford*, 44 Vt. 371. *Erwin v. Richmond*, 42 Vt. 557.

**110.** Although it is declared unlawful for a town liquor agent to purchase intoxicating liquors at the expense or on the credit of the town, yet the selectmen may make him their special agent to buy the liquors for them and in the name of the town. So, too, they have a right to adopt and ratify the transaction afterwards. *Topsham v. Rogers*, 42 Vt. 189.

**111.** A settlement made by the selectmen with the town liquor agent, was *held* not to be a ratification of unauthorized purchases of liquors made by the agent, where the selectmen had no knowledge thereof, and the town did not receive the profits arising therefrom. *Barton v. Pittsford*, 44 Vt. 371.

**112.** The authority given by the selectmen to the town agent to buy liquors on the credit of the town, cannot extend beyond their own official year. *Id.* *Erwin v. Richmond*, 42 Vt. 557.

**113.** Where selectmen in purchasing liquors for their town, acted for the town, the fact that they gave their personal obligation to pay for the liquors, does not affect the question of ownership by the town. *Lemington v. Blodgett*, 87 Vt. 210.

**114.** Assumpsit in the general counts lies in favor of a town against its agent to recover money withheld, arising from the sales of liquors. The presumption is, that such money belongs to the town. *Lemington v. Blodgett*, 87 Vt. 215.

**115.** A town liquor agent, having purchased liquors in the name of the town in addition to what the selectmen had furnished, and paid for them in money received in the sale of liquors, and sold them as such agent, but without the knowledge or consent of the selectmen, cannot shield himself from responsibility to pay over to the town the proceeds of the sales, by the fact that his sales were made in violation of the provisions of the law under which he sold. *Topsham v. Rogers*, 42 Vt. 189.

**116.** In an indictment against selectmen for neglecting and refusing liquors to the town liquor agent, it is not sufficient to aver that *it was the duty* of the respondents to furnish the liquors, but those matters of fact must be averred from which the duty arises; among others, the giving of a bond by the agent to the town, as provided by G. S. c. 94, s. 4, and the contract for compensation. *State v. Bartlett*, 48 Vt. 86.

**117.** A contract between a county commissioner under G. S. c. 94, and a town agent of his appointment, that the commissioner shall furnish the agent such liquors as may be needed to supply the town, and that the agent shall pay him for the same, is against public policy and void, and such commissioner cannot recover for liquors so furnished. *Baldwin v. Coburn*, 39 Vt. 441.

##### 2. As to other persons.

**118. Action.** Under the statutes of 1844 and 1846, no recovery can be had by action, nor by way of set-off, for intoxicating liquors sold in this State by a person not licensed to sell. *Bancroft v. Dumas*, 21 Vt. 456. *Boutwell v. Foster*, 24 Vt. 485; nor upon a promissory note given therefor. *Briggs v. Campbell*, 25 Vt. 704.

**119.** Under G. S. c. 94, s. 32, and on common principles, the seller of intoxicating liquors in violation of law cannot maintain an action based upon any right of stoppage *in transitu*, nor ask the aid of the law in reclaiming possession of the liquors. *Howe v. Stewart*, 40 Vt. 145.

**120.** If one participates in an illegal sale, any portion of which is transacted within this

State, he becomes through such participation a partaker in the illegality, and the law will not aid him in the recovery of the stipulated price. But if the vendor does nothing, either by himself or agent, to forward the illegal contract within the State, he may recover, notwithstanding he may know the illegal purpose to which the article is to be put in another jurisdiction. *Backman v. Wright*, 27 Vt. 187. *Territt v. Bartlett*, 21 Vt. 184. *Backman v. Mussey*, 31 Vt. 547. *McConihe v. McMann*, 27 Vt. 95.

121. Where intoxicating liquors were sold in this State by an agent of the vendor's residing in another State, and he knew they were intended for sale in this State in violation of law, the contract was held to be illegal, although the liquors were delivered in such other State where the sale would have been lawful; and that a note given therefor was void in the hands of a party having notice of the consideration, although executed in such other State. *Converse v. Foster*, 32 Vt. 828; and see *Territt v. Bartlett*, 21 Vt. 184. *Smith v. Allen*, 23 Vt. 298. *Hove v. Stewart*, 40 Vt. 145.

122. If the seller of intoxicating liquor, in New York, to a person in Vermont, knows that the purchaser intends it for sale in violation of the laws of Vermont, and, as part of the contract of purchase, or in the execution of the contract in the mode of delivery afterwards directed, intentionally aids the purchaser to evade and violate the laws of Vermont, by doing some positive act, though slight, in furtherance of such design of the purchaser, such as sending the liquor in some concealed or disguised form;—*Held*, that the contract of sale is thereby rendered invalid, and no recovery can be had upon it. *Gaylord v. Soragen*, 32 Vt. 110. *Aiken v. Blaisdell*, 41 Vt. 655.

123. Where an order for intoxicating liquor was drawn in this State by the defendant, residing here, and was forwarded by mail to the plaintiffs at their place of business in Connecticut, and the liquors were there delivered to a common carrier in the usual course of business and thus transported to the defendant in this State;—*Held*, that the *situs* of the contract was in Connecticut, and was not void as contravening the Vermont liquor law, although the plaintiffs knew that the defendant intended to sell the liquor in violation of our law,—he having done nothing, in the mode of packing or forwarding the liquor, or otherwise, to aid the defendant in the evasion or violation of the law. *Tuttle v. Holland*, 43 Vt. 542.

124. The owner of intoxicating liquor put it in the hands of the defendant for illegal sale, under an arrangement between them and the plaintiff that the defendant should so sell the liquor and pay the proceeds to the plaintiff, to apply upon the defendant's debt to him. *Held*, that the plaintiff was so far a party to the

illegal contract and sale, that he could not recover the proceeds. *Buck v. Albee*, 26 Vt. 184.

125. A quantity of intoxicating liquor was put in the hands of the defendant, who had a license to sell for medicinal purposes, under an arrangement between him, the owner, and the plaintiff, that he should sell and pay the proceeds to the plaintiff. *Held*, that although the defendant sold the liquors for other purposes and in violation of law, and this by an understanding and arrangement with the owner, yet, if the plaintiff was not privy thereto, he could recover the proceeds of the sale. *Buck v. Albee*, 27 Vt. 190.

126. The purchaser of intoxicating liquors, though in violation of law, acquires the property therein, and such liquors are subject to attachment by his creditors. *Hove v. Stewart*, 40 Vt. 145.

127. One is liable as trustee for the proceeds of intoxicating liquor sold by him, though in violation of law, as agent of the principal defendant; also for the value of such liquor on hand at the time of service of the trustee process, but disposed of afterwards, though consigned to him by the principal defendant for illegal sale. *Thayer v. Partridge*, 47 Vt. 423.

128. A trustee cannot deduct from the credits in his hands, a claim for money paid the principal defendant upon the illegal sale of intoxicating liquors. The only remedy to recover for such payments is the action given by G. S. c. 94, s. 32. *Id.*

129. Before the passage of the liquor act of 1852 (G. S. c. 94);—*Held*, that a promissory note given for the price of liquors illegally sold, though void as to the payee, was valid and collectible in the hands of a *bona fide* holder for value without notice. *Pindar v. Barlow*, 31 Vt. 529. *Converse v. Foster*, 32 Vt. 828.

130. But under G. S. c. 94, s. 32, which provides that "no action of any kind shall be had or maintained in any court in this State, for the recovery or possession of intoxicating liquor, or the value thereof, except such as is sold or purchased in accordance with the provisions of this chapter";—*Held*, that such note was absolutely void, even in the hands of such *bona fide* holder. *Streit v. Sanborn*, 47 Vt. 702.

## INTOXICATION.

1. Where one enters into a contract while in such a state of intoxication as to render him incapable of the exercise of his understanding, he may avoid it, although his intoxication was not procured by the other party, but was purely voluntary. *Barrett v. Buxton*, 2 Aik. 167. 24 Vt. 425. *Conant v. Jackson*, 16 Vt. 335.



2. In order to avoid a contract by reason of intoxication, it must be of that degree which prevents the party from knowing the consequences of his contract. *Foot v. Tewksbury*, 2 Vt. 97.

3. Intoxication, such as to charge a party with negligence, must be of such degree as to render him incapable of acting with ordinary care and prudence. *Cassedy v. Stockbridge*, 21 Vt. 391.

4. Whenever a man becomes deprived of his memory and understanding, he is entitled to legal protection as an insane person, although he has become such by his own imprudence or misconduct; as, by excessive and continued intoxication. It is the state and condition of the mind itself which the law notices, and not

the causes that produced them. *Bliss v. Conn. & Pass. R. R. Co.*, 24 Vt. 424. *Conant v. Jackson*, 16 Vt. 335.

5. Equity will not lend its aid to enforce a contract obtained from a man when intoxicated, though his intoxication was purely voluntary; and in relation to persons whose minds are prostrated or have become stupefied from a course of previous intoxication, so as to be incapable of judging upon the propriety of what they do, the court will make a strict examination, as to whether the contract does not contain evidence that advantage was taken of those habits. *Conant v. Jackson*.

See CONTRACT, I. INSANE PERSON. INTOXICATING LIQUOR.

## J.

### JAIL.

(Prisoner; Jail bond.)

- I. JAIL; COMMITMENT.
- II. DISCHARGE OF POOR DEBTORS.
- III. JAIL BOND.

- 1. *Validity; Breach.*
- 2. *Release.*
- 3. *Assignment.*
- 4. *Action on jail bond.*
- 5. *Action against sheriff.*

- I. JAIL; COMMITMENT.

1. **Repairing jail.** Under the authority given to the judges of the county court to order necessary repairs and improvements of the county property, they may, by a committee, repair the county jail and out-buildings and build a woodhouse for the jail-house, and draw orders therefor. *Campbell v. Franklin County*, 27 Vt. 178.

2. **Breaking jail.** It is an offense under G. S. c. 115, s. 11, for a prisoner confined in jail, though alone, to break it open in order to escape. *State v. Fletcher*, 32 Vt. 427.

3. **Commitment.** Where a tax-collector commits a delinquent to jail, he must then leave with the jailer an attested copy of his warrant with a certificate of his doings thereon,—not necessarily simultaneously, but as soon after the commitment as a man of ordinary business capacity, exercising due diligence and dispatch, can perform the labor required to do the act. *Boardman v. Goldsmith*, 48 Vt. 408.

4. Where the plaintiff was arrested upon a

warrant by a deputy sheriff and was lodged in jail, not as a commitment, but for temporary custody, and no copy of the warrant was left with the jailer, who was the sheriff, nor any return made upon the warrant;—*Held*, that the jailer was not liable for the penalty under G. S. c. 48, s. 28, for neglect to furnish the plaintiff a copy of the warrant. *McMahon v. Edgerton*, 34 Vt. 77.

5. Where a party was arrested on a *capias* issued upon affidavit under G. S. c. 33, ss. 76–79, and appeared before the authority signing the writ for examination and discharge;—*Held*, that the magistrate had authority in his discretion to adjourn the hearing to a future day, and that in the interim the officer having the writ might commit the party to jail upon the writ, and that during such time, at least, the party was not entitled to his discharge on *habeas corpus*. *In re Foot*, 31 Vt. 505.

6. If one be committed to jail on a sufficient process, that is a full defense to an action by him for false imprisonment, though he be at the same time committed on an irregular or void process, unless it is made to appear that he was put to some additional inconvenience or loss by reason of the void process. *Lewis v. Avery*, 8 Vt. 287.

7. —in wrong county. An execution, issued from the county court of B county and regular on its face, commanded the imprisonment of the debtor in the jail of the county of B. The defendant, an officer, arrested the debtor in the county of W and, although there was a legal jail in that county, committed him to the jail of the county of B according to the terms of the precept. *Held*, that he was liable

in an action for false imprisonment. (G. S. c. 38, ss. 59, 60.) *Clayton v. Scott*, 45 Vt. 386.

8. **Effect to discharge lien.** All former liens upon goods or lands, created by an attachment but not perfected, are abandoned and lost by the commitment of the body of the debtor. But this does not operate as a release of collateral remedies, so far perfected as not to depend upon any proceedings under the execution for their support. If the creditor release the body, and, under the statute, take a new execution against the property of the debtor, this is a new and independent remedy, and cannot be connected with any previous attachment lien. *Willard v. Lull*, 20 Vt. 373.

9. **Close jail.** The only difference between prisoners *in jail* and those *in close jail* under a certified execution, is, that the former may be admitted to the jail liberties, while the latter cannot. There is no difference in the mode of their confinement, nor as to what would constitute an escape. *Vt. Life Ins. Co. v. Dodge*, 48 Vt. 156.

10. **Copy of process.** A jailer is not liable for an escape for not detaining a prisoner, where, from the *copy* of the process left with him on commitment, it appears that the process was void, or did not authorize the commitment—as, where the copy shows the process to be a summons. He is not bound to look beyond the *copy*—that being indispensable to a legal commitment. *Kidder v. Barker*, 18 Vt. 454.

11. Upon the copy of a mittimus left with the jailer, with a return thereon, there was no certificate that it was a true copy of the original mittimus and return; but the return upon the original showed that the copy had been left, and that it was true and attested. *Held*, on *habeas corpus*, that it sufficiently appeared upon the face of the copy left, that the signature of the officer to the return on the copy was intended to authenticate the paper as a copy of the precept and return, and that this mere informality did not render the commitment and detention illegal. *Tracy, ex parte*, 25 Vt. 98.

12. **Fine.** Where a mittimus only requires the jailer to keep the convict until he pay the fine, costs of commitment and jailer's fees (omitting the costs of prosecution), the prisoner will not be discharged on *habeas corpus*, where he has not paid or tendered the fine and charges named. The mittimus is good as far as it goes. *Howard, ex parte*, 26 Vt. 205.

13. Where a sheriff, being jailer, took of a prisoner in jail his note for a fine and costs, legally imposed, and discharged the prisoner;—*Held*, that this was equivalent to the receipt of so much money, and that the sheriff became debtor for the fine and costs; that this was not against public policy, and that the note was upon good consideration and the maker liable

thereon. *St. Albans Bank v. Dillon*, 30 Vt. 122.

14. **Jailer's charges.** The negligent escape of a prisoner confined in jail for debt, with his voluntary return to jail, does not absolve the town chargeable for his support, in an action by the jailer for support of the prisoner thereafter furnished. *Sanderson v. Rutland*, 43 Vt. 385.

15. A jailer's account for keeping a person committed to jail under the vagrant act of 1864, is not chargeable to the State and should not be audited as such by the court auditor. *Mandamus refused*. *Drew v. Russell*, 47 Vt. 250.

## II. DISCHARGE OF POOR DEBTORS.

16. **Who entitled.** A prisoner in jail upon an execution issued by the court of chancery for the payment of money, is entitled, as in cases at law, to the benefit of the poor debtor's oath. *Cannon v. Norton*, 16 Vt. 334. 32 Vt. 387.

17. **Jail commissioners.** The board that acts in the process of discharging a poor debtor from jail being of special and limited jurisdiction, their jurisdiction must be shown, in order to sustain their decision, by proof of the prior proceedings, and that they were regular,—as, that due notice was given to the creditor, or that he was before them; otherwise, their certificate of discharge is void and affords no protection to the sheriff, if sued for an escape, nor to the surety upon the jail-bond. *Paine v. Ely*, 1 D. Chip. 37. *S. C.*, N. Chip. 14. 1 Vt. 257. 25 Vt. 350.

18. A plea setting up a discharge by jail commissioners must contain such averments of special facts as show that the acting commissioners had jurisdiction, and had the parties before them. *Hubbell v. Dimick*, 1 Vt. 253.

19. The discharge of a poor debtor by jail commissioners, without notice to the creditor, in a case where the statute requires such notice, is void, and does not justify the sheriff in permitting the prisoner to depart. *Dean v. Lowry*, 4 Vt. 481.

20. On the admission of a prisoner to the poor debtor's oath, his departure from jail, or the jail limits, is an escape and breach of the jail-bond, unless the jail commissioners shall have first delivered to the jailer the proper certificate of discharge. *Staniford v. Barry*, Brayt. 200. *Haight v. Richards*, 3 Vt. 77. 15 Vt. 617.

21. A certificate of discharge of jail commissioners which misdescribes the execution upon which the debtor is committed, as to the sums therein, does not authorize his discharge, although the proper oath may have been administered. *Holbrook v. Pearce*, 15 Vt. 616.

22. The proceedings of jail commissioners

may be proved by parole, they not being a court of record. *Richardson v. Hitchcock*, 28 Vt. 757.

**23. Notice to creditor.** The citation issued by jail commissioners must be directed to and be served upon the creditor in the execution, though but a trustee for the real creditor. *Hubbell v. Dimick*, 1 Vt. 253.

**24.** The indorsement of the name of the attorney of record upon an execution, is a sufficient appointment of him as *agent*, under the statute of 1820, for the purpose of service of notice of an application to take the poor debtor's oath. *Dean v. Lowry*, 4 Vt. 481. *Bennett v. Morrill*, 3 Vt. 322.

**25.** Where notice is attempted to be given to the creditor of the debtor's application to be admitted to the poor debtor's oath, the jail commissioners are to determine on the sufficiency of the notice and certify accordingly, and their decision is conclusive and cannot be re-examined. *Allen v. Hall*, 8 Vt. 34. *Raymond v. Southerland*, 3 Vt. 494. 12 Vt. 514. 40 Vt. 162. *Childs v. Morse*, 2 Tyl. 221. *Brush v. Robinson*, 2 Tyl. 358. *Adams v. Matlocks*, Brayt. 199. *Thornton v. Robinson*, Brayt. 199. *Smith v. Quinton*, Brayt. 200.

**26.** The certificate of jail commissioners discharging a poor debtor, when made and delivered as the law directs, is a sufficient bar to a recovery against the sheriff for an escape, and to a recovery on the jail-bond. *Id.* *Haight v. Richards*, 3 Vt. 77, 80.

**27.** Where the certificates of jail commissioners, given to the jailer, and to the debtor, after having administered to him the poor debtor's oath, show that the creditor was notified, this is sufficient to warrant the discharge of the debtor from jail, whether the creditor appeared or not; and a contradiction of the two certificates in this last respect is not material. *Carter v. Miller*, 12 Vt. 513.

**28. Pleading.** In an action for an escape, a plea in bar alleging a discharge by jail commissioners, was *held* sufficient, where the declaration did not aver an indorsement on the execution of a certificate, that the cause of action arose from the willful and malicious act of the defendant. (Stat. 1823.) *Barber v. Chase*, 3 Vt. 340.

### III. JAIL-BOND.

#### 1. *Validity; Breach.*

**29. Validity.** If a sheriff admit a prisoner to the jail liberties in a case not authorized by statute, he is guilty of an escape; and a jail-bond taken in such case is void. *Lowrey v. Barney*, 2 D. Chip. 11. *Leonard v. Hoyt*, Brayt. 73.

**30.** A jail-bond taken to the sheriff from a

prisoner committed under process from the United States court, was *held* void. *Warren v. Russel*, 1 D. Chip. 193. But see *Randolph v. Donaldson*, 9 Cranch. 76.

**31.** The illegality of the imprisonment is a defense to an action upon a jail-bond,—as, where no such judgment was rendered, or no such execution issued as is described in the jail-bond; or that the execution was illegal, as having been issued against the express provisions of a statute, &c. *Witt v. Marsh*, 14 Vt. 303.

**32.** In an action on a jail-bond, it cannot be objected that the execution did not issue regularly in pursuance of a rule. *Gibson v. Scott*, 7 Vt. 147.

**33.** On a process and judgment in favor of A, of R, the execution issued in favor of A, of F, on which the debtor was committed and gave a jail-bond. It appearing from the pleadings that there was such a person as A, of R;—*Held*, that the jail-bond was void. *Sheldon v. Kelsey*, Brayt. 86.

**34.** A misdescription, in a jail-bond, of the execution as regards the sums recovered and to be collected, avoids the bond. *Sherwin v. Bliss*, 4 Vt. 96. 16 Vt. 651. *Avery v. Lewis*, 10 Vt. 332. 15 Vt. 617.

**35.** A judgment was rendered at an adjourned term of court holden on the 22nd day of June, and the execution thereon so recited it. The jail-bond recited the judgment as rendered on the first Monday of June. In an action upon the bond;—*Held*, that this misdescription was fatal, and the plaintiff could not recover. *Sherwin v. Bliss*.

**36.** A jail-bond executed after the commitment, although ante-dated, is none the less valid. *Clark v. Kidder*, 12 Vt. 689.

**37. Effect.** The surety upon a jail-bond engages against the default of his principal, and is liable to the same extent as his principal. *Paine v. Ely*, 1 D. Chip. 87. *S. C.*, N. Chip. 14.

**38. Breach—Escape.** Where the jail limits existing at the time of the admission of a prisoner to the liberties were afterwards enlarged, and again contracted, and the prisoner failed to return and remain within the limits last fixed, this was *held* to be an escape. *Willard v. Hathaway*, Brayt. 75.

**39.** An escape of a debtor from the liberties of the jail is a breach of the jail-bond, and his return to the liberties before action brought does not cure the breach, or escape; nor can he by such return become again a prisoner, but the sheriff must look to the bond alone for his security. *Jameson v. Isaacs*, 12 Vt. 611. 43 Vt. 390.

**40. Mesne process.** *Held*, not a bar to an action for breach of a jail-bond given on commitment on *mesne* process, that the debtor remained within the precinct of the sheriff and

so that he might have been taken on the execution; but the bail was allowed to surrender the debtor on payment of the costs, and the penalty of the bond was chancered to one cent. *Warner v. Eames*, 2 Tyl. 121.

41. The surety in a jail-bond given on commitment on *meene* process, is exonerated by the same matters that would exonerate him if he had become bail by indorsing the original writ,—as, the death of his principal—although the statute (G. S. c. 121, s. 26) does not in terms so provide. *Graves v. Dyer*, 23 Vt. 614.

42. An action cannot be maintained against a sheriff for the escape of a debtor, who gave a jail-bond on his commitment to jail on *meene* process, until after the sheriff's refusal to assign the bond on demand made. The statute contains no exceptions, and the court cannot make them—certainly not, unless in the most obvious cases of necessity. *Spear v. Holmes*, 24 Vt. 547.

### 2. Release.

43. **Release by creditor.** The least inducement, or even countenance, given by a creditor to the departure of his debtor from the jail liberties, is a good defense to an action on the jail-bond for an escape. *Hobbs v. Whitney*, 2 Tyl. 409. 7 Vt. 164.

44. A license by the creditor to his debtor to leave the jail liberties will not release the surety on the jail-bond, if revoked before the escape and before any act done injurious to the surety. *Hooker v. Daniels*, Brayt. 32.

45. A written proposition by a creditor to his debtor, in the jail liberties, of terms of settlement and discharge of the jail bond, was *held* not to authorize a departure from the liberties before compliance with such terms. *Harvey v. Richardson*, 13 Vt. 549.

46. If the plaintiff, assignee of a bail bond, agrees to have a suit thereon reviewed on nominal bail, whereby the debt is lost, the sheriff is exonerated. *Wait v. Dana*, Brayt. 37.

47. **Effect as to the debt.** The escape of a debtor in prison on execution, with consent of the creditor, discharges the debt; and this result cannot be saved by stipulation. *Enos v. Fenna*, Brayt. 36. *Hyde v. Long*, 4 Vt. 581.

48. If the creditor consents to the escape of his debtor from prison, and the debtor in consequence of such consent goes at large, it is a discharge of the debt. So, if he makes a contract with his debtor which induces or causes him to depart from the liberties, this is a discharge of the jail-bond. *Conant v. Patterson*, 7 Vt. 163. *Carter v. Talcott*, 10 Vt. 471.

49. The discharge of a jail-bond discharges the debt, not only as to the party in prison but as to all others liable for the same original debt, though not sued; on the principle, that a dis-

charge of one of two joint obligors is a discharge of both. *Hyde v. Long*, 4 Vt. 581.

50. Where the creditor discharged from imprisonment one of two joint debtors, although after the escape of the other;—*Held*, that this discharged the debt as to both, and barred an action on the jail-bond. *Bailey v. Kimbal*, 1 D. Chip. 151.

51. Where the creditor discharges the body of his debtor committed to jail on execution, he is entitled under the Act of 1808 (G. S. c. 121, s. 60), as matter of right and without notice to the debtor, to an *alias* execution against his property; and upon such execution interest is collectible, as in other cases. *Martin v. Kilbourne*, 11 Vt. 93. See *Dennison v. Slason*, 39 Vt. 606.

52. — **as to interest.** A debtor upon the jail liberties by commitment on execution, may discharge himself by payment of the judgment, execution and fees of commitment without interest upon the judgment. *Allen v. Adams*, 15 Vt. 16.

53. So, where the creditor voluntarily discharges his debtor from imprisonment on execution, he cannot recover, in an action of debt upon the judgment, interest upon the judgment for the time that the debtor was imprisoned; and *quare*, whether the action of debt will lie in such case. *Dennison v. Slason*, 39 Vt. 606.

### 3. Assignment.

54. The high bailiff, on the commitment of the sheriff to jail, has authority to take from him a jail-bond and to assign it to the creditor. *Denton v. Adams*, 6 Vt. 40.

55. The assignment of a jail-bond must be by the sheriff who took it, whether in office, or not, when assigned. *Kendall v. Dodge*, 3 Vt. 380.

56. Where a sheriff put his name and seal on a jail bond, and delivered it to the creditor's attorney with parol authority to write an assignment over the signature, which the attorney afterwards did;—*Held*, that this was a valid assignment,—the statute of frauds not applying. *Id.*

57. Under the provision of the statute making a jail bond "assignable to the creditor";—*Held*, that an action on the case lies against the sheriff for refusing to assign. *Vilas v. Barker*, 20 Vt. 603.

58. In an action against a sheriff for refusing to assign a jail-bond taken on *meene* process, and for suffering the debtor to escape, it is not a defense that the plaintiff had added a new count to his declaration for a different cause of action, after the taking of the bond and after the escape. *Id.*

4. *Action on jail-bond.*

59. A sheriff may maintain an action upon a jail-bond given to himself by a debtor committed upon execution in favor of such sheriff. *Lourey v. Hine*, 2 D. Chip. 59.

60. In case of the death of a sheriff, the right of action upon a jail bond, not assigned, passes to his personal representative, who may recover thereon for the benefit of the creditor. *Lyman v. Mower*, 2 Vt. 517.

61. The sheriff has a right of action on a jail bond immediately on the escape of the debtor, whether he has paid anything to the creditor or not, and may recover the amount of the judgment and interest. *Id.*

62. A jail-bond is taken principally for the indemnity of the sheriff, and belongs to him until assigned, and he may prosecute it for his own protection, or even compromise and discharge it, if not done to defraud the creditor. *Weeks v. Stevens*, 7 Vt. 72. 21 Vt. 402.

63. **Defense.** In an action by a sheriff upon a jail-bond, no defense can avail the defendant that would not be allowed if the bond had been formally assigned to the creditor, and the action had been brought in his name. *Lyman v. Mower*, 2 Vt. 517. *Weeks v. Hunt*, 6 Vt. 15. 6 Vt. 686.

64. It is no defense to such action, that the debtor escaped more than six years before the suit, and that this was known to the sheriff and the creditor. *Keith v. Ware*, 6 Vt. 680.

65. The statute of limitations does not commence to run upon a jail bond from the time of the escape, but only from the time of a demand by the creditor upon the sheriff for an assignment of the bond, and a refusal. *Keith v. Ware*, 2 Vt. 174. *Kendall v. Dodge*, 3 Vt. 360.

66. **Pleadings—Declaration.** A declaration on a jail bond taken and assigned by the high bailiff need not allege the cause of his acting as sheriff. *Buck v. Marsh*, Brayt. 125.

67. In declaring upon a jail bond, it is sufficient to state the process and that the debtor was imprisoned in jail thereon, without further matter of inducement. *U. S. Bank v. Tucker*, 7 Vt. 184.

68. A declaration upon a jail bond was held ill on demurrer, because it did not aver an imprisonment in jail at the time of giving the bond. *Gregory v. Thrall*, 28 Vt. 805. See *Bank v. Tucker*, 7 Vt. 187.

69. **Plea.** *Non damnificatus* is not a good plea to an action on a jail bond. *Keith v. Ware*, 2 Vt. 174. *S. C.*, 6 Vt. 680.

70. To an action on a jail bond nothing can be pleaded which might have been pleaded to the original action, or which existed previous to the rendition of the judgment. *Allen v. Fisher*, 1 D. Chip. 277.

71. In such action, the recital of the judg-

ment in the bond does not estop the defendant from pleading *nul tiel record* of such judgment. *Stillman v. Barney*, 4 Vt. 187. 9 Vt. 178.

72. Where a sheriff promised a debtor within the liberties, that "if he escaped he would not sue him until he had first prosecuted the bail";—*Held*, that such agreement could not be pleaded as a defeasance of the jail bond, though the principal was joined with the bail in the action upon the bond. *Rice v. Pollard*, 1 Tyl. 280.

73. **Rule of damages.** The rule of damages in a recovery upon a jail bond is the amount of the creditor's judgment, with interest from its date. *Lyman v. Mower*, 2 Vt. 517. *Keith v. Ware*, *Id.* 174.

74. In an action against a surety on a jail bond;—*Held*, that interest, as damages, should not be allowed upon, and so as to exceed, the penalty. *Mattocks v. Bellamy*, 8 Vt. 463.

75. In an action on the case by bail in a jail bond, for forcing the principal out of the limits, the penalty of the bond does not furnish the rule of damages, but the amount of the debt specified in the bond, and this determines the jurisdiction. *Barker v. Willard*, Brayt. 148.

5. *Action against sheriff.*

76. The nominal plaintiff in ejectment cannot maintain an action against the sheriff, for the escape of a defendant committed on an execution *in his own name*, issued on the judgment in the ejectment suit. *Chipman v. Sawyer*, 1 Tyl. 83. *S. C.*, 2 Tyl. 61.

77. Where a debtor, admitted to the liberties of the jail upon jail bond, escaped in 1841, and the creditor brought his action against the sheriff in 1846;—*Held*, nothing else appearing, that the court could not presume that the plaintiff had lost his remedy by unreasonable delay. *Wheeler v. Pettes*, 21 Vt. 398.

78. The statute does not require the creditor to carry a jail bond into another State to be enforced; and if no sufficient means of enforcing collection are to be had within our own jurisdiction, the poverty of the signers is sufficiently established to sustain an action against the sheriff. *Id.*

79. The sheriff guaranties the actual sufficiency of the jail bond taken by him when the debtor is in execution; and though the form of the action against the sheriff is case as for an escape of the debtor, yet the rule of damages is the amount of the debt. *Id.* *Udall v. Rice*, 1 Tyl. 218.

80. In an action against a sheriff for the escape of a former sheriff committed to jail upon an extent for non-collection of taxes;—*Held*, that the defendant might show, upon the question of damages, the poverty of such former sheriff at the time of his escape,

although he could not have been discharged by taking the poor debtor's oath. *State's Treasurer v. Weeks*, 4 Vt. 215; and see *Middlebury v. Haight*, 1 Vt. 428.

## JUDGMENT.

- I. IN GENERAL; DIFFERENT KINDS.
- II. VALIDITY.
- III. CONCLUSIVENESS AND EFFECT.
- IV. JUDGMENT OF ANOTHER STATE.
- V. DECREES IN CHANCERY.
- VI. ACTION ON JUDGMENT.

### I. IN GENERAL; DIFFERENT KINDS.

1. **When rendered.** A judgment is considered as rendered on the last day of the term of court. *Hoar v. Jail Com'rs.*, 2 Vt. 402. *Day v. Lamb*, 7 Vt. 426. *Bradish v. State*, 35 Vt. 452.

2. **When it takes effect.** A judgment takes effect from the time it is rendered, and not from the time it is recorded. *Huntington v. Charlotte*, 15 Vt. 46.

3. **On the merits.** A judgment that the plaintiff is barred, and that the defendant recover his costs, is a judgment on the merits,—ends the case, puts the parties out of court, and is a bar to a further action for the same cause. *Dixon v. Sinclair*, 4 Vt. 354.

4. **Default.** The mere entry of a default does not amount to the rendering of a final judgment. The default is an incident which entitles the plaintiff to a judgment, but does not determine either the kind, or amount of such judgment. Further proceedings are required,—as the assessment of damages, &c.,—until which time, the action must be regarded as still pending. *Sheldon v. Sheldon*, 37 Vt. 152; and see *Webb v. Webb*, 16 Vt. 636.

5. **Nunc pro tunc under a rule.** In an action of trespass *qua. clau.*, the defendant justified under a right of way pleaded. After the close of the evidence, the court ruled that the evidence did not support the plea to the extent of the right claimed. The defendant then got leave to amend his plea upon payment of costs, and the case was continued under a rule that unless the costs should be paid in 30 days, judgment should be entered for the plaintiff, as of that term, for nominal damages and costs. The costs were not paid and judgment was entered according to the rule. In a second action for a subsequent trespass, in which the same right of way was set up in defense;—*Held*, that the first judgment was conclusive against the right pleaded, like a judgment by confession or consent, as if rendered by default or *nil dicit*; and that the proceedings and evi-

dence in the first case were important only as enabling the plaintiff more readily to show the identity of the questions litigated. *Atwood v. Robbins*, 35 Vt. 530.

*Judgments under special rules*, see RULES.

6. **Pro forma.** Where the county court upon the report of an auditor rendered a *pro forma* judgment, it cannot be claimed that the county court drew any inferences of fact beyond the facts expressly found by the auditor. *Brown v. Mudgett*, 40 Vt. 68.

7. **Retraxit.** In ejectment, verdict was rendered for the defendant, exceptions by the plaintiff were allowed and execution stayed, but without a formal entry of judgment on the verdict. Without entry in the supreme court, the plaintiff paid the defendant's costs and the case was no further prosecuted. Beyond the docket minutes, no record was made up. *Held*, that such payment of costs was a renunciation of the plaintiff's claim in the action, and in effect equal to a judgment against him. *Armstrong v. Colby*, 47 Vt. 359.

8. **Judgment a "contract."** An action on a judgment is founded on a "contract, express or implied," within G. S. c. 33, s. 76, and process against the body cannot issue therein, except on affidavit, &c. *Sawyer v. Vilas*, 19 Vt. 43.

9. The same, as to *scire facias* against bail backing a writ. *Stoughton v. Barrett*, 20 Vt. 385.

### II. VALIDITY.

10. An entry of judgment for the right sum, but inaccurately named *damages*, instead of *debt*, or so much *debt* and so much *damages*, is well enough. *Carver v. Adams*, 40 Vt. 552. *Sinclair v. Gadoomb*, 1 Vt. 32.

11. Judgment for a sum exceeding the *ad damnum* of the writ is erroneous. *Anon.*, Brayt. 72.

12. A judgment rendered by default, at the first term, against a non-resident who has had no notice of the suit, is void. *Rider v. Alexander*, 1 D. Chip. 267. *Sed quare*, 25 Vt. 350. 27 Vt. 26.

13. A judgment against a defendant who was out of the State and had no notice, cannot be overhauled by plea in an action upon such judgment. The only remedy against it is by writ of review under the statute. *Jones v. Ames*, Brayt. 189.

14. Want of actual notice to the defendant of the pendency of a suit does not render the judgment void; as, in that case, his rights are otherwise protected by statutory enactments. *Ellsworth v. Learned*, 21 Vt. 535. 30 Vt. 202. *Beach v. Abbott*, 6 Vt. 586.

15. A judgment rendered by default, without notice in fact, and without the appearance

of any one in the defendant's behalf, is not necessarily a nullity. *Lapham v. Briggs*, 27 Vt. 26.

16. The judgment of a court of competent jurisdiction is not void for error or irregularity of process, or other previous proceedings. *Kellogg, ex parte*, 6 Vt. 509. *Allen v. Huntington*, 2 Aik. 249. *Peck v. Smith*, 8 Vt. 265. *Kelley v. Paris*, 10 Vt. 261. *Gilman v. Thompson*, 11 Vt. 643. 4 Vt. 444. *Ross v. Fuller*, 12 Vt. 265. 32 Vt. 626.

17. There is no case in which the judgment of a court of record of general jurisdiction has been held void, unless for a defect of jurisdiction. *Redfield, C. J.*, in *Hammond v. Wilder*, 25 Vt. 342.

18. Where a writ of attachment, returnable before a justice, was served in another county by attaching property less than twelve days before the return day, and the defendant made no appearance and judgment was given by default;—*Held*, that the judgment was valid. Nor should the officer be regarded as a trespasser. Such defect of service is matter of abatement only. *Id.*

19. In case of a judgment rendered against an absent defendant, upon service by attachment of property without personal notice, the omission to give a recognizance for a writ of review does not affect the regularity of the judgment, but merely makes it irregular to issue an execution thereon. *Stearns v. Wrisley*, 30 Vt. 661.

20. A judgment is not to be held void, as matter of law, because the writ, being against a non resident, was served by the attachment of property of but a nominal value; nor because the return of service was defective; nor because the defendant had no actual notice of the suit; nor because the justice continued the suit for only one day before judgment; nor for all these causes combined. *Stevens v. Fisher*, 30 Vt. 200; and see *Collins v. Merriam*, 31 Vt. 622. *Hamilton v. Wilder*, 31 Vt. 695.

21. The adjudication by the court of proof of notice to an absent defendant, is conclusive, and cannot be re-examined on a writ of error. *Olcott v. Hutchins*, 4 Vt. 17.

### III. CONCLUSIVENESS AND EFFECT.

22. A judgment cannot be impeached collaterally;—as, by proof that the original writ was not served on all the defendants. *Tappan v. Nutting*, Brayt. 137; or by proof of facts which would have been a defense to the original action. *Nason v. Sewall*, Brayt. 119.

23. Judgment of reversal at one term is conclusive upon the court at a subsequent term, when called upon to render such judgment as the county court ought to have rendered. *Slade v. Day*, Brayt. 72.

24. Every regular judgment, while in force, is conclusive as to everything which might have been pleaded or given in evidence in defense, or to lessen the damages, except matters of offset; and this applies as well to judgments rendered on confession, as to those in adversary suits. *Barney v. Goff*, 1 D. Chip. 304. 41 Vt. 117.

25. The judgment of a court having jurisdiction of the subject matter and parties, while it remains in force, is conclusive upon the parties and their privies as to all matters involved in the suit; and cannot be impeached by the parties or their privies collaterally, nor except by some proper proceeding bearing directly upon the judgment itself to vacate and set it aside. *Porter v. Gile*, 47 Vt. 620.

26. A verdict and judgment are conclusive evidence between the same parties in a subsequent suit, of whatever it was necessary for the jury to find in order to warrant the verdict in the former action, but no further. *Town v. Lamphere*, 34 Vt. 365.

27. Parol evidence. Where the record of a former judgment does not show the precise point litigated, parol evidence is admissible to show it; and, when shown, the judgment is as conclusive as if shown by the record. *Atwood v. Robbins*, 35 Vt. 530. *Isaacs v. Clark*, 12 Vt. 692. *Gray v. Pingry*, 17 Vt. 419. *Perkins v. Walker*, 19 Vt. 144.

28. Presumption. Where there is a general verdict upon a declaration containing several counts, the legal presumption, *prima facie*, is that everything which might be presented on such a declaration, was presented and adjudicated. *Hutchinson, J.*, in *Squires v. Whipple*, 2 Vt. 114.

29. Where a case is submitted to a jury involving two or more issues, with evidence to sustain them all, and a general verdict is rendered, such verdict is *prima facie* evidence that all the issues were found for the party for whom the verdict is; and when a judgment thereon is presented as a bar in a subsequent suit, the burden is upon the opposite party to rebut such *prima facie* presumption. *White v. Simonds*, 33 Vt. 178. See *Squires v. Whipple*, 2 Vt. 111. *Dixon v. Sinclear*, 4 Vt. 354.

30. The decision of a question tried by a judicial tribunal, having jurisdiction of the matter, is presumed to have been upon the merits of the controversy, and to be a final settlement of it. The contrary, if claimed, must be proved. *Stearns v. Stearns*, 32 Vt. 678.

31. The defendant had recovered judgment by default against the plaintiffs for the use of his horse while it was being kept by them. The plaintiffs subsequent to this action sought to recover of the defendant for the keeping of the horse. *Held*, that the defendant's just claim in his suit against the plaintiffs was for the use of

the horse, they keeping it; and that, nothing appearing to the contrary, the presumption was that the damages in that suit were assessed upon that basis; consequently, that that adjudication included and merged the plaintiffs' claim for keeping the horse. *Bemis v. Jennings*, 46 Vt. 45.

**32. Previous payments.** The plaintiff sold the defendant a gun to be paid for in sawing at the defendant's mill. The defendant sawed all the logs furnished, and afterwards sued the plaintiff and recovered judgment therefor, the plaintiff not having presented his claim for the gun. *Held*, that this did not entitle the plaintiff to maintain an action for the gun sold, without furnishing other logs to be sawed; that he should have resisted the recovery when sued by the defendant; and that he was concluded thereby. *Downer v. Frizzle*, 10 Vt. 541.

**33.** Where money was paid and received as part payment upon a note, and the note was afterwards sued and judgment rendered upon it for the full amount, although by default;—*Held*, by a majority, that no action lay to recover the money so paid, though evidenced by a receipt to be so applied on the note. *Corey v. Gale*, 18 Vt. 639. 10 Vt. 231. 28 Vt. 657. 31 Vt. 372.

**34.** A party sued upon a note claimed to have made certain payments thereon, but the jury found against the claim, and judgment passed against him for the amount of the note. *Held*, that such judgment was a bar to an action to recover for the items so before claimed as payments;—that the party could not, by shifting his claim, take another chance to substantiate it. *Peach v. Mills*, 14 Vt. 371.

**35.** In an action of book account, the defendant declared upon certain notes in set-off, to which the plaintiff pleaded payment, and an issue was formed. Upon the auditing of the accounts, the plaintiff submitted to the auditor the same matters which he claimed as payments on the notes, and they were adjudicated upon their merits by the auditor. *Held*, that the plaintiff was concluded thereby, upon a trial of the plea in set-off. *Stearns v. Stearns*, 32 Vt. 678.

**36.** Items credited to the defendant on the plaintiff's book were allowed to the defendant in a judgment against him before a justice, although he refused to present any claim in offset, or to submit any question to the determination of the justice except the question of a settlement. No appeal was taken. In a subsequent suit by that defendant against that plaintiff;—*Held*, that he must be regarded as having acquiesced in the adjudication, and that those items were barred by the judgment. *Gilbert v. Earl*, 47 Vt. 9.

**37. Other matters.** In an action against A and B, partners, final judgment was rendered against A, and in favor of B. In a subsequent suit in chancery brought by B against those

other parties;—*Held*, that the judgment was conclusive that the debt sued for was the separate debt of A. *Miner v. Pierce*, 38 Vt. 610.

**38.** A judgment recovered by the vendor for the price of an article manufactured to order under a special contract, is a bar to a suit by the vendee for a breach of the contract. *Gilson v. Bingham*, 43 Vt. 410. But see 46 Vt. 209.

**39.** The defendant contracted to dig a cellar and lay the cellar wall for the plaintiff by a certain time, at a certain price. He completed the job, but not by the time fixed. The defendant brought suit against the plaintiff to recover a balance due upon the job, and recovered judgment by default for the full amount of the contract price, deducting payments, and collected the judgment. Afterwards the plaintiff brought this suit to recover damages for the non-completion of the job by the time fixed in the contract. *Held*, that said judgment and the payment thereof were not a bar to the plaintiff's recovery. *Davenport v. Hubbard*, 46 Vt. 200.

**40.** There cannot be a succession of actions to recover damages resulting from one and the same injury; fresh damage does not give a new cause of action. Thus, where a father brought suit to recover damages to himself occasioned by a personal injury to his minor son, and recovered;—*Held*, that such recovery was a bar to a second action to recover further damages resulting from the same injury, although in the first suit the court restricted his recovery to such damages as he had sustained from loss of his son's services and expenses incurred down to the time of bringing that suit. *Whitney v. Clarendon*, 18 Vt. 252. *Williams, C. J.*, dissenting.

**41.** The judgment of a justice of the peace, not appealed from, in trespass *qua. clau.* where the title of land is involved, is conclusive of the title. *Small v. Haskins*, 26 Vt. 209.

As to the effect of a judgment in ejectment, see EJECTMENT.

**42. When not a bar.** A judgment for the defendant in an action upon a bond given as an arbitration bond, where the transaction was in fact converted into a reference under an order of the probate court, according to the statute, with a report of the referees accepted by the court, was *held* to be no bar to an action on the award of the referees for the plaintiff, as so approved by said court. *Bashelder v. Hanson*, 2 Aik. 319.

**43.** The defendant made a formal attachment of goods of the plaintiff upon a writ against a third person, but without removing them, for which the plaintiff sued him in trespass *de bonis*, and afterwards, but before trial, the defendant removed the goods under the attachment. On trial upon the general issue, judgment was rendered for the defendant.



Afterwards the plaintiff brought a second action of trespass for the same property. *Held*, that the first judgment was not a bar. *Clark v. Harrington*, 4 Vt. 69. *Williams, J.*, dissenting.

44. A recovery (as in trespass) for a wrongful taking of property, where damages are given for the taking only, is not a bar to an action of trover for a subsequent conversion, to recover the value. *Stewart v. Martin*, 16 Vt. 397. *Gates v. Goreham*, 5 Vt. 317.

45. Husband and wife were both injured at the same time by reason of a defect in a highway, which was occasioned by one and the same default of the defendant, a railroad corporation. The husband had sued the town and recovered for his injury, and the town, having paid that judgment, sued the defendant for indemnity, and recovered judgment. The husband and wife also brought suit against the town for her personal injury and recovered judgment, which the town paid. In a second action by the town to recover a further indemnity;—*Held* that the first judgment was not a bar. *Newbury v. Conn. & Pass. R. R. Co.*, 25 Vt. 377.

46. The plaintiff was allowed to recover in assumpsit for an item of account, by casualty and mistake omitted in the adjustment of accounts by the auditor in the defendant's action of book account against the plaintiff, notwithstanding the judgment therein—but without costs. *Post v. Smiley*, 48 Vt. 185.

47. In a penal action, a former judgment in a civil suit between the same parties, although the same point was there litigated, is not conclusive, nor admissible, the measure of proof being different. *Riker v. Hooper*, 35 Vt. 457.

48. **Privies—Strangers.** A judgment, not *in rem*, is never conclusive except upon the very matter in judgment, and between the very same parties, or their privies either in blood or estate. As to all others, the judgment may be impeached and contradicted by collateral evidence. *Nason v. Blaisdell*, 12 Vt. 165.

49. The rule that a judgment of a court of competent jurisdiction is conclusive, and cannot be attacked collaterally by showing that it was irregularly or improperly obtained, applies only to parties and privies to the judgment, and in no sense extends to strangers. *Atkinson v. Allen*, 12 Vt. 619. *Ingals v. Brooks*, 29 Vt. 401.

50. A record of a judgment is conclusive as to all persons to prove the fact that such a judgment was rendered; but when used to prove matters of fact recited in the judgment, it is conclusive only as to parties and privies. *Knapp v. Marlboro*, 31 Vt. 674.

51. The conclusiveness of a judgment extends only to collateral attacks. When process is brought directly upon it, to impeach it or set it aside, the whole subject is necessarily open

to inquiry, as a mere matter *in pais*. *Redfield, J.*, in *Paddleford v. Bancroft*, 22 Vt. 585.

52. The rejection of a claim by commissioners on the estate of a deceased person, is no bar to an action against the survivor. *Parmelee v. Woodbridge*, Brayt. 132.

53. A judgment in trespass or trover, without satisfaction, is no bar to another action against a different person for the same tort. *Sanderson v. Caldwell*, 2 Aik. 195.

54. A judgment against one signer of a joint and several promissory note extinguishes the note as to him, but does not affect the liability of the other signers. *Sauyer v. White*, 19 Vt. 40; and see *Tremont Bank v. Paine*, 28 Vt. 24.

55. The plaintiff brought trespass against several, including one H, for cutting certain pine and other trees. H had cut the pine trees and sold them to the other defendants. On a former trial of the case in the county court, the plaintiff recovered against all the defendants, except H, for the other timber, but failed to recover against either for the pine trees, on the ground of want of title in the plaintiff. This verdict as to H was final, and was affirmed in the supreme court, and thus he became separated from the other defendants. They reviewed, and at the next trial, put in defense, as to the pine trees, the judgment in favor of H. *Held*, that such judgment was conclusive in favor of H, and consequently in favor of the defendants who derived their title under him, and were his privies in estate. *Morgan v. Barker*, 26 Vt. 602.

56. Where a bill was brought by an administrator to set aside a deed executed by his intestate, on the ground that it was made with intent to avoid the payment of a particular debt, or, if not that, that it was a deed of gift supported by no pecuniary consideration, and there was not other estate sufficient to satisfy said debt;—*Held*, that the defendant, claiming under the deed and not through the estate, was in no manner bound by the judgment of the commissioners allowing the debt claimed. *Sprague v. Waldo*, 38 Vt. 139.

57. **Sureties—Bail.** Where sureties, by the express terms of their agreement, or by reasonable implication from the very nature and intent of their obligation, have stipulated to pay the damages and costs which may be recovered against their principal, or otherwise to abide the decree or judgment of a court against the principal, they are bound by the judgment, though they have no notice of the suit,—as, sureties upon a deputy sheriff's bond. *Chamberlain v. Godfrey*, 36 Vt. 380;—bail in pending suits, who are sureties for costs, &c., and special bail. *Parkhurst v. Sumner*, 23 Vt. 538.

58. In an action against the sureties upon the bond of a deputy sheriff given to the sheriff,

conditioned "to save and keep harmless and indemnify the said sheriff from all actions, suits, troubles, costs, charges, damages and expenses whatsoever, on account or by reason of any malfeasance, misfeasance, or non-feasance of said deputy";—*Held*, that the sureties were concluded by a judgment rendered against the sheriff for a default of the deputy, of which suit the deputy had notice and defended, although such sureties had no notice of it. *Chamberlain v. Godfrey*.

59. That a judgment was entered up by collusion between the parties, for the purpose of defrauding the bail, is a matter not concluded by the judgment, but is a good defense to an action on the recognizance. *Parkhurst v. Sumner*, 28 Vt. 588. *Mott v. Hazen*, 27 Vt. 208.

60. Obligation to indemnify, &c. An attaching creditor is not concluded by a judgment against the officer for having attached the property, unless he had notice of the suit and opportunity to defend. *Peaslee v. Staniford*, Brayt. 140. *S. C.*, 1 D. Chip. 170.

61. Where one transfers to another a note and warrants it valid and given upon good consideration, or to be due, and in a suit upon the note in this State, a recovery is had against the title so warranted, such judgment, if obtained without fraud or collusion, will be conclusive evidence against the warrantor as to every fact established by it, if the warrantor, upon reasonable notice and with a fair opportunity to maintain his rights, neglected or refused to do so. *Carpenter v. Pier*, 30 Vt. 81. *Warner v. McGary*, 4 Vt. 507. *Walker v. Ferrin*, 4 Vt. 523.

62. This doctrine is claimed to extend to all cases where a party has, by express agreement or operation of law, a right of recovery over against another, and notifies such other to appear and defend the suit. 30 Vt. 87. *GUARANTY*, 50-52.

63. So *held*, in the case of a justice judgment rendered in the State of New York, where the warrantor of the validity of the note had notice of the suit by his assignee, and actually attended and got the case continued. *Carpenter v. Pier*, 30 Vt. 81.

64. Where a covenantor is vouched in to defend a suit against his covenantee for the recovery of premises to which his covenant is applicable, he becomes a privy to the action, and the judgment is conclusive upon both, of every fact litigated upon the trial which was necessary to the upholding of the judgment. *Knapp v. Marlboro*, 34 Vt. 235. *S. C.*, 31 Vt. 674.

65. In trespass, A v. B, the defendant pleaded in bar a judgment recovered in a former suit of B & C v. D, averred to be the servant and agent of A, as an adjudication of the right now in question. *Held*, that A's connection

with the former suit was not sufficiently shown by an averment that, in the acts of trespass therein complained of, D was the servant and agent of A, and that A and D "appeared in said court and the respective parties in said action were then and there impleaded, &c." It does not show that A defended that suit, or took upon himself that burden. *Goodrich v. Judevine*, 40 Vt. 190.

*Note*. The plea in this case was *held* bad, also, for not showing with sufficient distinctness and certainty, that the identical right in question was adjudicated in the former suit.

66. Judgment on plea of payment. In an action by the indorsee of a promissory note against the makers, they put in the defense of payment, and that issue was found for them in part, and judgment against them for the balance, which judgment they paid. In an action brought by the same plaintiff upon the same note against an accommodation indorser of the note;—*Held*, that the plaintiff was concluded by the former trial and judgment, although the present defendant was not a party to that suit, and that the plaintiff could not recover. *Austin v. Hall*, 43 Vt. 110.

67. A valid award of arbitrators between the payee of a joint and several promissory note and one of the signers (a surety), finding and awarding that such note has been paid, is conclusive upon the payee in favor of the other signer (the principal) that such note has been paid, although the principal was not a party to the arbitration. *Spencer v. Dearth*, 43 Vt. 98. 46 Vt. 149.

#### IV. JUDGMENT OF ANOTHER STATE.

68. Effect. In an action of debt on judgment rendered in Connecticut on default; the defendant was allowed, on plea of *nil debet*, to impeach the judgment, so far as to show that more was recovered than was in fact due. *Stoddard v. Allen*, N. Chip. 44. (Overruled.)

69. In an action of debt on judgment rendered in another State;—*Held* (doubtfully), that a plea in bar, averring facts affecting the validity of the judgment, must aver that the judgment was obtained against the law of the State where rendered. *Waddams v. Burnham*, 1 Tyl. 233.

70. A judgment rendered in any State of the U. S. is treated in this State as a domestic judgment; and it has the same validity and effect, under the constitution and laws of the U. S., in every other State as in the State where rendered. Hence, an action of assumpsit will not lie in this State upon a judgment rendered in another State, it being matter of record. *Boston India Rubber Co. v. Hoit*, 14 Vt. 92.

71. In an action on such judgment, *nil debet*

cannot be pleaded. *Blodgett v. Jordan*, 6 Vt. 580. *Newcomb v. Peck*, 17 Vt. 302. 14 Vt. 97.

72. Such judgment merges the original cause of action, and the record is conclusive as to the matters included therein. *Hoxie v. Wright*, 2 Vt. 263. *Bellows v. Ingham*, 2 Vt. 575. *Lapham v. Briggs*, 27 Vt. 26. *McGillivray v. Avery*, 30 Vt. 588. *White v. Simonds*, 33 Vt. 178. *Low v. Mussey*, 41 Vt. 398. *Dimick v. Brooks*, 21 Vt. 569.

73. To escape the effect of a judgment rendered in another State, on the ground of want of jurisdiction, the defect must appear upon the face of the record, the same as in case of a domestic judgment. *Lapham v. Briggs*, 27 Vt. 26. 30 Vt. 541.

74. Matters *in pais* cannot be pleaded as against the record in such case. *Newcomb v. Peck*. *Dimick v. Brooks*, 27 Vt. 84.

75. The law is the same as to judgments in the circuit court of the U. S. *St. Albans v. Bush*, 4 Vt. 56.

76. The judgment of a justice of the peace of another State, where the law requires him to keep records, and where he acts within his jurisdiction, is conclusive in this State upon the parties thereto and their privies, as to all the facts adjudicated. *Carpenter v. Pier*, 30 Vt. 81. *Starkweather v. Loomis*, 2 Vt. 573 (overruling *King v. Van Gilder*, *contra* 1 D. Chp. 59.) *Blodgett v. Jordan*, 6 Vt. 580.

77. The defendant, a citizen of New Hampshire, was sued by the plaintiffs, simultaneously, in N. H. and Vt., upon the same cause of action. Property was attached in each case, but that in N. H. was subject to prior attachments. Judgment was obtained in N. H., but the judgment was unsatisfied. *Held*, that such judgment merged the cause of action and was a bar to the further prosecution of the suit in this State. *McGillivray v. Avery*, 30 Vt. 588.

78. Jurisdiction. In debt on judgment rendered in another State, on default, the record set up the defendant as then a resident of that State, an attachment of land there, and a copy of the process left at his last and usual place of abode there. *Held*, that this was sufficient *prima facie* evidence of the court's jurisdiction of the cause and of the defendant. *Fullerton v. Horton*, 11 Vt. 425.

79. *Held*, in *Pierson v. Mudgett*, in 1831, that a judgment rendered in another State against a citizen of this State who was not within the jurisdiction of the court rendering the judgment, and had no notice of the suit, and did not appear, could not be enforced in this State by action of debt on the judgment. 17 Vt. 308.

80. It is competent for every country, in pursuance of its own laws, to seize the property, real and personal, of an absent debtor, whether citizen or foreigner, or debts due to such absent

debtor from persons residing within its jurisdiction, and, through the medium of a judgment, to appropriate them to the payment of debts due from such absent debtor to its own citizens, or to others, even without service of process upon the judgment debtor within its territorial limits. The *situs* of the property, in such case, gives jurisdiction to the extent of the property seized, and the judgment has the force of a proceeding *in rem*. But such presence and attachment of the property gives no jurisdiction over the person, nor validity to the judgment when sought to be enforced by action in another State, either upon general principles, or under the constitution and laws of the United States. Nor does the fact that process was served upon, or notice given to the defendant, *out of the State in which the judgment was rendered*, add anything to the force or validity of the judgment—such service and notice being regarded as a nullity. *Price v. Hickok*, 39 Vt. 292. See *Starkweather v. Loomis*, 2 Vt. 573.

81. An action was brought in Massachusetts against a citizen and resident of Vermont, by attachment of real estate in Massachusetts, and judgment was rendered on default. The defendant was never a resident or citizen of Massachusetts, and no process was served upon him nor notice given him in that State, but the court's order of notice of the proceedings was served upon him in Vermont, before judgment. *Held*, that such judgment could not be enforced by action upon it in Vermont. *Price v. Hickok*.

82. A former adjudication in a New Hampshire court, dismissing a petition for divorce for want of sufficient proof of the allegations of the petitioner, viz: "extreme cruelty and drunkenness," was *held* not a bar to granting a divorce, on the petition of the same party in this State, for acts of intolerable severity committed in the State of New York while the parties were domiciled there, where it was not made to appear that the New Hampshire court had jurisdiction to annul a marriage for causes that accrued out of the State, nor that that court took jurisdiction of, or made inquiry into such causes. *Blain v. Blain*, 45 Vt. 588.

83. Collateral remedies. It seems, that the courts of one State cannot give effect to the judgments of the courts of another State, by enforcing any of the collateral remedies provided in the State where the judgment was rendered. *Dimick v. Brooks*, 21 Vt. 569, 579; and see *Pickering v. Fisk*, 6 Vt. 102. *Judge of Probate v. Hibbard*, 44 Vt. 597.

84. In an action brought in New Hampshire on a bond conditioned for the payment of certain notes, judgment was rendered for the penalty and execution issued for the sum then due. The remedy for enforcing such bonds was prescribed by the statute of New Hampshire, and by such statute the judgment stood as security

for any damages resulting from future breaches of the condition, to be liquidated upon a *scire facias*. *Held*, that an action of debt on such judgment could not be sustained in this State, either by declaring upon it directly and simply as a judgment, nor by setting forth all the facts in the case and averring further breaches of the condition. *Dimick v. Brooks*.

85. Such judgment only merges the damages then accrued, and is not a bar in this State to a direct action for further breaches. *Ib.*

86. **Canadian judgment.** Upon a judgment obtained in Canada and execution thereon against A, the property of the plaintiff, a resident citizen of this State, was seized and sold as the property of A, and the proceeds deposited in court according to the law of Canada, and under the same law other creditors of A appeared and made claim to a portion of such proceeds, and by judgment of the court, the same were so divided and wholly appropriated. By the same law, any person having claim to such property might enter an appearance in court, and, on neglect so to do and to make and prosecute his claim, the judgment and the judgment of distribution were declared conclusive as to the title to the property, and a bar to any claim therefor. The plaintiff had no notice of those proceedings. *Held*, that such proceedings and judgment, the plaintiff not being a party thereto, were not a bar to an action of trespass in this State to recover for the property. (Judgments *in rem*, and *in personam*, discussed.) *Woodruff v. Taylor*, 20 Vt. 65.

87. The same is the law although the plaintiff, a resident of this State, did have notice, but did not appear. *Putnam v. McDougall*, 47 Vt. 478.

#### V. DECREES IN CHANCERY.

88. **Effect at law.** The final determination of a question by the decision of the court of chancery, is conclusive of that question in a suit at law between the real parties to the chancery suit, although in the chancery suit another party was joined for conformity. *Pierson v. Catlin*, 18 Vt. 77.

89. Where a bill in chancery is regularly dismissed upon its merits, the decree is conclusive, as to the matters therein litigated, upon the parties thereto; and this whether so dismissed in pursuance of an agreement of the parties, or upon hearing. *Pelton v. Mott*, 11 148.

90. The law is the same, as to a like decree rendered in another State. *Low v. Mussey*, 41 Vt. 398.

91. A bill in chancery charged that certain claims of the defendant were fictitious and without consideration, and this question was put in issue, and the bill upon hearing was dismissed,

in general terms, upon its merits. *Held*, that such decree estopped the plaintiff from afterwards contesting that question at law. *Eaton v. Cooper*, 29 Vt. 444.

92. A decree of foreclosure of a mortgage does not affect the title of a defendant against whom the decree passed, *pro confesso*, who claims by title earlier than that of the mortgagor, and independent of it. *Bowne v. Page*, 2 Tyl. 392.

93. **Conditional decree.** A decree conferring an authority upon the performance of a condition precedent, as, the giving of certain security, is wholly inoperative unless the condition be complied with. *Sparhawk v. Buell*, 9 Vt. 41.

94. **Action at law on decree.** An action of debt will lie upon an absolute decree of the court of chancery for a fixed, liquidated and absolute debt decreed to be paid in money; as, for a balance of account between partners. *Thrall v. Waller*, 18 Vt. 281.

95. But not, where the decree is not *in personam*, but only establishes and fixes the amount as a lien upon lands, and provides, in default of payment, for a foreclosure, or for an application of the lands towards the sum chargeable. *Manly v. Slason*, 28 Vt. 346.

96. An action cannot be sustained upon an order of the supreme court that a bill in chancery be dismissed with costs. In such case, the cause is remanded to the court of chancery, and the costs must be there taxed and the final decree be there rendered. G. S. c. 29, s. 86. *Downer v. Dana*, 22 Vt. 337.

#### VI. ACTION ON JUDGMENT.

97. The mode of enforcing a judgment refers solely to the remedy, and depends upon the *lex fori*. *Adams v. Wait*, 42 Vt. 16.

98. Regularly, debt cannot be sustained upon a judgment upon which execution has issued, without showing a return of the execution unsatisfied, in whole or in part. *Dewey v. Bradbury*, 2 Tyl. 201. 29 Vt. 338.

99. Whenever a party becomes entitled by law to take execution, although it be by special leave of the court granted during a term, the judgment is final for all purposes, and an action on such judgment may be at once brought. *White River Bank v. Downer*, 29 Vt. 332.

100. A declaration in debt on a judgment, which omits to aver that the judgment is unsatisfied, is bad on demurrer. *Dewey v. Bradbury*, 2 Tyl. 201.

101. A declaration in debt upon judgment was held ill on special demurrer, for lack of the *debit* and *detinet*. *Adams v. Campbell*, 4 Vt. 447.

102. It is of the very essence of debt upon judgment, or upon any matter of record, that the obligation should result from the record

itself. The record imports absolute and complete verity. It is neither to be increased, nor diminished, by any averment out of or beyond the record; and must show a still subsisting obligation, perfect in its inception, and still unsatisfied. *Dimick v. Brooks*, 21 Vt. 589.

103. Enough of the previous proceedings should be recited, or stated, to show that the parties were properly in court, and that the general nature of the subject matter came within the cognizance of the court; as, that the defendant being summoned, or attached, *taliter processum est*, &c. *Downer v. Dana*, 22 Vt. 337.

104. In a declaration of debt upon a judgment, the usual *ad damnum* clause is a sufficient allegation of damages to entitle the plaintiff to recover interest. *Allen v. Lyman*, 27 Vt. 20.

105. A less sum than is demanded may be recovered in debt on judgments and specialties, as well as in debt on simple contracts; though a variance between the description of the instrument declared upon, and that offered in evidence, would be fatal. *Keyes v. Throop*, 2 Aik. 276.

106. In an action upon a judgment, with an averment that four executions had issued thereon, issue was joined upon the plea of *nullius record*. *Held*, that the plea only denied and put in issue the judgment, and that the plaintiff was not bound, under this issue, to produce or prove the executions. *Stevens v. Hewitt*, 30 Vt. 262.

107. **Payment—Satisfaction.** To an action on judgment, the defendant pleaded that in consideration that the defendant would make and deliver at his shop, by a time named, certain winnowing mills, the plaintiff promised to receive the same in full payment and discharge of the judgment; and averred that relying on such promise the defendant did make said mills by the time named, and had them ready at his shop for delivery to the plaintiff. *Held* a good plea in bar of the action. *Downer v. Sinclair*, 15 Vt. 495.

108. Where there was a judgment against two, and one was committed on the execution, gave a jail-bond, and escaped, and the creditor received from the sheriff an assignment of the bond;—*Held*, that he could not maintain debt on that judgment against both. *Dewey v. Bradbury*, 2 Tyl. 201. 29 Vt. 342. But see 1 D. Chip. 297. 22 Vt. 628.

109. To an action of debt on judgment, a plea that execution issued and the defendant was committed to jail thereon, was *held* good, without averring that he remained in prison until after the commencement of the suit. *Kinsman v. Page*, 23 Vt. 628. (*Dictum contra* in *Farnsworth v. Tilton*, 1 D. Chip. 297, disapproved); and see *Day v. Abbott*, 15 Vt. 632.

As to judgments and decrees in other tribunals see CHANCERY; PROBATE COURT; MILITIA.

## JURISDICTION.

1. **How acquired.** A party upon whom no service of the writ is made is not bound to appear by having notice, merely, of the suit, nor is he bound by the proceedings had. *Clark v. Freeman*, 5 Vt. 122.

2. If neither the person nor property of a citizen of another State can be found in this State whereon to serve process, the courts of this State can acquire no jurisdiction over him by notice, and any judgment against him, without voluntary appearance, is wholly void. *Skinner v. McDaniel*, 4 Vt. 418. *Id.* 488. 25 Vt. 350; and see *Starkweather v. Loomis*, 2 Vt. 573. *Pierson v. Mudgett*, 17 Vt. 808. *Price v. Hickok*, 39 Vt. 292.

3. Where a writ is served by attaching the property of the defendant within this State, though without notice to him, and judgment is rendered against him by default, such judgment is not void;—the property gives the court jurisdiction. *Buck v. Abbott*, 6 Vt. 586.

4. Courts obtain jurisdiction over the persons of defendants by service of process either on their bodies, or property, within the jurisdiction of the court. If an attachment of property is made, this gives jurisdiction of the party, and the after proceedings and judgment are not void, though the officer, making the attachment, failed to give the proper notice thereof,—for the attachment is one thing; the notice, another. *Gilman v. Thompson*, 11 Vt. 643. 4 Vt. 444.

5. Assumpsit upon a policy of life insurance issued to the plaintiff and her husband jointly, and payable to the survivor upon the death of either.—The defendant was a corporation, established under the laws of New York and there located and doing business. The plaintiff was a resident of Minnesota. The contract was not made in this State, nor was it to be performed here. The plaintiff's husband died in this State, but it did not appear that either he or the plaintiff was a resident or citizen of this State at the time of his death. The writ was not served by attaching the defendant's property, but only by leaving a copy thereof with one F, in this State, described in the writ as "general agent and attorney of the defendant." F did not appear in the suit. On a plea to the jurisdiction;—*Held*, that the court acquired no jurisdiction of the defendant, nor of the cause of action. *Sawyer v. North American Life Ins. Co.*, 46 Vt. 697. JUDGMENT, 78–82.

6. **Retained.** Where a court has once acquired jurisdiction of the subject matter and

the parties, it retains that jurisdiction, although the party may have removed from the State, as to all proceedings which are in continuation of that suit; as, a *scire facias* upon the judgment. *Burns v. Belknap*, 22 Vt. 419; or petition to correct the record, so as to vacate the levy of the execution. *Tudor v. Taylor*, 26 Vt. 444.

**7. How affected by jurisdiction or proceedings of U. S. courts.** The United States can maintain an action upon a contract, in the courts of this State. *United States v. Dwy*, Brayt. 146.

8. The jurisdiction of the U. S. courts under the acts of Congress, and that of the courts of this State under the statutes of the State, over the crime of counterfeiting, are concurrent within the State. *State v. Randall*, 2 Aik. 89.

9. Where property has been seized under authority of the U. S., as forfeited, an action for the seizure or detention, of a character which necessarily goes to divest the possession—as replevin—cannot be sustained in a State court; but if the action is an ordinary one, seeking merely to recover damages, there would seem to be nothing in principle to forbid the pendency of such suit, and a proceeding *in rem* for a forfeiture, at the same time. *Stoughton v. Mott*, 13 Vt. 175.

10. Where an officer of the U. S., under the neutrality act of congress of March 10, 1838, seized a vessel carrying arms, &c., and about to pass the frontier, and neglected to procure, as required by the act, a warrant from the U. S. district court, within ten days, to justify the detention;—*Held*, that the detention thereafter was unlawful, and that the state court had jurisdiction of an action to recover therefor. *Id.*

11. The jurisdiction of a state court is not defeated because the subject matter of the action concerns the use of an exclusive patent right, where the action does not necessarily involve the validity of the patent, and the question as to its validity arises only incidentally and by way of defense. *Sherman v. Champlain Transportation Co.*, 81 Vt. 162.

12. The unexercised jurisdiction of the U. S. district court over a question—as bankruptcy—does not oust the state court of jurisdiction, where the question arises collaterally by way of defense to an action in which the state court has jurisdiction of the parties, and the subject matter. *Wilkinson v. Wait*, 44 Vt. 506.

13. **Concurrent jurisdictions.** In all cases of concurrent jurisdiction, the court that has first assumed jurisdiction and control of the subject matter, should be entitled to retain it for a final hearing, unless there exists some peculiar equitable ground for withdrawing a controversy from a court of law to a court of

chancery. *Bank of B. Falls v. Rut. & Bur. R. Co.*, 28 Vt. 470. See *Glastenbury v. McDonald*, 44 Vt. 450.

**14. Election of party by limitation of his claim.** In actions of tort, the plaintiff may set his own estimate upon his cause of action, whether for general or final jurisdiction, and the defendant cannot complain; and we see no more objection to allowing the plaintiff, in other actions, to reduce his claim within the final jurisdiction of a justice by his writ, declaration, and exhibit or specification, by reducing the price of his charges, or by abandoning some,—the abandonment, in this mode, being conclusive upon all after claims; and thus, in some sense, to make a jurisdiction, or to make one final, at his election. *Warren v. Newfane*, 25 Vt. 250; and see *Stevens v. Pearson*, 5 Vt. 508. *Parkhurst v. Spalding*, 17 Vt. 537. *Herren v. Campbell*, 19 Vt. 28. *Danforth v. Streeter*, 28 Vt. 490. *Carpenter v. Pier*, 30 Vt. 81. 35 Vt. 576.

15. In an action of trespass on the freehold, where the *ad damnum* of the writ exceeds \$20, and the plaintiff is put upon proof of his title, the county court has original jurisdiction; and the action cannot be dismissed because the plaintiff's evidence does not tend to prove damages to that amount. The *ad damnum*, in such case, is conclusive as to the jurisdiction, which does not, in this action, in any way depend upon the belief of the plaintiff as to the amount of damages to which he may be entitled,—differing from the rule applied to actions of trespass *de bonis* in *Kittridge v. Rollins*, 12 Vt. 541; it being against the policy of the law to give to justices of the peace power to settle the title to land. *Doubleday v. Martin*, 27 Vt. 488.

16. In actions of trespass on the freehold, actions of assault and battery, and the like, the *ad damnum* in the writ is the “sum in demand,” determining the jurisdiction. *Montgomery v. Edwards*, 45 Vt. 75.

**17. Irregularity of process—Waiver.** Want of jurisdiction growing out of irregularity of process, is waived by pleading to the merits; while want of jurisdiction of the subject matter cannot be so waived. *Eaton v. Houghton*, 1 Aik. 390 25 Vt. 349.

18. That a suit is brought in the wrong town, or county, does not present the case of a want of jurisdiction, but is only an objection to the particular process—matter of abatement which is waived by not being seasonably pleaded. *University v. Joslyn*, 21 Vt. 52. *Colomer v. Page*, 35 Vt. 887.

**19. Effect of want of jurisdiction of subject matter.** The court will dismiss an action at any stage of it, whether moved by a party or not, when it is discovered that they have no jurisdiction, and an objection to the

jurisdiction over the subject matter is never out of time. *Chittenden v. Hurlbut*, 1 D. Chip. 384. *Glidden v. Elkins*, 2 Tyl. 218. *Southwick v. Merrill*, 8 Vt. 320. *Stoughton v. Mott*, 13 Vt. 175. *Shepherd v. Beede*, 24 Vt. 40. *Thayer v. Montgomery*, 26 Vt. 491.

20. Consent cannot confer a jurisdiction where it is not given by law; and where the want of jurisdiction appears upon the face of the proceedings, the judgment is void. *Glidden v. Elkins*. *Thayer v. Montgomery*.

21. Where a court has no jurisdiction over the subject matter, the process gives no protection to the officer executing it. *Driscoll v. Place*, 44 Vt. 252.

22. **Special tribunals.** According to the general principle which governs the exercise of special and extraordinary powers under a statute, the proceeding is deemed to be authorized in the particular case contemplated and described by the statute, but unauthorized, and therefore void, in all other cases. *Emerson v. Reading*, 14 Vt. 279.

23. Where an inferior court of limited jurisdiction exceeds its powers, having no jurisdiction of the subject matter, or of the person of the defendant, the whole proceedings are *coram non iudice* and void, and can furnish no justification to the court, or to the party who procured them to be had, or to the officer who attempts to execute its process. *Barrett v. Crane*, 16 Vt. 246. *Walbridge v. Hall*, 8 Vt. 114. *Darling v. Bowen*, 10 Vt. 148.

24. The plaintiff, an alien, and so not subject to military duty, was amerced by court martial for non-performance of militia duty. Held, that the defendant, an officer, was liable in trespass, for serving an execution for such amercement, though regular upon its face. *Barrett v. Crane*.

25. He who justifies under a court or tribunal of limited jurisdiction, must show every fact necessary to give such court jurisdiction. Nothing is to be presumed in favor of the jurisdiction of courts of limited and special powers, but whoever seeks to derive advantage from their proceedings must show affirmatively their jurisdiction. *Barrett v. Crane*. *Bates v. Haseltine*, 1 Vt. 81.

26. In sessions matters, the facts which are indispensable to the jurisdiction of the court must appear upon the face of the proceedings; as, in a petition for laying a highway, that the petitioners are freeholders, &c. *Hewes v. Andover*, 16 Vt. 510.

As to the *jurisdiction* of particular Courts see CHANCERY; COUNTY COURT; JUSTICE OF THE PEACE; JAIL COMMISSIONERS, &c.

## JURY.

- I. GRAND JURY.
- II. TOWN GRAND JUROR.
- III. PETIT JURY.

### I. GRAND JURY.

1. It was held no cause for arrest of judgment, that the grand jury were impeached and charged by one judge in the absence of the others, though those absent were not disqualified. *State v. Jenkins*, 2 Tyl. 384.

2. The court has no power to order a grand juror to withdraw himself from the panel in any particular case, even though the complaint be against himself. *Baldwin's case*, 2 Tyl. 478.

3. An indictment against a town for not building a road will not be quashed because one of the grand jurors presenting the bill was, at the time, a ratable inhabitant of the town. *State v. Newfane*, 12 Vt. 422.

4. It is the duty of the jurors, the attorney for the State, and witnesses, not to divulge what passes in the grand jury room, unless required so to do in a court of justice. They cannot then be excused. By *Redfield, J.*: I apprehend that the true doctrine in regard to requiring a witness to disclose state secrets is, that the court will exercise its discretion in each particular case. *Clark v. Field*, 12 Vt. 485.

### II. TOWN GRAND JUROR.

5. Before the act of Oct. 27, 1801 (Slade's Stat. 421), town grand jurors were not general informing officers. Before that, they had no authority, as such, to prefer a complaint to a justice for theft. *Brackett v. State*, 2 Tyl. 152. 11 Vt. 844.

6. A town grand juror has authority to employ counsel, at the charge of the town, to aid in criminal prosecutions where the fines and costs go to the town, and where the prosecution is conducted at the expense of the town. *Barrett, J.*, dissenting. *Burton v. Norwich*, 84 Vt. 845.

### III. PETIT JURY.

7. **Qualifications—Freeholder.** See *Orcutt v. Carpenter*, 1 Tyl. 250. *Briggs v. Georgia*, 15 Vt. 61. G. S. c. 15, s. 18.

8. **Interest.** It is good cause of challenge to a petit juror, that he has been recognized for costs in the suit, though he has been discharged from his recognizance. *Phelps v. Hall*, 2 Tyl. 401.

9. A juror, like a justice, is not disqualified to try a criminal case because the fine on conviction is payable to the treasurer of the town

of which he is a rated inhabitant. *Middletown v. Ames*, 7 Vt. 166.

**10. Relationship.** The relationship to one of the parties which by the statute disqualifies a judge or justice, viz: the fourth degree reckoned by the civil law, disqualifies a juror,—as, also, an auditor. *Churchill v. Churchill*, 12 Vt. 661. 34 Vt. 583.

**11. Opinion.** A juror who has expressed an opinion is disqualified. *State v. Godfrey*, Brayt. 170. *State v. Clark*, 42 Vt. 629.

**12.** But that he has formed an opinion merely, does not disqualify him. *Boardman v. Wood*, 3 Vt. 570;—although he sat in the case on a former trial, when the court ordered a verdict, without consultation of the jurors. *Atkinson v. Allen*, 12 Vt. 619. *State v. Phair*, 48 Vt. 366.

**13.** Where peremptory challenges are allowed, it is proper to ask a juror if he has formed an opinion, in order to enable a party to decide upon his peremptory challenges. *State v. Godfrey*, Brayt. 170.

**14.** A juror, being called, stated, in answer to questions put by the respondent's counsel, that he had expressed an opinion as to the guilt of the respondent on reading a newspaper account of the examination before the magistrate, published a month or six weeks before; but that he had no opinion and had formed none, and could try the case impartially upon the evidence. *Held*, that the juror was disqualified, and his admission, against the objection of the respondent, was error;—the court holding this statement to amount to an admission that the juror had both formed and expressed an opinion—the expression necessarily involving the formation of an opinion. *State v. Clark*, 42 Vt. 629.

**15.** One called as a juror in a trial for murder, stated that he had read an account of the matter in the newspapers; had heard the matter talked of considerably, and formed an opinion in regard to the guilt or innocence of the respondent, but had no bias or prejudice in the matter, and did not know that he had ever expressed an opinion, but might have done so. *Held*, that he was "impartial" within the meaning of Art 10 of the Constitution, and was a competent juror. *State v. Phair*, 48 Vt. 366.

**16. Scruples.** In a capital case, the declaration, sincerely made, of one called as a juror, that he had conscientious scruples against rendering a verdict of guilty in a case where the punishment is death, is good cause for excluding him as juror. The "impartial jury," provided for in Art 10 of the State Constitution, implies that the juror be impartial in respect to the State as well as to the accused. *State v. Ward*, 39 Vt. 225.

**17. Question of discretion.** Where, as to the fitness of a juror called, the question was

resolved into one of fact upon the statements of the juror and the evidence, and required the exercise of judgment and discretion in the decision;—*Held*, that the decision excluding the juror presented no question of law, and was not revisable on exceptions. *Id.*

**18.** A juror called in a criminal cause, claimed to be excused on the ground that he was a member of an organized fire company in the city of Burlington, where the trial was held. The court below, in view of the facts, but against the objection of the respondent, excused the juror. *Held*, that this involved no question of law, and was not matter of exception. *Id.*

**19. Challenges—Objections.** A respondent is not obliged to exhaust his peremptory challenges before challenging for cause. G. S. c. 120, s. 4, has not changed the law and practice in this respect. *State v. Fuller*, 39 Vt. 74.

**20.** The fact that the court suffered a juror to sit in the trial who was legally incompetent, is no reason for arresting the judgment. That is not the remedy. *Atkinson v. Allen*, 12 Vt. 619.

**21.** A verdict will not be set aside, because one of the jurors had a cause pending to be tried by jury at the same term, no motion having been made to discharge him. (Acts 1864, No. 36.) *Bellows v. Weeks*, 41 Vt. 590.

**22. Juror as witness.** A petit juror may properly be sworn and may testify as a witness in the cause in which he is a juror; but no question should be allowed to be put, the answer to which would indicate his opinion of the merits of the cause. *Dunbar v. Parks*, 2 Tyl. 217.

**23. Privilege.** A petit juror is not liable in an action of slander for what he says in the jury room concerning the cause. His privilege is absolute, like that of judges, magistrates, grand jurors, and members of legislative bodies. *Dunham v. Powers*, 42 Vt. 1.

**24. Right to jury trial.** The *immemorial practice* of proceeding to trial without a jury, in a certain class of cases, in the common law courts of England and of this country, has been held conclusive to show that they are not "proper for the cognizance of a jury, within the terms of the constitution," and were not intended to be therein included. *Plimpton v. Somerset*, 33 Vt. 283, 291. 44 Vt. 654.

**25.** The county court may lawfully make and enforce a rule of court, requiring the defendant in an action apparently for the recovery of a mere debt, to furnish his affidavit, at least of his own belief, that the claim is disputable; and that, otherwise, he shall not be entitled to a jury trial. *Jones v. Spear*, 31 Vt. 426; and see *Bradley v. Chamberlain*, 31 Vt. 468. *Briggs v. Gleason*, 32 Vt. 472. *Chamberlain v. Murphy*, 41 Vt. 110.

CONSTITUTIONAL LAW, II.



26. **Judges of the law in criminal cases.** *Held*, that in all criminal trials the jury, at common law and in Vermont, are rightful judges of the law as well as of the facts; that the power which a jury may in such cases exercise, by rendering a general verdict, is a legitimate and legal power, which, they, acting under their oath and governed by a sense of duty, may rightfully and properly exercise, although it may be in contradiction to the law stated to them by the court. (Question largely discussed. *Bennett, J.*, dissenting.) *State v. Croteau*, 23 Vt. 14. See *State v. Wilkinson*, 2 Vt. 488. *State v. McDonnell*, 32 Vt. 491. *State v. Woodward*, 28 Vt. 92.

27. In a criminal case, the exceptions stated that the court "directed the jury to return a verdict of guilty for each act of selling" proved. In the absence of any request for an instruction that the jury were judges of the law, or any question made on that point, this was *held* to be but an expression of opinion, and not as controverting the ultimate right of the jury to determine the law against the opinion of the court, and so was not positive error. *State v. Paddock*, 24 Vt. 312.

28. In a criminal trial, where the respondent claims the benefit of the rule that the jury are judges of the law, it is not error for the judge to state to the jury, in his own way, that this rule is not intended for ordinary criminal cases; that it is matter of favor to the defendant, and should not be acted upon by the jury except after the most thorough conviction of its necessity and propriety; that any departure by the jury from the law laid down by the court must be taken solely upon their own responsibility; and that the safer, and better, and fairer way, in ordinary criminal cases, is to take the law from the court, and that they are always justified in so doing. *State v. McDonnell*, 32 Vt. 491.

29. **Not witnesses as to their own misconduct.** A juror cannot testify to his own misconduct, nor to that of his fellows, to impeach the verdict. *Cheney v. Holgate*, Brayt. 171.

30. The affidavit of a juror cannot be admitted to show what passed in the jury-room, during the investigation of the cause. *Robbins v. Windover*, 2 Tyl. 11. *Harris v. Huntington*, *Id.*, 129. *Newton v. Booth*, 13 Vt. 320.

31. It has long been settled in this State, that affidavits of jurors will not be received to show any impropriety in the conduct of the jury, or improper mode of arriving at the verdict, in order to set it aside. *Poland, C. J.*, in *Sheldon v. Perkins*, 37 Vt. 557. See *Newton v. Booth*. *Cutler v. Cutler*, 48 Vt. 660.

32. It would be productive of great mischief to receive *ex parte* affidavits of jurors, after they have separated, to show upon what

ground the verdict was rendered. *Held*, that such affidavits were properly excluded. *Sheldon v. Perkins*.

33. Affidavits of jurors may be read to exculpate themselves, and sustain their verdict, but not to impeach it. *Downer v. Baxter*, 30 Vt. 467.

## JUSTICE OF THE PEACE.

- I. APPOINTMENT AND QUALIFICATIONS.
- II. HIS JURISDICTION AS A COURT.
- III. PROCEDURE.
- IV. RECORDS.
- V. ACTION AGAINST JUSTICE.

### I. APPOINTMENT AND QUALIFICATIONS.

1. **Appointment.** An objection was taken, in a collateral proceeding, that the person acting and signing as justice of the peace was not a justice. *Held*, that his commission as justice from the Governor, under the seal of the State, was conclusive, and cut off further inquiry whether he had been duly elected by the General Assembly. *Norwich v. Yarrington*, 20 Vt. 473.

2. **Oath of office.** In an action against a justice of the peace for an arrest under a warrant issued by him, he cannot justify if he had not, before the arrest and during that particular term for which he had been elected, taken the oath of office as prescribed by the Constitution, Part 2, s. 29. *Courser v. Powers*, 34 Vt. 517. *Dictum contra* in *Taylor v. Nichols*, 29 Vt. 110, denied. *Id.*

3. **Qualification as affected by interest.** A justice of the peace has no jurisdiction to render judgment, though on confession, in a case where he is interested in the demand; and such proceeding is void. *Bates v. Thompson*, 2 D. Chip. 96. 5 Vt. 127.

4. In criminal causes, a justice has jurisdiction, though the penalty or fine may go into the treasury of the town of which he is a rated inhabitant; but in civil causes, if any part of the debt or penalty is for such town, he is "interested in such cause or matter," and is disqualified. (G. S. c. 31, s. 22.) *State v. Batchelder*, 6 Vt. 479. *Waters v. Day*, 10 Vt. 487.

5. A plea in abatement, in a suit in which a town was interested, averred that the justice before whom the proceedings were instituted was "a lawful inhabitant and citizen of said town." *Held*, that the plea did not disclose any interest in the justice, it not averring that he was liable to pay taxes in the town. *Pierce v. Butler*, 16 Vt. 101.

6. — **by relationship.** A justice of the peace cannot take a confession of judgment

where he is related to either of the parties within the fourth degree. Such judgment is void. *Hill v. Wait*, 5 Vt. 124.

7. In a suit by a corporation, the jurisdiction of the justice is not affected by the fact of his relationship to a corporator and stockholder. *Searsburgh T. Co. v. Cutler*, 6 Vt. 315.

8. — **by being counsel, &c.** Under the statute prohibiting a justice from acting as counsel in a cause in which he had acted as justice;—*Held*, by construing it with other statutes *in pari materia*, that he could not act as justice in a civil cause growing out of a criminal transaction, where he had acted as grand juror in the prosecution of the defendant. *Free-love v. Smith*, 9 Vt. 180.

9. The appointment by a justice to serve a process is a "judicial act." *Kellogg, ex parte*, 6 Vt. 509. *Kelley v. Paris*, 10 Vt. 261. *Ingraham v. Leland*, 19 Vt. 304. *Ib.*, 388. So is the taking of a recognizance for costs. *Ingraham v. Leland*; and neither of these can be done by a justice who is attorney, or of counsel for the plaintiff. *Ib.*

10. In a bastardy prosecution instituted by the overseers of the poor of the town, a plea to the jurisdiction averred, that the justice before whom the primary proceedings were had, was the agent of the town to prosecute and defend suits in which the town was interested. *Held*, on demurrer, that this averment fell short of an averment that the justice acted therein in his capacity as agent, or that he was or had been "of counsel in the case," and that the plea was insufficient. *Pierce v. Butler*, 16 Vt. 101.

11. — **by having expressed an opinion.** A justice of the peace is not legally disqualified from trying a case, as justice, by the fact that he had heard the same claim as an arbitrator, and had formed and expressed an opinion to his associate arbitrator, favorable to the plaintiff—the statute which specifies his disqualifications not naming such cause as one. *Batchelder v. Nourse*, 35 Vt. 642.

## II. HIS JURISDICTION AS A COURT.

12. **In account.** A justice of the peace has jurisdiction of the action of account. *Chadwick v. Dool*, 12 Vt. 499.

13. **As controlled by the amount of the debt, &c.** *Note.*—By Stat. 1797, the jurisdiction of justices in pleas and actions of a civil nature, with certain exceptions, extended to where the debt or other matter in demand did not exceed the sum of \$33. By Stat. 1811, this was extended to the sum of \$53; by Stat. 1821, to \$100; and by G. S. (Dec. 2, 1862), to \$200.

14. In an action before a justice upon a recognizance, where the damages were uncer-

tain, his jurisdiction was *held* determinable by the amount of the recognizance. *Clark v. Campbell*, N. Chip. 57.

15. In an action of debt upon a recognizance taken to the defendant in a writ, to recover his costs taxed in the original suit, the matter in demand, as respects the jurisdiction of the court, is the amount of such costs, and not the amount of the recognizance. *Edgerton v. Smith*, 35 Vt. 578.

16. In a general action for money had and received, the plaintiff may limit the jurisdiction by the *ad damnum* of his writ. *Stevens v. Pearson*, 5 Vt. 508. 17 Vt. 529.

17. A justice of the peace has jurisdiction in an action of assumpsit where neither the *ad damnum* in the writ, nor the amount claimed, exceeds \$100, although this is the balance of an account, the debtor side of which exceeds \$100. *Bank of Rutland v. Crampton*, 28 Vt. 380. *Stevens v. Howe*, 6 Vt. 572.

18. The plaintiff sued before a justice on a contract of service for the defendant for one year at \$180, averring that he had performed part of the service when the defendant refused further to employ him, and concluding, to his damage \$100. *Held*, that the justice had jurisdiction. *Hair v. Bell*, 6 Vt. 35. 35 Vt. 576.

19. Where the declaration in a justice suit contains several counts which may be for the same subject matter, they will be so intended, where, to suppose the contrary, they would exceed the justice's jurisdiction as limited by the *ad damnum*. The *ad damnum* usually determines the jurisdiction, unless from the declaration it certainly appears that the matter in demand exceeds the jurisdiction. *Richardson v. Denison*, 1 Aik. 210. 6 Vt. 93. *Bell v. Mason*, 10 Vt. 509. *Wightman v. Carlisle*, 14 Vt. 296. 20 Vt. 172.

20. Where the plaintiff upon his whole declaration demands but \$100, a justice court has jurisdiction, though the declaration is in several counts, upon either of which, if duly sustained by proof, he might legally have claimed to recover even more than \$100. It is not the amount of injury sustained, but the amount *in demand* and actually sought to be recovered, which forms the test of apparent jurisdiction, except in certain specified cases,—as promissory notes, &c. The plaintiff may demand less than in justice he is entitled to recover, and thus, by his *ad damnum*, confer a jurisdiction upon a justice court. *Wightman v. Carlisle*.

21. The *ad damnum* will not give jurisdiction where the declaration shows the case without the jurisdiction. *Thompson v. Colony*, 6 Vt. 91.

22. In an action upon judgment before a justice, his jurisdiction must be determined by the amount appearing by the record and proceedings under the judgment to be due; and,

for this purpose, no payment, the evidence of which is extrinsic, can be considered. *Brush v. Torry*, Brayt. 141.

23. It is only in cases where the declaration does not otherwise limit the extent of the plaintiff's claim, that the *ad damnum* is taken as the proper evidence of it, or as a test of apparent jurisdiction. In an action of debt on judgment before a justice:—*Held*, that the demand being defined with certainty in the declaration, was by law limited by the amount of the judgment there described, and interest upon it, and that, although the *ad damnum* exceeded the jurisdiction, the excess should be treated as unmeaning for any purpose affecting jurisdiction. *Bishop v. Warner*, 23 Vt. 591. 35 Vt. 576.

24. In a justice suit declaring upon a judgment rendered for a sum less than \$100, but which, by adding interest upon it, exceeded \$100, the writ concluded with the *ad damnum* of \$100. *Held*, that the plaintiff might waive the interest, and that the justice had jurisdiction. *Parkhurst v. Spalding*, 17 Vt. 527. 85 Vt. 576.

25. In an action before a justice upon a promissory note, where his jurisdiction depends upon the amount of the note "deducting indorsements," a motion to dismiss, founded upon the declaration alone, is premature. The defendant must wait until the note is presented in the course of the trial. *Perkins v. Rich*, 12 Vt. 595. See INSURANCE, 16.

26. An indorsement of part payment upon a note, if made in good faith, though erroneous, may be allowed to bring the case within a justice's jurisdiction. *Boutwell v. Mason*, 12 Vt. 608.

27. A party having a claim in assumpsit, exceeding in amount the jurisdiction of a justice to try, may bring it within such jurisdiction by abandoning a part of it, and so reducing the claim to a sum within the jurisdiction; as, by an indorsement upon a promissory note, though without payment. *Herren v. Campbell*, 19 Vt. 28. *Danforth v. Streeter*, 28 Vt. 490. *Carpenter v. Pier*, 30 Vt. 81.

28. A suit which, when commenced by the issuing of the writ, is within the jurisdiction of a justice, does not pass out of his jurisdiction by the accumulation of interest before the trial so as to make a sum larger than the jurisdictional limit,—the *ad damnum* being within that limit. *McDaniels v. Johnson*, 36 Vt. 687. *Phelps v. Wood*, 9 Vt. 399.

29. *Set-off*. The amount of the plaintiff's set-off, pleaded to the defendant's set-off, is not to be reckoned as part of the plaintiff's "matter in demand," so as to exceed the jurisdiction of the justice, unless it appears to be connected with the matter originally sued for, and a portion of that account. *Talbot v. Robinson*, 42 Vt. 698.

30. *Amount of judgment*. *Dictum*. In case of mutual off-sets, a justice may render judgment for the balance, though exceeding \$100. *Hatch, ex parte*, 2 Aik. 28.

31. The judgment of a justice against the principal debtor was for \$100 damages and \$35 costs, and against the trustee for \$185. *Held* correct, and within the justice's jurisdiction. *Harmon v. Harwood*, 35 Vt. 211.

32. *Trespass to the freehold*. A justice has no jurisdiction of an action for breaking and entering the plaintiff's "close and barn," and taking and carrying away his horse, "to his damage \$100." *Prindle v. Cogswell*, 9 Vt. 183.

33. Nor, where the declaration is in two counts,—one for trespass *qua. clau.*, and the other *de bonis*,—where the *ad damnum* exceeds \$20. The court must have jurisdiction of the whole case as it stands on the face of the declaration, to render judgment on the whole, or any part of it, to the full amount of the plaintiff's demand. *Chadwick v. Batchelder*, 46 Vt. 724.

34. *Title to land concerned*. Under the statute excepting from a justice's jurisdiction actions "where the title to land is concerned," if from the nature of the suit, as shown by the declaration, the title of land must directly and necessarily be concerned, the justice has no jurisdiction. *Hall, J., in Haven v. Needham*, 20 Vt. 184.

35. The jurisdiction depends upon the nature of the action; and wherever the declaration is of such a character that, under the general issue or any other plea which merely puts the plaintiff to the necessity of proving his declaration, he is bound either to prove or to disprove a title to land, the justice has no jurisdiction. *Poland, C. J., in Jakeway v. Barrett*, 38 Vt. 326.

36. As, in an action on the covenants of seisin, &c., in a deed,—the declaration averring that the defendant was not seized, &c. *Hastings v. Webber*, 2 Vt. 407.

37. So, in an action on the case for a nuisance by erecting a fence so near the plaintiff's dwelling house, as to obstruct his lights. *Whitney v. Bowen*, 11 Vt. 250.

38. So, in an action for the obstruction of a water course, occasioning injury to the plaintiff's land. *Haven v. Needham*, 20 Vt. 183.

39. So, in an action of account between tenants in common of lands. *Thayer v. Montgomery*, 26 Vt. 491.

40. So, in an action to recover under R. S. c. 89, s. 13 (G. S. c. 102, ss. 11, 12), the expense of building a division fence between the lands of the plaintiff and defendant. *Shaw v. Gilfillan*, 22 Vt. 565. *Foster v. Bennett*, 33 Vt. 66.

41. But where the declaration is such as not to require proof of title to land to sustain

it, and such question only comes into the case by reason of some special line of defense, or incidentally, the justice is not ousted of his jurisdiction. *Poland, C. J.*, in *Jakeway v. Barrett*, 38 Vt. 326. *Held*, contrary to the dictum of *Davis, J.*, in *Whitman v. Pownal*, 19 Vt. 229, that it is not left to be determined by the pleadings subsequent to the declaration, whether the justice has jurisdiction. *Ib.*, 325.

42. In assumpsit before a justice, declaring in common form for use and occupation, a plea of title in the defendant does not oust the jurisdiction. This is not a case where "the title of land is concerned." *Clough v. Horton*, 42 Vt. 10.

43. The title of land may incidentally come in question in various forms of action; as, for instance, in assault and battery, where the defendant justifies the assault in defence of his freehold. In such case, the justice should proceed to hear and determine the title, so far as it affects the rights of the parties in the suit, in the same manner that the matter would be heard and determined in the superior court. *Hall, J.*, in *Haven v. Needham*, 20 Vt. 184.

44. A justice has jurisdiction of an action against a town, to recover for injuries caused by an insufficiency of a highway. *Whitman v. Pownal*, 19 Vt. 223. *Yuran v. Randolph*, 6 Vt. 369.

45. So, against an individual for obstructing a pent road, though described in the declaration as running through the defendant's land. *Bell v. Prouty*, 43 Vt. 279.

46. In an action of trover for a quantity of manure, claimed to have passed under a deed of the farm from which it was removed;—*Held*, that the title of land was not in question so as to oust a justice of jurisdiction. *French v. Freeman*, 43 Vt. 93.

47. In an action on the covenants of a deed of lands, the justice is not ousted of jurisdiction unless, upon a traverse of all the material facts alleged in the declaration, the title of land is involved in the issue and the proof of the breach. (This applied, and the jurisdiction sustained, in an action on the covenant of warranty against all lawful claims and demands, where the only breach assigned was the non-payment of certain taxes chargeable on the land, which the plaintiff was forced to pay in order to save the land from sale.) *Flannery v. Hinkson*, 40 Vt. 485.

48. In an action of covenant, before a justice, upon a covenant to pay taxes upon lands conveyed by the plaintiff to the defendant by quit-claim deed, the consideration for which covenant was such conveyance;—*Held*, that the title to land was not so concerned as to oust the justice of jurisdiction; and, by *Barrett, J.*, the giving of a quit-claim deed does not import title to land in either party to it. *Judevine v. Holton*, 41 Vt. 351.

49. **Division fence.** Stat. 1867, No. 9, gives a justice jurisdiction of an action to recover the expenses of building a division fence under G. S. c. 102, s. 6, whether or not the title to land may be involved in it. *Hall v. Niles*, 44 Vt. 489.

50. **Confession of judgment.** Under G. S. c. 31, s. 21, providing that "a justice may accept and record a confession of any debt to a creditor, made personally," &c., it seems, that he has no jurisdiction to take a judgment by confession unless the party appears in person to make such confession. *Farr v. Ladd*, 37 Vt. 159. *Shedd v. Bank of Brattleboro*, 32 Vt. 716.

51. **Final jurisdiction.** To give a justice final jurisdiction of a cause, the *ad damnum* in the writ must not be laid above \$10, nor must the sum in demand appear from the declaration, the plaintiff's specification, or exhibits, to be more than \$10. *Hill v. Wait*, 5 Vt. 124. (Limited to \$20 by Stat. 1876, No. 64.)

52. **Criminal jurisdiction.** A town grand juror preferred his complaint to a justice in two counts, the one charging an assault with intent to ravish, and the other a common assault. The justice, after examining the testimony in the case, held that the same was in his jurisdiction to try, and tried and convicted the respondent upon the second count. *Held*, that it was to be presumed that the justice, after making a preliminary inquiry, determined that there was not sufficient evidence to justify him in requiring the respondent to recognize for a trial upon the first count, and that he tried the case only on the second count; and that being so, his jurisdiction was fully made out. *State v. Hall*, 25 Vt. 247.

### III. PROCEDURE.

53. **Entry of suit.** A justice suit is duly entered, if the justice is present at the place appointed for trial within two hours after the hour set, for the purpose of discharging his duty as a magistrate in regard to the suit, either presently or in a convenient time, and has knowledge of the writ, then at the place and within his power, although he does not take the writ in his hands, nor call the parties; and he may hold the case open for a reasonable time without any special order, and need not, for this purpose, remain at the place of trial until the defendant appears, or until the expiration of the two hours. *Peach v. Mills*, 13 Vt. 501. *Hall v. Safford*, 25 Vt. 87. *Underwood v. Hart*, 23 Vt. 120.

54. **Default.** The entry of a default upon a justice writ has no legal effect until after the expiration of the two hours given for appearance of the defendant. *Hall v. Safford*.

55. Sec. 5 of the act of 1803, requiring justices not to default a party until two hours

after the time set for trial, applies exclusively to the return day of the writ, and not to a case continued. *Steel v. Bates*, 2 Vt. 320. 9 Vt. 406. 13 Vt. 241. 20 Vt. 52. (Changed by G. S. c. 31, s. 38.)

56. It is the duty of a justice, to see that the defendant in a suit before him has his day in court and an opportunity to make his defense. A justice writ was made returnable at one o'clock P. M. and the justice was present, and within the two hours entered a default upon the writ and left the place for a time, with the understanding that the case should stand open for trial, and if the defendant should appear before three o'clock, or within a reasonable time thereafter, and want a trial, he should have one. The defendant afterwards, within the two hours, appeared and was told by the plaintiff's attorney what had been done, and that the case was still open for trial. At four o'clock, the justice returned and informed the defendant that the suit was then open for trial, but he refused to appear, when the justice made up his judgment as by default. *Held*, that the judgment was regular, and that the justice had fully complied with his duty. *Hall v. Safford*, 25 Vt. 87.

57. **Discontinuance.** A judgment rendered by a justice after the suit has in any manner been discontinued, will be set aside on *audita querela*. The non-attendance of the justice at the place set for trial, and within the two hours given by statute for appearance after the hour set, operates as such discontinuance. *Brown v. Stacy*, 9 Vt. 118. *Phelps v. Birge*, 11 Vt. 161. *Crawford v. Cheney*, 12 Vt. 567. So, the absence of the parties. *Pike v. Hill*, 15 Vt. 183. *Paddleford v. Bancroft*, 22 Vt. 529;—and all subsequent proceedings, as an entry of a continuance, or entry of judgment, without consent of parties, are void. *Ib.*

58. By *Bennett, J.* To constitute an entry of an action in a justice's court, within the purview of the statute, it is at least necessary for the magistrate to be at the place of holding the court within the two hours after the time set for trial, having in his possession the writ, and being ready on his part to proceed with the cause. If the action is not entered within the two hours, it operates as a discontinuance, and the jurisdiction of the magistrate is lapsed, and cannot be restored but by consent of the defendant entered on the records of the justice. So *held* in this case, although the justice was purposely detained by the defendant from appearing within the two hours, and though, after the two hours, the defendant appeared and was offered a hearing by the justice. *Phelps v. Birge*.

59. By *Redfield, J.* A case formally continued, without the appearance of the defendant, and without his consent, and with no stat-

utory or other legal ground for such continuance, is, in strictness, discontinued, and no legal judgment can thereafter be taken in the case, without the consent of the defendant. *Paddleford v. Bancroft*, 22 Vt. 536.

60. A justice suit was made returnable at the plaintiff's inn. After service of the writ and before the trial day, the defendant made a tender which the plaintiff took. Next day, the defendant went on summoning his witnesses, hearing of which the plaintiff gave the defendant notice that the suit was discontinued. On receiving the notice, the defendant claimed his costs made since the tender. The plaintiff refused to pay, insisting that the suit was settled by his acceptance of the tender, and notified the justice not to appear. The defendant notified him to be present. The justice did appear with the defendant at the time and place appointed, having the writ, and called the case, and told the plaintiff that the defendant claimed costs. The plaintiff told the justice the case was settled, and he would have no court in his bar-room that day. The justice then publicly adjourned the court to another place, and there, in the absence of the plaintiff, rendered judgment for the defendant for his costs. On an *audita querela* brought to set aside that judgment;—*Held*, that the plaintiff could not in this way effectuate a discontinuance that would oust the justice of his authority to pass upon the question of the defendant's right to costs; and that the justice had proceeded properly, and that the judgment was valid. *Remick v. Sanborn*, 42 Vt. 477.

61. **Adjournment.** A justice has power, at any stage of a cause, to adjourn the court to any place in the town where the writ was made returnable. *Griffin v. Spaulding*, 6 Vt. 60.

62. A justice has a discretionary power to continue a case for a week or more, and to require the jury already summoned to appear again; although the better course might be to summon a new jury. *Tracy, ex parte*, 25 Vt. 93.

63. Where the parties to a justice suit agreed to a continuance out of court, and the continuance was entered on the files without either party or the justice being present at the time set for trial, an *audita querela* to set aside the judgment, afterwards rendered, was denied. *Scott v. Larkin*, 13 Vt. 112.

64. A justice decided, on the defendant's motion, to continue a cause pending before him, and then, at the same sitting, allowed the plaintiff to discontinue the suit. *Held* correct. *Flint v. Whitton*, 28 Vt. 557.

65. The limitation of three months to the adjournment of a justice court (G. S. c. 31, s. 41) applies to a single adjournment, and is not a limitation of the aggregate time of all of several adjournments. *Bryant v. Pember*, 48 Vt. 599.

66. An adjournment of a justice court beyond the time allowed by the statute, is a continuance *out of court*, and the defendant is not obliged further to appear in the cause; and a judgment thereafter taken, without his presence or consent, would be voidable, if not void. But a subsequent appearance and pleading to the merits, and a trial thereon, is a waiver of the irregularity. *Ib.*

67. **Date of judgment.** A justice's judgment was set forth in pleadings as rendered September 24. The record produced described the judgment as rendered on that day for the plaintiff to recover of the defendant "\$4 damages and his costs," and then added: "Said cause was continued for taxation of cost to September 25, at which time said cost was taxed at \$8.92 and allowed at \$5.95." *Held*, that the judgment was properly described as rendered on the 24th, and that the delay in the taxation of the costs was improperly described as a continuance. *Starbird v. Moore*, 21 Vt. 529.

68. Where a trial before a justice is commenced on the return day, or on a continuance day, and is pursued to judgment without adjournment, all the proceedings must, in law, be treated as done and perfected on that day, although, in fact, not completed until a subsequent day. So *held* in an *audita querela* to set aside an execution which described the judgment as rendered May 7th, whereas the record was of a judgment rendered May 8th; but the record also showed that the trial was commenced on the 7th, and lasted into the 8th, when the verdict and judgment were in fact rendered; and *held*, that the execution rightly described the judgment as rendered on the 7th. *Oakes v. School District*, 33 Vt. 155.

69. **Continuance by another justice.** Under the statute of 1882, No. 1, authorizing one justice to continue a suit returnable before another when the latter is "unable to attend by reason of sickness or other cause," and directing that the justice making the continuance should enter on the files "the reasons therefor," an entry on the files in this form: "The signing magistrate being absent, I continue this cause," &c.—was *held* sufficient. *Holland v. Osgood*, 8 Vt. 276.

70. In order for one justice regularly to continue a suit in place of the justice who signed the writ, he must be present at the place of return within the two hours from the time of return, and there, having the writ in his possession, continue the case. If not so done, the suit is discontinued, and a judgment thereafter rendered on default will be set aside on *audita querela*. *Cranford v. Cheney*, 13 Vt. 567. *Hinman v. Swift*, 18 Vt. 315.

71. Where a justice, authorized to continue a suit in the absence of the justice signing the

writ, went to the door of the office where the writ was made returnable and within two hours after the hour set in the writ for trial, and found the door locked, and there, having the writ in his possession, decided to continue the suit;—*Held*, that it was legally entered and continued, although the door remained locked during the two hours, and although the case was not actually called at the door, and although the entry of the continuance was not made on the writ until after the two hours, and then at another office. *Knight v. Berry*, 22 Vt. 246.

72. Under R. S. c. 26, s. 19, providing that "whenever at the time and place of trial of any civil suit before a justice, such justice shall be unable to attend, any other justice may continue the cause," &c.;—*Held*, that such other justice could not continue the cause after it had been once continued by the justice signing the writ; that his power to continue the cause was limited to the return day. *Whitcomb v. Rood*, 20 Vt. 49. (Changed by G. S. c. 31, s. 42.)

73. But if, in such case, the defendant appears at the time to which the cause is finally continued, and does not object to the irregularity of the continuance, or waives it by going to trial upon the merits, the judgment rendered is regular; and this, although the justice who continued the cause was interested in the cause, or was related to one of the parties within the fourth degree. *Hove v. Hoaford*, 8 Vt. 220. 25 Vt. 224. *Austin v. Smith*, 23 Vt. 704; and see *Bryant v. Pember*, 43 Vt. 599.

74. But if the defendant appears and makes and insists upon the objection, the suit will be dismissed, and he will recover judgment for his costs. *Whitcomb v. Rood*, 20 Vt. 49. *Ames v. Hilliard*, 25 Vt. 222.

75. Though one justice can continue a case on account of the necessary absence of the justice who signed the writ, he cannot make an order continuing the case for notice to a defendant out of the State. Such order is inoperative. *Braynard v. Burpee*, 27 Vt. 616.

76. **Jury trial.** In a justice suit, after a judgment by default and a continuance for the assessment of damages, the defendant cannot claim a jury for the assessment. It is doubtful whether the justice is authorized, in such case, to award a *venire*; if so, it is discretionary with him. *Brown v. Irwin*, 21 Vt. 68.

77. **Surrender by bail.** Upon the surrender of the principal by his bail on *mesne process* in a justice court, the justice may order him, for the time being, into the custody of a proper officer. If none such be present, he may appoint some suitable person to fill the place, and to detain the principal, and this without written precept, but such verbal order can operate only while his court is in session. After the adjournment of the court, whether with or

without day, it is only by a *mittimus* that the detention can be justified. *Abells v. Chipman*, 1 Tyl. 377.

78. **Execution.** Under the Statute of 1821, increasing a justice's jurisdiction from \$53 to \$100;—*Held*, that the execution should be made returnable in 60 days, unless the debt or damages recovered, exclusive of the costs, exceeded \$53. *Allen v. Warren*, 9 Vt. 203.

#### IV. RECORDS.

79. The forms of proceedings of justices in making up their records should not be too strictly or severely examined, but should be most favorably construed. *Story v. Kimball*, 6 Vt. 541. *McGregor v. Balch*, 17 Vt. 562.

80. The record of a justice showed a conviction, and a penalty imposed, but did not show any costs taxed; but in the recital of the judgment in the *mittimus*, the costs were stated as taxed at a sum named. *Held*, on *habeas corpus*, that this was not a fatal defect, since the *mittimus* showed sufficient matter by which the justice could amend his record. *Howard, ex parte*, 26 Vt. 205.

81. A justice should certify in his record the fact that a demand pleaded in set-off was so pleaded, although he did not regard it as *bona fide*. *Hall v. Crossman*, 27 Vt. 297.

82. A justice's record of a judgment which shows no appearance by either party, nor adjudication by the justice, and contains no allusion to any writ, process, or declaration, and shows no award of execution, is not such evidence of the judgment as the record contemplated by the statute should furnish, and, if the justice is alive, is not admissible. *Nye v. Kellam*, 18 Vt. 594;—though the justice may live without the State. *Wright v. Fletcher*, 12 Vt. 431.

83. The original minutes of a justice, made upon and in connection with the original files, and showing a judgment rendered, are sufficient evidence of the judgment, when no other can be had,—as, where the justice has deceased and has made no other, or formal record. *Story v. Kimball*, 6 Vt. 541.

84. In such case, also, a certified copy of the original files and entries thereon, made by the county clerk, may be sufficient as evidence of the record. *Ellsworth v. Learned*, 21 Vt. 535.

85. But where the justice is alive, such original entries and files are not admissible to make out a record. *Strong v. Bradley*, 13 Vt. 9. *Nye v. Kellam*, 18 Vt. 594. 21 Vt. 532.

86. A justice being required by law to record his proceedings, copies of his records, by him certified, are as valid evidence as those of the higher courts. He sends up no originals on appeal, but certifies copies of his record, including the recognizances taken. *Hubbard v. Davis*, 1 Aik. 296.

87. As evidence of a justice's judgment the plaintiff offered a copy of the original writ and of the officer's return and of the entries on the writ:—"Continued to September 24, 1845, at eight o'clock forenoon, at which time judgment on verdict of jury for plf. to recover of dft. four dollars damages and his costs"—certified by the justice to be "a true copy." *Held* to be a sufficient copy of the record of a judgment. *Starbird v. Moore*, 21 Vt. 529.

88. The mode of authenticating the record of a justice of the peace to be used in another State is, for the justice to certify his record, and then certify that he has no seal or clerk, but acts as clerk of his own court, and that the foregoing attestation is in due form; and such record is as conclusive to all intents, as a record of the highest court in the State. *Redfield, J. in Brown v. Edson*, 23 Vt. 448. *Starkweather v. Loomis*, 2 Vt. 574. *Blodget v. Jordan*, 6 Vt. 580.

89. A justice of the peace, although out of office but residing in the county for which he was appointed, is the proper one to certify his own records, and not the county clerk. *Carruth v. Tighe*, 32 Vt. 626.

#### V. ACTION AGAINST JUSTICE.

90. *Held*, that an indictment did not lie against a justice of the peace for doing an act, as justice, after his commission had expired; but, *arguendo*, that a civil action would lie by a party injured. *State v. Campbell*, 2 Tyl. 177.

91. Under a statute authorizing a suit by writ of *capias* against a non-resident of the State, but not against a resident;—*Held*, that a justice who signed such writ against a resident was not liable for an arrest and imprisonment thereon, where the party was described in the writ as a non-resident, and the justice supposed such to be the fact. It is not a case where the justice is required, at his peril, to know in advance, the facts limiting his jurisdiction; and sound policy requires us to extend the same rule of construction in favor of the jurisdiction of justices, which obtains as to courts of general jurisdiction. *Wright v. Hasen*, 24 Vt. 143.

92. A justice has the same right to the custody of papers or exhibits filed as evidence in a case before him, that any other court of record has. He can retain them so long as they are necessary for his consideration in determining the issues upon which they are evidence. If he refuses to surrender them after such determination, where they were used simply as evidence, he is liable in trover. *Yates v. Pelton*, 48 Vt. 314.

93. A justice is liable in trespass for an arrest upon a warrant issued by him before taking the oath of office prescribed by the Constitution. *Courser v. Powers*, 34 Vt. 517.

## L.

## LAKE CHAMPLAIN.

1. **Boundary.** Lands bounded on Lake Champlain extend to the edge of the water at low water mark; and the same rule applies to lands near the lake bounded on a creek emptying into it, the waters of which ordinarily maintain the same level and rise and fall with the waters of the lake. *Fletcher v. Phelps*, 28 Vt. 257. *Jakeway v. Barrett*, 38 Vt. 316. *Austin v. Rutland R. Co.*, 45 Vt. 215.

2. **Wharfing.** The owner of land bounded by Lake Champlain has no common law right in Vermont, to appropriate, as his own, the bed of the lake beyond low water mark. His right to build wharves, &c., into the lake beyond low water mark, is not appurtenant to his ownership of his land so bounded, but is only the right given him by statute. (G. S. c. 64, ss. 5, 6, 7.) Hence, where the defendant filled into the lake in front of the plaintiff's land, and built wharves and docks upon the made land;—*Held*, that the plaintiff could not maintain ejectment therefor. *Austin v. Rutland R. Co.*

## LANDLORD AND TENANT.

- I. CHARACTER OF TENANCY.
- II. DISPUTING LANDLORD'S TITLE.
- III. TERMINATING TENANCY.
- IV. RENT.
- V. TENANT'S RIGHT.
- VI. LETTING ON SHARES.
- VII. INJURY TO REVERSION.

## I. CHARACTER OF TENANCY.

1. **At will, or for years.** A parol lease, with a stipulation to pay an annual rent, though "an estate at will only," under the statute, may become an estate from year to year by subsequent events;—as, by an entry into possession and paying the rent according to the stipulation, and continuing in possession beyond the first year. *Barlow v. Wainwright*, 22 Vt. 88. *Hall v. Wadsworth*, 28 Vt. 410. *Silsby v. Allen*, 43 Vt. 172. 46 Vt. 88.

2. Continuing in possession of a farm for several years under a parol agreement to support the owner, was treated as a tenancy from year to year, in *Hanohett v. Whitney*, 2 Aik. 240. S. C., 1 Vt. 311.

3. An agreement to pay rent is an essential element of a tenancy from year to year. *Cham-*

*berlin v. Donahue*, 45 Vt. 50. *Rich v. Bolton*, 46 Vt. 84.

4. Leases for uncertain times are, *prima facie*, leases at will; it is the reservation of annual rent that turns them into leases from year to year. *Rich v. Bolton*.

5. Where a tenancy at will has run into a tenancy from year to year, the landlord cannot maintain trespass *qua. clau.* against the tenant. *Catlin v. Hayden*, 1 Vt. 375.

## II. DISPUTING LANDLORD'S TITLE.

6. In ejectment for non-payment of rent, the tenant cannot set up a defense adverse to the title of his landlord, nor deny his title. *Robinson v. Hathaway*, Brayt. 150.

7. One who holds under another cannot set up an adverse claim, until he has first surrendered up the possession to him; and all who in any way obtain this possession of the tenant are tenants in his place, and are subject to the same rule, whether informed of that relationship, or not. *Reed v. Shepley*, 6 Vt. 602.

8. Where one goes into possession of land under another, or acknowledging the title of another, whether such possession is that of a tenant proper, a mortgagor, a trustee, or is under a contract of purchase, neither he nor his grantee can set up an adverse title or possession, nor does such possession become adverse, until and unless distinct knowledge or notice of such adverse claim is brought home to the party under whom the possession was taken, and is held. *Greene v. Munson*, 9 Vt. 37. *Bowker v. Walker*, 1 Vt. 18. *Tuttle v. Reynolds*, 1 Vt. 80. *Reed v. Shepley*. *Hall v. Dewey*, 10 Vt. 593. *Ripley v. Yale*, 18 Vt. 220. *Wires v. Nelson*, 26 Vt. 13. *Robinson v. Sherwin*, 36 Vt. 69.

9. A tenant cannot dispute the title of his landlord, nor acquire a title by adverse possession, until he has first, *bona fide*, surrendered his possession, or has by some unequivocal act repudiated the tenancy, and this was distinctly known to the landlord; and this extends to mortgagor and mortgagee, trustee and *cestui que trust*, vendor and vendee, and to all cases where one goes into possession of the land of another, acknowledging his title. *Greene v. Munson*. *Stacy v. Bostwick*, 48 Vt. 192.

10. A tenant may repudiate his tenancy and set up an adverse claim in his own right, and, by making this known to his landlord, but in no other way, the statute of limitations begins to run in his favor from that time. *Greene v.*



*Munson. North v. Barnum*, 10 Vt. 220. *Hall v. Dewey*, 10 Vt. 593. 16 Vt. 124. 19 Vt. 163. 22 Vt. 623. 24 Vt. 174. 28 Vt. 613. 31 Vt. 177.

11. Though a tenant may, by claiming in his own right and apprising his landlord thereof, so far throw off his tenancy as to commence an adverse possession, which may ripen into a title, yet for all other purposes the original relation has its legal effect as to the landlord's rights. The tenant is still restrained from disputing the title under which he entered. *Hall v. Dewey*.

12. In an action for use and occupation, the defendant cannot dispute the title of his landlord, nor that of the assignee of the landlord; and while he occupied, he is bound to pay the rent, and cannot object that the assignment of the lease to the plaintiff was fraudulent and void as to the creditors of the lessor. *Steen v. Wadsworth*, 17 Vt. 297.

13. No case has been found where this principle of repudiating a tenancy, without surrendering the possession, has been extended to an action for the rent, so as to excuse the tenant from paying rent, or for use and occupation for the full term of the occupation, under the contract by which he made his entry. *Redfield, C. J.*, in *Sherman v. Champlain Tr. Co.*, 31 Vt. 178.

14. A tenant in possession under the right owner was held not concluded by his acknowledgement of tenancy to the plaintiff, made under a mutual misapprehension, or misrepresentation of the plaintiff's title. *Swift v. Dean*, 11 Vt. 323.

15. One who receives possession of land from another may set up an adverse claim of title to it, if that is consistent with the contract under which he obtained possession; otherwise, not. *Ripley v. Yale*, 19 Vt. 156.

16. Though a tenant cannot dispute his landlord's title, yet he may show that it has expired by matter *ex post facto*; and this will be a defense to an action of covenant for non-payment of rent, or of ejectment predicated upon a forfeiture. *Orleans Co. Grammar School v. Parker*, 25 Vt. 696.

17. A tenant in possession cannot surrender his possession to a third person, without consent of his landlord, so as to defeat the possession of the landlord. *Swift v. Gage*, 26 Vt. 224.

18. Where the plaintiff, a tenant of the defendant, a mortgagor, took a deed of assignment of the mortgage from the mortgagee after condition broken, and exhibited the mortgage deed and assignment to the defendant, notifying him that he held the premises under that mortgage;—*Held*, that this was a repudiation of the tenancy and a dissolution of that relation; that his possession thereafter was adverse, and that by force of such possession and

title he could maintain trespass against the defendant for any after entry upon the premises. *Pierce v. Brown*, 24 Vt. 186.

19. In ejectment by a corporation against one who entered as their tenant, the defendant cannot, under the general issue, deny or compel the plaintiffs to prove their corporate capacity, nor object to the formality of the lease under which he held. *Grammar School v. Burt*, 11 Vt. 632.

20. A religious society leased to the defendant the first settled minister's right in the town, and afterwards brought ejectment founded upon a provision of forfeiture. The plaintiffs produced on trial no evidence of title except the lease. *Held*, that this was sufficient, and that the defendant could not object that the care and management of such lands were given by statute to the selectmen of the town. *Congregational Soc'y. of Newport v. Walker*, 18 Vt. 600.

### III. TERMINATING TENANCY.

21. **Notice to quit.** In order to terminate a tenancy from year to year, so as to entitle the lessor to possession, or the lessee to exemption from the payment of rent, six months' notice of the termination of the tenancy, and looking to the end of the year, is necessary. *Hanohett v. Whitney*, 2 Aik. 241. *S. C.*, 1 Vt. 311. *Barlow v. Wainwright*, 22 Vt. 88. *Hall v. Wadsworth*, 28 Vt. 410. *Silaby v. Allen*, 43 Vt. 172.

22. A tenancy at will, which is such in fact, may always be determined by any act or declaration inconsistent with the continued voluntary relation of landlord and tenant, any assertion of title to the possession—as, notice to quit; threat of legal means to recover possession; anything which amounts to a demand of possession, although not expressed in precise and formal language; the bringing of an action to obtain possession, which fails, &c. *Chamberlin v. Donahue*, 45 Vt. 50. *Rich v. Bolton*, 46 Vt. 84.

23. A tenant at will, though he may have occupied for several years, is not entitled to six months' notice to quit, but only to reasonable notice, and such as determines the will of the landlord; and, where emblements are in question, such as will protect the tenant in his rights. *Rich v. Bolton*.

24. One took a lease of a slate quarry for a term of years and occupied the quarry, paying as rent the price per square, stipulated in the lease, for the slate quarried. He afterwards, without consent of the owner, took possession of and worked a part of the quarry outside the limits fixed in the lease, and for several years accounted to the owner for the slate quarried, in the same manner as for that embraced in the lease. *Held*, under the circumstances of

the case, that the occupation and use of this additional parcel had not expanded into a tenancy from year to year, so as to require a six months' notice to quit, but only such notice as was reasonable to enable him to quarry the slate he had uncovered. *Sheldon v. Davey*, 42 Vt. 687.

25. The plaintiff and defendant, adjoining land owners, by written agreement established a division line between them, subject to be changed on the establishment of the true line "on proper and lawful authority and manner," and, if the line should be so changed, each should pay to the other a specified yearly rent per acre for the land of the other occupied by him, as it should prove. In ejectment, wherein the true line was found and it appeared that the defendant had been occupying the plaintiff's land;—*Held*, that as both parties claimed title to the land, the defendant was not tenant of the plaintiff so as to be entitled to six months' notice to quit, but that his occupation was under a license, and he was entitled to reasonable notice of the plaintiff's intention to institute a suit to settle the disputed line; and that, for want of this, the plaintiff could not recover. *Bishop v. Babcock*, 22 Vt. 295.

26. —*when not necessary*. A disclaimer of tenancy, or denial of the owner's title, dispenses with the necessity of notice to quit. *Tuttle v. Reynolds*, 1 Vt. 80. *Clapp v. Beardsley*, *Id.*, 151.

27. Where a defendant in ejectment denies on trial the plaintiff's title and his own tenancy, or requires proof thereof, he cannot insist on want of notice to quit, as a defense. *Catlin v. Washburn*, 8 Vt. 25.

28. Notice to quit is never necessary, unless the relation of landlord and tenant subsists; nor, where the party in possession repudiates such relation, is notice to quit, or demand of possession, necessary. *Chamberlin v. Donahue*, 45 Vt. 50.

29. The defendant went into possession of the plaintiff's land with the plaintiff's consent, but with no agreement as to paying rent, and so occupied for near 14 years. He built a barn on the premises and repaired the house. He declined and refused to settle and pay rent. *Held*, that after such refusal, he could not claim that he was holding under an implied liability to pay reasonable annual rent; that if the repairs were made in compensation for the use, they were not a payment of a yearly rent, but rather payments in gross for the whole occupancy; and that the defendant was a mere tenant at will, and so not entitled to six months' notice to quit. *Rich v. Bolton*, 46 Vt. 84.

#### IV. RENT.

30. In ejectment for non-payment of rent

under a lease;—*Held*, that the defendant was not entitled to time to redeem, *i. e.*, to pay the rent, &c., under Sec. 76 of the judiciary act of 1797. *Rockingham v. Hunt*, *Brayt*, 66.

31. That the receiving of rent, *eo nomine*, accruing after a forfeiture, is a waiver of the forfeiture, applies only to cases where the forfeiture was known at the time; and, in ejectment for rent under G. S. c. 40, s. 14, can only apply to the receipt of such rent after suit brought. *Maidstone v. Stevens*, 7 Vt. 487.

32. The right to re-enter for non-payment of rent is not incident to the estate of the lessor, at common law, but must be reserved by deed; and all the conditions, or stipulations, annexed thereto must be complied with. *Smith v. Blaisdell*, 17 Vt. 199.

33. Where there was a parol lease for one year, and an express promise by parol to pay therefor a certain sum, and most of the premises were, during the year, consumed by fire, but the lessee continued to occupy the rest through the year;—*Held*, that he was liable, in assumpsit for use and occupation, for the full rent agreed. *Voluntine v. Godfrey*, 9 Vt. 186.

34. A conveyance by a lessor to a lessee of the leased premises, is not a release of a claim for the rent already accrued. *Johnson v. Muzzy*, 42 Vt. 708.

35. The fact that a tenant of leased premises is also a mortgagee of the same, with condition broken, and has obtained a decree of foreclosure, but where the time given for redemption has not yet expired, does not of itself, without other notice of an intention to terminate the relation of tenant, absolve him from payment of the stipulated rent. *Id.*

36. An under-tenant, who has paid his rent to the lessee, is not liable for rent to the lessor, unless he attorned to the lessor during his occupancy. *Way v. Holton*, 46 Vt. 184.

37. Surrender. If a tenant discontinues his possession, this should be treated as a surrender to his landlord. *Warner v. Page*, 4 Vt. 291.

38. The lease of premises at a certain quarterly rent provided that, on failure to pay the rent at the day, the lessor should have full right and liberty to take immediate possession without "law" or hindrance. The lessor demanded payment of a quarter's rent, which the lessee claimed (and so the fact was) he had already paid; whereupon the lessor told him to quit, unless he paid the rent; and thereupon the lessee did quit the premises, which remained thereafter unoccupied. *Held*, that this constituted a surrender and acceptance of the possession and terminated the lease, and that the lessee was not liable for rents thereafter. *Patchin v. Dickerman*, 81 Vt. 666.

39. If a lease gives the lessee a right to

enter and possess the premises, it is, I think, his business to get into possession; and it is not incumbent on the lessor to put him in. The lessee has as perfect and effectual a remedy to dispossess the wrong-doer, after the execution of the lease, as the lessor had before that time. *Bennett, J., in University of Vt. v. Joslyn, 21 Vt. 52.* So held in *Underwood v. Birchard, 47 Vt. 805.*

V. TENANT'S RIGHT.

40. Unless under special circumstances, a tenant cannot make necessary repairs at the expense of the landlord, without his express consent and authority. *Brown v. Burrington, 36 Vt. 40.*

41. Erections made by a tenant which he has a right to remove; must be removed before the expiration of his term—or, perhaps, in a reasonable time thereafter. *Preston v. Briggs, 16 Vt. 124.*

42. A tenant has no right to remove from a farm manure made from the crops which grew upon it, and which good husbandry requires should be expended upon it, although he was the owner of the crops. *Wetherbee v. Ellison, 19 Vt. 379.*

43. The court cannot assume that it was necessarily bad husbandry, for a tenant to carry off the greater portion of the hay, for a single year, from the farm where grown. This is a question of fact for the jury. *Wing v. Gray, 36 Vt. 261.*

44. The particular contract. Since a lease is good against the lessor without acknowledgment, if the lessee goes into possession under it and conforms to its terms, the rights of the parties are to be regulated by it as a written contract. *Lemington v. Stevens, 48 Vt. 88.*

45. The plaintiff was in possession of premises under a written lease from the defendant, not acknowledged, when the defendant conveyed the premises to another party, not reserving the plaintiff's right, and claiming that he had forfeited it. In an action of assumpsit for breach of the contract;—*Held*, that it was no defense to the action, that the grantee of the land had notice of the plaintiff's title, and might be compelled to confirm it in equity. *Staples v. Flint, 28 Vt. 794.*

46. The defendant took a lease of land, on which there was a growing hay crop, for five years from July 18, 1863, and gathered that crop, and, before the 18th of July, 1868, gathered and removed the hay crop of that year, making six hay crops during the term. The county court having found that it was good husbandry to gather the last crop at the time it was gathered, and no custom being shown to control the terms of the lease;—*Held*, that the

defendant was entitled to the last crop. *Willey v. Conner, 44 Vt. 68.*

47. Where the lessee of land agreed, by way of rent, to "deliver" to the lessor a certain share of the products at a time and place named;—*Held*, that he was bound to sever such share from the mass and to deliver it as agreed;—that until after delivery the lessor had no interest in severalty in the crops. *Manwell v. Manwell, 14 Vt. 14.*

48. H leased his farm and stock to D for the term of two years, for which D agreed, among other things, to "deliver" to H one-half of all the crops, except that fed to the stock, the produce to be divided by weight and measure. After gathering the hay and crops, D, together with A, drew them away and consumed them. *Held*, that under this contract, the title to the hay and crops did not become vested in H without delivery, and that he had no such title as enabled him to sustain trover, or an action on the case for an injury to any reversionary interest, against D and A. *Hurd v. Darling, 14 Vt. 214. 16 Vt. 377. But see 28 Vt. 4. 21 Vt. 181. 23 Vt. 311-12.*

VI. LETTING ON SHARES:

49. An agreement between the owner of land and the occupier, that the latter shall raise a single crop upon shares, does not amount to a lease of the land, but the parties have a joint interest in the crop before a severance of the shares. *Bishop v. Doty, 1 Vt. 87.*

50. A contract in writing, not sealed, agreeing to let a farm for five years, or so long as the parties should agree and be satisfied; and terminable upon one month's notice by either party, and taken after the usual custom of farmers, that is, the produce of the farm to be equally divided by weight and measure between the parties, was *held* not to be a lease, but that it gave the parties a common interest in the growing crops, as in case of a letting for a single crop. *Aiken v. Smith, 21 Vt. 172.*

51. In the ordinary case of letting a farm by the owner to one who performs the labor and receives a share of the products of the farm and the stock, the general result of such a contract is to make the parties joint owners or tenants in common of the increment. But the parties may, by their contract, vest the property in the increment, either in the one, or in the other. *Frost v. Kellogg, 23 Vt. 308.*

52. The taking of a field to plant, cultivate and harvest on shares does not amount to a lease of the land, nor divest the owner of his legal possession, nor create any estate in the land, but gives the taker a right and authority to enter upon the land for the purpose of carrying out his contract. *Warner v. Hoisington, 43 Vt. 94.*

53. In trespass, *q. c. f.*, by the owner of the field, in such case, the defendant's right to enter should be specially pleaded. *Id.*

54. **Title to crop, &c.—Particular provisions.** The tenant of a farm and stock upon shares, where by the contract he is to have one-half the growth of the cattle and half the wool of the sheep, has but an inchoate interest in such property, which rests merely in contract, and does not become perfect until his part of the contract is performed; and such interest, before the expiration of the tenancy, cannot be taken and sold on execution, so as to convey a title to the purchaser. *Smith v. Meech*, 26 Vt. 288.

55. Where it was provided by a contract for raising a crop of grain upon shares, that the grain when harvested should be secured in the barn of the land-owner and be there threshed by the occupier, and be then divided between the parties;—*Held*, that an attachment of one-half of the harvested grain in the field, as the property of the occupier, worked no severance, and that the land-owner was not liable to the attaching officer for removing the grain to his barn. *Bishop v. Doty*, 1 Vt. 87.

56. Where, in the letting of a farm and stock, it is provided, expressly or impliedly, that certain growth and increase of the original stock shall be kept and divided at the end of the term, the title of the tenant, as an owner in common therein, becomes perfected only at the end of the term, and then only by having performed the conditions of the lease. A sale by him of the entire interest, before that time, is a conversion, and the lessor can maintain trover therefor. *Turner v. Waldo*, 40 Vt. 51;—or replevin. *Briggs v. Oaks*, 26 Vt. 188.

57. A provision in the lease of a farm upon shares, that the produce shall be "at the control of the lessor until sold," leaves the entire ownership in the lessor, and gives to the lessee only the right to his share of the money, after the produce has been sold. In such case, the produce is not subject to attachment for the debt of the lessee. *Edson v. Colburn*, 28 Vt. 681.

58. Where the owner leased land for one year at a specified money rent, and "to have a hold or lien on the crops raised on said premises until the rent is paid";—*Held*, that this provision was merely an executory contract, and that the lessor acquired no general or qualified property in the crops before they were raised and delivered to him. *Brainard v. Burton*, 5 Vt. 97. (Overruled by *Paris v. Vail*, 18 Vt. 277. *Smith v. Atkins*, *Id.* 464. *Baxter v. Bush*, 29 Vt. 469, &c., *infra*.)

59. The sale of a thing not in existence is, upon general principles, inoperative, being merely executory. But where the thing thereafter to be produced is the produce of land, or other thing, the owner of the principal thing

may retain the general property of the thing produced, unless there be fraud in the contract as to creditors. *Smith v. Atkins*, 18 Vt. 461.

60. The lessor of land may stipulate in the lease that the crops grown on the premises by the lessee, or the stock put by the lessor upon the land, with its increase, farming tools, &c., shall remain the property of the lessor until the rent shall be paid, or other condition performed, and such a provision is valid, not only between the parties, but as to third persons also. *Paris v. Vail*, 18 Vt. 277. *Smith v. Atkins*, *Id.* 461. *Briggs v. Oaks*, 26 Vt. 188. *Briggs v. Bennett*, *Id.* 146. *Gray v. Stevens*, 28 Vt. 1. *Edson v. Colburn*, *Id.* 681. *Leland v. Sprague*, *Id.* 746. *Baxter v. Bush*, 29 Vt. 465. *Bellows v. Wells*, 36 Vt. 599. *Cooper v. Cole*, 38 Vt. 191.

61. But these decisions all proceed upon the ground, that the lessor is the absolute owner of the premises leased, so far as respects the right to the crops as between the lessor and third persons, and do not apply to the case where a mortgagor is in possession, though under a lease in form, and has raised crops which are attached by his creditors. *Cooper v. Cole*, 38 Vt. 185. See *Leland v. Sprague*, 28 Vt. 746.

62. The plaintiff hired of the defendant a piece of land, at a certain price per acre, to raise a crop of corn, the defendant to have the stocks. The plaintiff planted and cultivated the crop, and the defendant harvested and retained it, claiming to have a lien upon it. *Held*, there being no express contract to that effect, that the defendant had no such lien, and was liable in trover for the corn, and without demand. *Loomis v. Lincoln*, 24 Vt. 158.

63. Where a lessor retained, by the agreement, a "lien" upon all the crops and produce of the farm leased, as security for payment of the rent;—*Held*, that this lien was not affected by the lessor's taking at the same time the note of the lessee, with surety, for the rent, and that he had brought suit on the note. *Baxter v. Bush*, 29 Vt. 465.

64. B moved on to A's farm in the spring, under an arrangement that A should furnish means to carry on the farm and have a lien upon the crops for his security for advances, and that B should cut and put up the hay, either upon shares or for reasonable pay, as A should elect. A did furnish the means and B cut and put up the hay. In the winter following, A elected to have the hay divided as upon shares, and it was agreed that A should have a lien upon B's share, enough to pay the advances then in arrear. The plaintiff, an officer, then attached the hay as the property of B. Subsequently, the hay was divided and the share so holden to pay advances was set apart, by mutual arrangement between A, B, and the defendant, and was sold to the defendant

to pay A's debt to him, contracted for such advances. The defendant removed the hay, and executed his receipt to the plaintiff upon his attachment. In an action of trover upon the receipt;—*Held*, that B had no property in the hay; that the property was in A until the sale to the defendant, and the defendant acquired a good title by his purchase, and was the lawful owner when he executed the receipt, and that the plaintiff could not recover. *Tinker v. Cobb*, 39 Vt. 483.

65. Where a lessee of land conveyed, by deed recorded, to his lessor (who then had a right of re-entry under the lease for non-payment of past due rent), the crops then growing, which required annual planting or sowing and cultivation;—*Held*, that this was equivalent to a reservation of the crops in the original lease;—and *held*, that no change of possession was necessary in order to protect them, when gathered, from attachment as the property of the lessee,—they not being subject to attachment when sold, and then having no real existence as property at all. *Bellows v. Wells*, 36 Vt. 599.

66. Under the provisions of a lease of a farm upon shares, that the lessor shall receive one-half of the gross proceeds of the farm and shall "have as much property and value in hay, seed, teams, stock and tools returned to him at the expiration of said contract as he puts on to said farm and delivers to said lessee";—*Held*, that the lessee was bound, under the contract, to return the property specified, or its equivalent in value; and he was *held* liable to make up all losses by death and depreciation in value by age or otherwise, though without his fault, except as to such property as was disposed of by mutual consent during the lease. *Smalley v. Corliss*, 37 Vt. 486.

67. The defendant leased to the plaintiff a farm to be cultivated on shares for one year, by the terms of which lease the defendant was to furnish the plaintiff a horse to be used in carrying on the farm. He did furnish the horse, which the plaintiff accepted and used, but later in the season the defendant, against the will of the plaintiff, took away and sold the horse, without furnishing any other in its place. In an action of trover for the horse;—*Held*, that the plaintiff had acquired by the bailment a special property in the horse, and was entitled to recover in this action against the defendant, the general owner, just damages for the loss of the use of the horse upon the farm for the remainder of the term. *Hickok v. Buck*, 22 Vt. 149. 82 Vt. 650.

68. Where one took a farm at the halves, the landlord to put upon it a yoke of oxen to do the farm work, the tenant furnishing half the keeping and taking care of them;—*Held*, that the value of the use of the oxen upon the farm

for the exclusive benefit of the landlord, also the earnings of the oxen when worked by the tenant off the farm, should be equally divided. *Brown v. Burrington*, 36 Vt. 40.

69. In such case, where the oxen were sold, during the year, by the consent and for the benefit of both, but without any agreement as to how the team work should be done in future, and who should furnish it;—*Held*, that this should not be deemed a waiver of the original stipulation, that the landlord should furnish the team. *Id.*

## VII. INJURY TO REVERSION.

70. A declaration for obstructing a way and right of way in the plaintiff's possession, is not sustained by proof of such obstruction while in possession of his tenant for years. In such case, the action should be for an injury, if any, to his reversionary interest. *Higgins v. Farnsworth*, 48 Vt. 512.

See FORCIBLE ENTRY.

## LEGAL TENDER ACT.

1. The law of Congress making treasury notes a legal tender, was *held* (without much discussion) to be constitutional; and *held*, that the tender of such notes by a State bank, in payment of its own bank bills, was a good tender, notwithstanding a statute enacting that if a bank should refuse payment *in gold or silver* of any bill presented for payment, the bank should be liable to pay the holder damages at the rate of twelve per cent, a year &c. *Carpenter v. Northfield Bank*, 39 Vt. 46.

2. The judgment of the U. S. supreme court in May, 1871, that all debts, whether created before or after the passage of the "Legal Tender Act," were payable in the paper issues authorized by Congress, determined and fixed the rule of legal duty binding upon all other courts; and *held*, that the Vermont State bonds, issued before the passage of that Act and falling due June 1, 1871, were legally payable in legal tender notes. *Kellogg v. State Treasurer*, 44 Vt. 356.

3. There is no law in this State that authorizes the court to make an order, on the rendition of a judgment upon a promissory note dated before the passage of the U. S. Legal Tender Act, that such judgment be paid in specie currency, or its equivalent in legal tender notes. *Davis v. Field*, 43 Vt. 221.

4. In actions upon debts due in coin, the value in currency of the amount of the debts in coin, when due, is not the true rule of damages. *Townsend v. Jennison*, 44 Vt. 315.

## LICENSE.

1. The plaintiff's written agreement, made at the time of his sale of a farm, that the notes given for the price might be satisfied by paying a certain mortgage on the farm, where this was made known to the mortgagee and relied upon, was held not revocable by the plaintiff. *Joy v. Hull*, 4 Vt. 455; and see *Lewis v. Holly*, Brayt. 204.

2. Where one erects a building upon the land of another by his license, such license cannot be revoked so as to make the owner of the building a trespasser for entering upon the land, within a reasonable time after the revocation, to remove the building. *Barnes v. Barnes*, 6 Vt. 388. 16 Vt. 129.

3. A building erected on the plaintiff's land, but owned by another, was sold at sheriff's sale, at which the plaintiff announced that whoever bid off the building might take it away at any time. Held, that such license could not thereafter be revoked, so as to make the purchaser a trespasser by entering upon the land to remove the building. *Id.*

4. A lessee of land who erects a building thereon by license of the owner of the fee, with the right to move off the building at the expiration of the lease, has an interest in real estate which he may convey by mortgage, or which may be set off on execution. *Hagar v. Brainerd*, 44 Vt. 294.

5. Whether a parol license to enjoy an easement in lands, when once executed, becomes irrevocable at law, and the right thus acquired permanent—*quære*. But if expense be incurred upon the faith of it, so that the parties cannot be placed *in statu quo*, equity may grant relief, as in any other case of part performance of a parol contract for the sale of lands, or any interest therein,—*i. e.*, to prevent fraud. *Redfield, J.*, in *Hall v. Chaffee*, 18 Vt. 150, note.

6. Held, that a license given to lay an aqueduct to the licensor's spring and to take water therefrom, under which the licensee lays an aqueduct, may be revoked after the licensee has had the full benefit of that expenditure; and does not give the right to lay a new aqueduct, after the first has become decayed and useless. *Allen v. Flake*, 42 Vt. 462.

7. The plaintiff and his wife had difficulties, and had separated, when, upon a conference between them about their difficulties, he said to her, that "if she was not going to live with him again she might have a part of the household furniture, and might come and get it." Held, that this did not amount to a license to the wife to go to the plaintiff's house, in his absence, and take away, without his knowledge, such articles of furniture as she might choose. *Crumb v. Oaks*, 38 Vt. 566.

8. An instrument defectively executed as a lease, may be good as a license to enter. *White v. Fuller*, 88 Vt. 198.

## LIEN.

1. Particular lien of mechanic. Where a party has, in the way of his trade or occupation, bestowed his money, labor, or skill upon a chattel in the alteration and improvement of its properties, or for the purpose of imparting an additional value to it, he has a lien upon it for a fair and reasonable remuneration, or for the contract price,—*e. g.*, a manufacture of starch. *Ruggles v. Walker*, 34 Vt. 468;—a dresser of skins. *Burdiet v. Murray*, 8 Vt. 302.

2. An agreement to pay in advance for the manufacturing an article will not, of itself, exclude the manufacturer's lien for the price of manufacturing—such agreement not being inconsistent with the lien. *Id.*

3. The accepting of a promissory note in payment of an account for labor on any article, amounts to a waiver of any lien upon the article, for such labor, whether the note is payable on demand, or at a future time. *Hutchins v. Olcott*, 4 Vt. 549. 14 Vt. 489.

4. A particular lien—as, of a manufacturer—as distinguished from a pawn or pledge, is merely a right to retain or keep possession of the property until payment, without power of sale. It is a personal privilege which cannot be sold or transferred, and, if possession be parted with, the property becomes free from the lien. *Ruggles v. Walker*, 34 Vt. 468. *Kitteridge v. Freeman*, 48 Vt. 62.

5. Where the general owner of boards sued a stranger in trover for a conversion of them;—Held, that the defendant could not set up in defense a lien of the sawyer for the price of the sawing, where the sawyer had not exercised his right of lien, but had voluntarily parted with the possession or control of the boards before the trespass. Such lien must be considered as waived. *Bailey v. Quint*, 22 Vt. 474.

6. Mechanic's lien by statute. The mechanic's lien, as applicable to buildings under the statutes before 1863, is given only to those who contract with the owner of the building, or have a claim against him for their labor, and not to laborers employed by the contractors, and between whom and the owner there is no privity of contract. *Greenough v. Nichols*, 80 Vt. 768.

7. A mortgage lien, acquired by perfecting a mechanic's lien under the statute, stands upon the same ground as to existing rights, whether legal or equitable, as a mortgage executed at the time of the filing of the claim. *Kenny v. Gage*, 88 Vt. 302.

8. On a bill of foreclosure of a mechanic's lien;—*Held*, that the lien rested only upon the building upon which the work was done, but this carried with it such right to the land on which the building stood, and which was appurtenant to it, as should be necessary to enable the orator to hold, appropriate, and use the building for all the legitimate purposes to which such building might be put, in order to render it available as property in its full value and usefulness. *Roby v. University of Vt.* 36 Vt. 564.

9. **Agistment.** The agister of cattle has no lien upon them for their keeping, unless so agreed. *Cummings v. Harris*, 3 Vt. 244. *Wills v. Barrister*, 36 Vt. 220.

10. **Advancements by wrong doer.** Where one wrongfully takes property, though under a *bona fide* claim of right, he acquires no lien thereon, as against the owner replevying it, by paying the charges for freight and giving bonds to the U. S. for the payment of duties, though the bonds have become forfeited by reason of the replevin and subsequent sale by the owner; and the owner in such case may replevy the property without the tender of such charges, or an indemnity. *Guilford v. Smith*, 30 Vt. 49.

11. **Assignment subject to lien.** Where the plaintiff attached certain sheep of his debtor, and the debtor then assigned them to the defendant, but subject to the plaintiff's attachment and the payment of his debt, and the defendant afterwards disposed of the sheep without accounting to the plaintiff;—*Held*, that the defendant was liable in trover to the extent of the plaintiff's debt. *Paine v. Tilden*, 20 Vt. 554.

As to *particular liens*, see the appropriate titles; such as ATTORNEYS; CARRIERS; FACTORS, &c.; also, ATTACHMENT; EXECUTION; BANKRUPTCY; SALES, B.

## LIMITATION OF ACTIONS.

### I. CASES TO WHICH THE STATUTE OF LIMITATIONS APPLIES.

1. *At law.*
2. *In chancery.*

### II. WHEN THE STATUTE BEGINS TO RUN.

### III. SUSPENSION OF THE STATUTE.

1. *By superceding disability.*
2. *Infectual suit.*
3. *Absence from the State.*

### IV. AVOIDANCE OF STATUTE.

1. *By acknowledgement; new promise; part payment.*
2. *Mutual accounts.*

### V. PLEADING.

### I. CASES TO WHICH THE STATUTE OF LIMITATIONS APPLIES.

#### 1. *At law.*

1. **College lands.** The provision in the statute of limitations, that it shall not extend to lands granted, sequestered or appropriated to public, pious, or charitable uses, applies to lands reserved or granted in a town charter for the use of a seminary or college. *University of Vt. v. Reynolds*, 3 Vt. 542.

2. **Covenant of seisin.** Under the statute of limitations of 1797, s. 8, an action upon the covenant of seisin was *held* barred in eight years. *Pierce v. Johnson*, 4 Vt. 247.

3. **The State.** The statute of limitations barring civil actions does not apply to the State, not being named. *State Treasurer v. Weeks*, 4 Vt. 215.

4. **Probate bond.** No statute of limitations applies, where the non-payment of a debt allowed by commissioners is assigned as a breach of the administrator's bond. *Probate Court v. Chandler*, 7 Vt. 111. 9 Vt. 75.

5. In *scire facias*, by a professed creditor of a distracted person under guardianship, against the guardian, after judgment for the penalty of the probate bond;—*Held*, that any plea denying the indebtedness of the ward is good,—as, the statute of limitations. *Aldrich v. Williams*, 12 Vt. 413.

6. **Insane person.** The putting of a distracted person under guardianship, or the fact that he is under guardianship, does not prevent the bringing of suits against him, and therefore does not prevent the running of the statute of limitations upon a claim against him. *Id.*

7. **Sheriff's recognizance.** The official recognizance of a sheriff and his sureties is not a judgment, nor a specialty; and in an action brought thereon, whether debt or *scire facias*, the period of limitation is six years from the accruing of the cause of action (G. S. c. 63, ss. 5, 11.) *Brainerd v. Stewart*, 33 Vt. 402.

8. **Debtor in jail.** The statute of limitations will not run on a judgment while the debtor is in prison thereon, for his imprisonment repels any presumption of payment, while it continues; but the statute will begin to run on his discharge. *Ferries v. Barlow*, 8 Vt. 90. 13 Vt. 294.

9. **Informal levy of execution.** Nor will it run upon a judgment apparently satisfied of record by the levy of an execution, during the continuance of such levy, so as to bar a *scire facias* to revive the judgment, where the levy was made upon property not the debtor's. *Baxter v. Tucker*, 1 D. Chip. 353. *Hall v. Hall*, 8 Vt. 156. 13 Vt. 294.

10. **Undiscovered fraud.** In an action on the case for a deceit, it is no answer to the

statute of limitations that the plaintiff was ignorant of his cause of action until within six years, although that ignorance resulted from the character of the original fraud, or the manner in which it was perpetrated. *Smith v. Bishop*, 9 Vt. 110.

11. **Several remedies.** If a party have two remedies, distinct and independent, although for the same debt, as a promissory note or bond, and a mortgage to secure it, the statute bar as to one remedy does not bar the other,—the statute operating upon the remedy, and not the debt. *Reed v. Shepley*, 6 Vt. 602. *Sparhawk v. Buell*, 9 Vt. 41.

12. **Joint contractors.** One of two joint contractors, having paid the whole debt, may maintain his action for contribution, although such payment was made after the statute of limitations had run upon the debt. *Mills v. Hyde*, 19 Vt. 59. (But see G. S. c. 63, ss. 23, 28.)

13. **Certain penalties.** The limitation of six months, named in G. S. c. 25, s. 86, to a suit for penalties for obstructing, &c., a highway, does not require that the suit be brought within six months from the time the first penalty was incurred. It only bars a recovery for all such penalties as have not been incurred within six months before suit. *Londonderry v. Arnold*, 30 Vt. 401.

14. The limitation in G. S. c. 100, s. 24, of the prosecution for a fine under that act, does not apply to the forfeitures continuous in their character [so much for each day] provided for in sec. 10. *Riker v. Hooper*, 35 Vt. 457.

15. **As barring title.** Fifteen years' adverse possession of lands has the effect of a conveyance from the right owner, divesting the former owner of all which the new owner acquires. The statute (G. S. c. 63, ss. 1, 2,) is not a mere bar to the owner's right against the person only who occupied adversely, but relates to his rights to the land, divesting him of his title thereto. *Hughes v. Graves*, 39 Vt. 359.

16. The title to personal property may be lost, or gained, by six years' adverse possession. *Preston v. Briggs*, 16 Vt. 124.

17. **Presumption.** No term less than twenty years, unless aided by extrinsic evidence, is sufficient to raise a presumption of payment, in a case not coming within any of the statutes of limitations. *Matlocks v. Bellamy*, 8 Vt. 468. *Sparhawk v. Buell*, 9 Vt. 41, 75.

## 2. In chancery.

18. **Trust—Fraud.** The statute of limitations does not run, in chancery, against a subsisting trust; nor against an equity, where the grounds of it have been kept out of sight by the fraud of the party pleading the statute. *Payne v. Hathaway*, 8 Vt. 213.

19. Where a bill charges fraud, or a trust, the statute is not a good plea, without answer denying the trust, or fraud. *Id.*

20. **Legal demand.** The statute of limitations is a good plea in bar of a bill in equity, as well as of a suit at law, where it is brought for a legal demand;—this by analogy, though the statute does not in terms embrace equitable demands. *Collard v. Tuttle*, 4 Vt. 491. *Stanford v. Tuttle*, 4 Vt. 82. *Tharp v. Tharp*, 15 Vt. 105.

21. Where courts of law and of equity have concurrent jurisdiction, if the claim is barred at law by the statute of limitations, it cannot be enforced in equity. *Id.* *Hall v. Hall*, 8 Vt. 156.

22. **Presumption.** In analogy to the statute barring a right of entry after fifteen years, a mortgage debt will, after the lapse of fifteen years, be presumed in chancery to have been paid, and a bill of foreclosure will not lie. This presumption is repelled by proof of part payment, or payment of interest, or other recognition. *Martin v. Bouker*, 19 Vt. 526.

23. The doctrine of presumption in chancery is in strict analogy to the statute of limitations. That court, it is true, applies the presumption in cases not within the statute, but never to cases excepted by the statute. *Wells v. Morse*, 11 Vt. 9, 15.

24. Where the remedy is in chancery only, the statute of limitations does not directly apply, that statute, in terms, applying only to actions at law; still, a court of chancery, to quiet a stale claim and discountenance laches in the claimant, will, from lapse of time, raise a presumption of adjustment or payment, in analogy to the statute, provided the case furnishes no evidence to rebut the presumption and satisfactorily account for the delay; and no presumption can be made which is contradicted by the pleadings. *Id.* *Spear v. Newell*, 13 Vt. 288.

25. Where a mortgagee was administrator of the mortgagor's estate, and had his mortgage debt allowed by the commissioners while the heir was an infant without guardian, and there was a strong presumption of fraud in obtaining such allowance, and, upon obtaining it, the mortgagee entered into possession and so remained for more than 20 years, but not for more than 15 years after the heir became of age;—*Held*, that the statute of limitations did not apply to bar the right of redemption; that there was no presumptive bar; and that the heir might redeem. *Wells v. Morse*, 11 Vt. 9.

26. **Bar at law as ground for relief.** That a party is barred by the statute of limitations from relief at law, does not form a substantive ground of relief in equity; but, in order to such relief, the defendant must be charged and fixed with some act, or course of



conduct, which was designed to be, and in fact was, the inducement for the orator to delay the assertion of his legal claim, and thus expose it to the statutory bar. *Burton v. Wiley*, 26 Vt. 480. *Fletcher v. Warren*, 18 Vt. 45.

## II. WHEN THE STATUTE BEGINS TO RUN.

**27. From demand.** Where a right of action depends upon a demand made, the statute of limitations does not begin to run until demand. *Poultney v. Wells*, 1 Aik. 180. *Hutchinson v. Parkhurst*, 1 Aik. 258.

**28.** Where a contract is payable in specific articles or property on demand, and all at one time, and there is nothing peculiar in the terms of the contract, or other circumstances indicating that the parties contemplated any longer delay than is to be inferred from the fact that the contract is so payable, perhaps the rule adopted in certain reported cases is sufficiently liberal towards the creditor—which is, that he may have the whole period of the statute of limitations in which to make demand, and if he make no demand in that time, the statute will then commence running. *Peck, J., in Thrall v. Mead*, 40 Vt. 540; and so held in this case, distinguishing it from *Stanton v. Stanton*, 37 Vt. 411.

**29.** Where a written contract for the payment of specific articles or property, in which no certain day of payment is named, indicates of itself that the calls for payment are to be indefinitely prospective, and to be made as may suit the wants and convenience of the payee, there is no ground furnished from which the law can assume any fixed point as a limit to a reasonable time for making a demand, and from that point give operation to the statute of limitations. *Semble*, that this fixed point might be determined from other facts proved. *Stanton v. Stanton*.

**30.** A promissory note promising, for value received, to pay \$ "four hundred dollars in produce or wood from the farm on demand as he may want to use the same, on interest," had run for over twelve years without any demand or request for payment. *Held* (nothing more being shown), that the action upon it was not barred by the statute of limitations. *Id.*

**31. Default of officer.** The right of action against an officer for an insufficient levy upon land accrues immediately on the breach of duty, and the statute of limitations then begins to run; and it is not saved or deferred by the fact that the creditor went into possession under a void levy, and after quiet possession for more than six years, was afterwards evicted in ejectment by the debtor, because of the invalidity of the levy. *Hall v. Tomlinson*, 5 Vt. 228. 13 Vt. 586.

**32. Guaranty.** A guaranty that a note,

payable at a future day, "is due and that the maker has nothing to file against it," was held to refer to the time of the maturity of the note; and that the statute of limitations did not commence running on such guaranty until the note became due. *Adams v. Clark*, 14 Vt. 9.

**33. Estate tail.** The statute of limitations does not commence to run against the issue in tail, until at the death of the donee in tail. *Giddings v. Smith*, 15 Vt. 344.

**34. Interest.** The statute of limitations does not begin to run upon a demand until the principal, or at least some separate and distinct portion of the principal, becomes due and payable,—and then only upon such distinct and separate portion. The previously accrued yearly interest is not barred, if the principal is not. *Grafton Bank v. Doe*, 19 Vt. 463. 36 Vt. 599.

**35. Contract to pay after death.** Where the plaintiff supported his father's second wife at the father's request, and upon the father telling him "to carry in his claim against his (the father's) estate, after his death;"—*Held*, that this was sufficient evidence of a contract to that effect; that the statute of limitations did not begin to run during the life of the father; and that without other evidence of an agreement for the payment of interest, none could be allowed against the estate until from the father's death. *Sprague v. Sprague*, 30 Vt. 483.

**36. Propagation society.** Where the defendant took possession under a perpetual lease by the town, under the act of 1794, of lands granted in the town charter to the propagation society;—*Held*, that such possession was adverse to the society; and that such possession, commenced before the act of 1832 [which removed the exemption in previous statutes of limitations as to persons beyond seas], but continued for 15 years thereafter, gave title to the defendant against the society. *Propagation Society v. Sharon*, 28 Vt. 603.

**37. Retainer as attorney.** The defendant consulted with the plaintiffs and retained them as his attorneys in an expected litigation, for which they charged him a retaining fee. No litigation was had, and there was no further service rendered by the plaintiffs. *Held*, that the statute of limitations commenced to run from the date of the retainer, although the plaintiffs continued professionally bound thereafter by the retainer. *Adams v. Mott*, 44 Vt. 259.

**38. Entire day for payment.** December 24, 1874, the plaintiff brought suit on a promissory note dated December 24, 1867, payable generally to the plaintiff, or bearer, in one year from date, and not entitled to grace. In the absence of proof of demand and refusal of payment on the day the note fell due;—*Held*, that that should not be presumed; that the right of action accrued only at the close of the

24th day of December, 1868, and that the action was not barred by the statute of limitations. *Beeman v. Cook*, 48 Vt. 201.

**39. Disabilities.** If more than one disability exists at the time the right accrues, the statute of limitations will not begin to run until all those disabilities are removed. But successive disabilities will not save from the statute, —as where a new disability succeeds the one which existed when the right accrued. *McFarland v. Stone*, 17 Vt. 165.

### III. SUSPENSION OF THE STATUTE.

#### 1. *By supervening disability.*

**40. Death of party.** The death of a creditor after a cause of action has accrued to him, does not interrupt the running of the statute of limitations. *Conant v. Hitt*, 12 Vt. 285. (Changed by G. S. c. 68, s. 16.)

**41.** Without any special statute to that effect, it was held, that from the death of a debtor until the appointment of an administrator, the running of the statute of limitations was suspended. *Hapgood v. Southgate*, 21 Vt. 584.

**42.** If a debtor die before the statute of limitations has run upon his debt, the operation of the statute is suspended for two years at the farthest after the granting of administration (G. S. c. 68, s. 16); and such suspension is not extended by the opening of the commission for the presentation of such debt. (C. S. c. 52, s. 9.) *Briggs v. Thomas*, 32 Vt. 176.

**43. Insanity.** A disability—as, the insanity of the plaintiff—occurring after the accruing of the cause of action, does not prevent the running of the statute of limitations. *Lincoln v. Norton*, 36 Vt. 679.

**44. Minority.** No disabilities are within the saving of the statute of limitations, except such as existed at the time the right first accrued. *Tracy v. Atherton*, 36 Vt. 503. *McFarland v. Stone*, 17 Vt. 165. *Arbuckle v. Ward*, 39 Vt. 48.

**45.** Where the right to an easement in the plaintiff's lands depended upon an uninterrupted adverse use for 15 years, commenced in the lifetime of the plaintiff's ancestor;—*Held*, that it was not interrupted by a descent cast upon the plaintiff during his minority. *Tracy v. Atherton*.

**46. Agreement.** Parties claiming adverse rights in land agreed to submit their rights to arbitration, and that the party in possession should so continue until the decision of the arbitrators. *Held*, that the running of the statute of limitations was thereby interrupted, the possession under the agreement not being adverse. *Perkins v. Blood*, 36 Vt. 273.

#### 2. *Ineffectual suit.*

**47. Without fault of plaintiff.** Whenever the merits of an action fail to be tried without fault of the plaintiff, it is a case falling within G. S. c. 68, s. 17, allowing another action to be commenced in a year thereafter, though in the meantime the statute of limitations had run; and this, regardless of the particular manner in which the action terminated; as, where it was by non-suit, not voluntary, but constrained by some decision of the court. *Spear v. Newell*, 18 Vt. 288. *Phelps v. Wood*, 9 Vt. 399, 404.

**48.** G. S. c. 68, s. 17, providing for a second suit within one year after the defeat of the first “for any matter of form,” &c., does not cover the case of a defeat of the first suit by a non-suit ordered for lack of compliance with an order to furnish bail for costs, although the plaintiff through poverty was unable to furnish it. *Hayes v. Stewart*, 23 Vt. 623.

**49.** Where the plaintiff became non-suit by order of court, and it did not appear affirmatively that this was without his fault;—*Held*, that the case did not fall within the equity of this statute. *Poland v. Grand Trunk R. Co.*, 47 Vt. 73.

**50.** Where an action failed through the neglect of the justice to be present with the writ at the time and place of trial, and without fault of the plaintiff;—*Held*, that the case was within the equity of G. S. c. 68, s. 17; and that an action, brought within one year thereafter, was not barred by the statute of limitations, which had in the meantime run (as to time) upon the claim. *Spear v. Curtis*, 40 Vt. 59.

**51.** Plaintiff's guardian brought assumpsit in his own name, as guardian, and for that reason the suit was defeated without trial on the merits. The plaintiff, within one year after, by the same person as guardian, brought a new action for the same cause. *Held*, that the first action, with its result, had saved the case from the statute of limitations, under G. S. c. 68, s. 17. *Spear v. Braintree*, 47 Vt. 729.

#### 3. *Absence from the State.*

**52. Terms—“Absence.”** Section 10 of the statute of limitations of 1797 (Slade's Stat. 291) provided, that if the debtor was without this State at the time the cause of action accrued, the suit might be commenced within six years after his coming, or return, into this State. *Held*, that this applied to resident citizens of other States, who came but temporarily into this State, as well as to citizens of this State temporarily absent; and this, although both parties resided out of the State when the cause of action accrued; and although the

action was barred by the statute of limitations of the State where the cause of action accrued, and where both parties resided. *Graves v. Weeks*, 19 Vt. 178. *Dunning v. Chamberlain*, 6 Vt. 127. *Mason v. Foot*, 1 Aik. 282. *Hill v. Bellows*, 15 Vt. 727.

53. "Coming"—"Return." The "coming" or "return" into this State which sets in operation the statute of limitations where the debtor was out of the State when the cause of action accrued—as mentioned in Stat. of 1797, s. 10 (Slade's Stat. 291; R. S. c. 58, s. 14; C. S. c. 61, s. 14; G. S. c. 63, s. 15)—means a "coming" to the knowledge of the creditor, or a coming to dwell and reside permanently. *Mason v. Foot*. *Hill v. Bellows*. *Hall v. Nasmith*, 28 Vt. 791. *Davis v. Marshall*, 37 Vt. 69.

54. "Residing." A debtor must be considered "absent from" and to "reside out of the State" (G. S. c. 63, s. 15), when his domicile in this State is so broken up, that it would not be competent to serve process upon him by leaving a copy there; and for that purpose, there must be some place of abode which his family, or his effects, exclusively maintain in his absence, and to which he may be expected soon, or in some convenient time, to return, so that, a copy being left there and notice in fact proved, the plaintiff may take a valid judgment. *Hackett v. Kendall*, 28 Vt. 275.

55. If a debtor, having no intention to reside in this State, comes or returns into the State, and this is known to the creditor so that he has opportunity to make service of process upon him, the statute of limitations will be set in operation. *Mason v. Foot*, 1 Aik. 282. 30 Vt. 205.

56. "Go"—"Absence." The statute of 1832, No. 3, providing that "if any person shall go from this State before the cause of action shall be barred by the statute of limitations," "the time of such absence shall be deducted in deciding whether such cause of action is barred," &c., was held (*Bennett, J.*, dissenting) not intended to apply to a cause of action already barred under a previous statute, although the debtor had left the State before such previous statute had run. *Lourey v. Keyes*, 14 Vt. 66.

57. Nor does this statute allow, in behalf of the plaintiff, the deduction, in any case, of the time of the defendant's absence from the State before the passage of the act—it having no retrospective action whatever. *Wires v. Farr*, 25 Vt. 41. *Poland, C. J.*, in *Richardson v. Cook*, 37 Vt. 605.

58. Under C. S. c. 61, s. 15 (G. S. c. 63, s. 15) any absence of a debtor from the State, while having a residence in it so that service of process may be made upon him, is not to be taken into account to prevent the running of

the statute of limitations; otherwise, if he leave no domicile in this State. If he have a fixed residence out of this State, then all his absences from the State are to be deducted from the time of limitation fixed by the statute. *Hall v. Nasmith*, 28 Vt. 791.

59. Residence. If a debtor comes to reside in this State and actually resides here for the statute time in all, though it be with occasional interruptions, the statute of limitations will bar the claim. *Russ v. Fay*, 29 Vt. 386. *Hackett v. Kendall*, 28 Vt. 275.

60. Under G. S. c. 63, s. 15, the time of the debtor's absence from this State while residing out of it, is to be deducted in computing the period of the statute of limitations, although he was absent and resided out of this State when the cause of action accrued,—the creditor always residing in this State. *Davis v. Marshall*, 37 Vt. 69.

61. Military service. Under G. S. c. 63, s. 20, the time of absence from the State of an inhabitant of the State in the U. S. military service, is to be deducted in computing the period of the statute of limitations, notwithstanding his wife and family resided in the State during his absence. *Cardell v. Carpenter*, 42 Vt. 234.

62. This statute is retrospective, as well as prospective, in its operation; and the time of one's absence as a volunteer or enlisted soldier, in the U. S. service before the passage of the act, is not to be taken as any part of the time limited for the commencement of an action. *Cardell v. Carpenter*, 43 Vt. 84.

63. Several partners. In an action against several partners, it was held barred as to some, although not as to those who had been absent from the State. *Spaulding v. Ludlow Woolen Mill*, 36 Vt. 150.

64. "Known property." The settled construction of the terms: "known property in this State, which could by the common and ordinary process of law be attached," as applicable to the case of an absent defendant under the statute of limitations (G. S. c. 63, s. 15), is, that the defendant's ownership of the property must be notorious to such an extent that it would not escape a reasonable search and inquiry on the part of the plaintiff; but that actual knowledge of the property and of the defendant's title to it need not be possessed by the plaintiff, if by reasonable diligence he would acquire that knowledge. *Tucker v. Wells*, 12 Vt. 240. *Wheeler v. Brewer*, 20 Vt. 118. *Stoughton v. Dimick*, 29 Vt. 538. *Hill v. Bellows*, 15 Vt. 727. *Moore v. Quint*, 44 Vt. 97.

65. The "known property within this State" which saves to a defendant absent from the State the benefit of the statute, must be so far known that by reasonable diligence it can be found and attached, and it must also be of an

amount sufficient to yield a substantial benefit to the plaintiff, and be so far unembarrassed as to be liable to a levy for satisfaction of the debt. *Wheeler v. Brewer*, *Royce v. Hurd*, 24 Vt. 620. *Russ v. Fay*, 29 Vt. 881.

66. It is not enough to bring a case within this statute, in case of a debtor absent from the State, that he should show he had deeds of land in this State on record, without proof of title; but he must prove that he had known and visible property within the State from which the plaintiff could have satisfied his demand, by attachment and levy of execution. *Hill v. Bellows*, 15 Vt. 727.

67. Known property in this State belonging to a partnership, not shown to be insolvent, of which an absent debtor is a member, is such property of the debtor, within this statute, as "could by the common and ordinary process of law be attached." *Russ v. Fay*, 29 Vt. 881.

68. Whether, in a given case, mortgage incumbrances would exclude property from the expression "known property which could, by the common and ordinary process of law, be attached," would depend on whether, by attachment and levy, the creditor might derive substantial benefit in the matter of getting pay upon his debt. *Moore v. Quint*, 44 Vt. 97.

69. The statute of limitations will run in favor of a party residing out of this State, during the time that he has known attachable property within it, although his ownership is not continuous; and if amounting in all to six years (or other statute period), will bar an action. (G. S. c. 63, s. 15.) *Russ v. Fay*, 29 Vt. 881. *Dictum contra* in *Royce v. Hurd*, 24 Vt. 620, denied.

70. A replication to a plea of the statute of limitations, that the defendant had resided out this State, &c., without averring that he had had no known property in this State, &c., had not been within the State, &c., was held ill. *Stevens v. Fisher*, 30 Vt. 200.

#### IV. AVOIDANCE OF STATUTE.

##### 1. By acknowledgment; new promise; part payment.

71. **Acknowledgment of debt — New promise.** An unqualified acknowledgment that a debt is due, takes it out of the statute of limitations. *Barlow v. Bellamy*, 7 Vt. 54. *Gailer v. Grinnel*, 2 Aik. 349.

72. The admission of a debt as due takes it out of the statute, though the debtor says he is poor and unable to pay it, and for that reason refuses to give a new note for it. *Olcott v. Scales*, 8 Vt. 178.

73. An acknowledgement or new promise within six years, removes the bar of the statute

as to a judgment, as well as to a simple contract. *Id.*

74. It is not essential to the sufficiency of an acknowledgment of a debt so as to take it out of the statute of limitations, that the acknowledgment be made to the creditor, his agent, or servant. It may be sufficient if made to a stranger. *Brewin v. Farrell*, 39 Vt. 206. *Blake v. Parleman*, 18 Vt. 574. *Minkler v. Minkler*, 16 Vt. 193. *Hunter v. Kittredge*, 41 368.

75. The effect of a new promise, or of part payment, to avoid the statute, is the same, whether made before or after the limitation has run. *Carlton v. Ludlow Woolen Mill*, 27 Vt. 496.

76. The acknowledgment of a debt barred by the statute, includes as well the interest as the principal, unless the acknowledgment be limited. *Williams v. Finney*, 16 Vt. 297.

77. An acknowledgment of an existing debt, or promise to pay it, does not keep the right of action in life beyond the period fixed by the statute, dating from the time of such acknowledgment or new promise. *Munson v. Rice*, 18 Vt. 53.

78. An acknowledgment or part payment of the debt by one of several joint contractors, removes the bar of the statute as to all. *Wheelock v. Doolittle*, 18 Vt. 440. *Wilson v. Green*, 25 Vt. 450. *Joslyn v. Smith*, 18 Vt. 353. (Changed by G. S. c. 63, s. 23.)

79. But this statute (G. S. c. 63, s. 23) does not apply to the case where one partner, as agent for the firm, makes a part payment from the partnership funds. *Carlton v. Coffin*, 28 Vt. 504.

80. Where there is no dispute about the facts and what the admissions are, which are insisted on as taking a case out of the statute of limitations, their effect is a question of law. *Chapin v. Warden*, 15 Vt. 560. *Phelps v. Stewart*, 12 Vt. 256.

81. The acknowledgment of a debt, barred by the statute, from which a new promise to pay can be implied, must be an acknowledgment of the debt as subsisting and still due—a distinct, unqualified acknowledgement. *Brewin v. Farrell*, 39 Vt. 206—with an apparent willingness to remain liable for it, or, at least, without an avowed intention to the contrary. *Phelps v. Stewart*, 12 Vt. 256. *Blake v. Parleman*, 18 Vt. 574. *Cross v. Conner*, 14 Vt. 394. *Carruth v. Paige*, 22 Vt. 179. *Brainard v. Buck*, 25 Vt. 578. *Aldrich v. Morse*, 28 Vt. 642. *Bowker v. Harris*, 30 Vt. 424. *Moore v. Stevens*, 33 Vt. 308. *Goodwin v. Buzzell*, 35 Vt. 9. *Hunter v. Kittredge*, 41 Vt. 359.

82. An unqualified acknowledgment of a debt, barred by the statute, as unpaid and still subsisting, with an apparent willingness to remain liable for it, or unaccompanied by any

unwillingness to pay it, is evidence from which a new promise is to be inferred, and will take the case out of the statute. *Phelps v. Stewart. Blake v. Parleman. Moore v. Stevens. Brewin v. Farrell. Hunter v. Kittredge. Brayton v. Rockwell*, 41, Vt. 621.

83. But the mere acknowledgment of an original indebtedness, is not sufficient. It must be such, as that a promise to pay can be implied. *Brainard v. Buck*, 25 Vt. 578. *Brayton v. Rockwell*.

84. An acknowledgment by the defendant that certain notes against him existed, and that he had an account to go against them, and a promise to call and have the notes and account settled, were held sufficient to take the notes out of the statute of limitations. *Chapin v. Warden*, 15 Vt. 560.

85. The debtor's promise to pay a debt barred by the statute, "as soon as he could," was held to remove the statute bar, without proof of his ability to pay. *Cummings v. Gassett*, 19 Vt. 308.

86. A declaration by the defendant, that "the plaintiff's account ought to be settled, that he would call and settle it, and did not suppose there was much due," is a sufficient acknowledgment to take the account out of the statute. *Williams v. Finney*, 16 Vt. 297.

87. So, where the defendant requested a third person to call on the plaintiffs and settle his account with them, saying he thought he had paid them more than was due; and afterwards said to the same person, that the plaintiffs' account was not settled. *Blake v. Parleman*, 18 Vt. 574.

88. So, where the defendant said he did not suppose he ought to pay the demand, but that, if it was right, he would pay it, as he did not mean to decline paying a just debt; and said to the officer, when the writ was served upon him, that he had assured the plaintiff that he would not take advantage of the statute of limitations. *Paddock v. Colby*, 18 Vt. 485. (*Questioned in Carruth v. Paige*, 22 Vt. 179.)

89. So, saying that the statute of limitations should make no difference; that he and the plaintiff would look over their accounts, and what was due the plaintiff should have. *Cooper v. Parker*, 25 Vt. 502; and see *Minkler v. Minkler*, 16 Vt. 198.

90. But, saying that it was a just debt and ought to have been paid, but he became poor and could not pay it, but that he would pay one-half of it the next winter if the plaintiff would give up the note, does not take the case out of the statute. *Cross v. Conner*, 14 Vt. 394.

91. Nor does a declaration by the defendant that he would not take advantage of the statute, but if it was a just account he would pay it,—when he at the same time contended

that it was not a just account. *Carruth v. Paige*, 22 Vt. 179.

92. If a debtor denies his indebtedness, but expresses a willingness to settle it, if established, and the indebtedness is proved to have existed, the admission is sufficient to take the case out of the statute of limitations. *Paddock v. Colby*, 18 Vt. 485. *Hill v. Kendall*, 25 Vt. 528. *Steele v. Towne*, 28 Vt. 771. But see *Carruth v. Paige*, 22 Vt. 179; and *questioned in Moore v. Stevens*, 33 Vt. 308.

93. Within six years, the plaintiff requested the defendant to apply the claim now in suit upon certain demands which the defendant then had against him. The defendant replied, "No matter about it—it will all come right;" and at another time, on like request, he said "he was too busy." Held, that the operation of the statute was not saved thereby. *White v. Dow*, 23 Vt. 300.

94. As to the note in suit, the defendant said "he had signed with his son, and in the end he thought he should have this to pay;" and added, "that there had been enough paid to pay the debt, if it had been paid when it should have been," or, "in the first place." Held, that such acknowledgment prevented the operation of the statute of limitations. *Phelps v. William-son*, 26 Vt. 230.

95. An admission by the maker of a promissory note, that the amount of it is to be deducted from a larger claim which he has against the holder, is a sufficient acknowledgment to remove the statute of limitations. *Brigham v. Hutchins*, 27 Vt. 569.

96. The defendant, being called upon for payment of his note, said: "I supposed it was paid by White, by an arrangement; tell your father (the plaintiff) to put White up to pay it;—if he does not, I shall have to pay it." Held, as matter of law, that this took the note out of the statute of limitations. *Hayden v. Johnson*, 26 Vt. 768.

97. A receipt in full was given by the defendant, "one item only excepted," [specifying that], "*which may be adjusted as the facts may prove.*" In an action to recover that item;—Held, that the case was taken out of the statute by the terms of the receipt. *Sweet v. Hubbard*, 36 Vt. 294.

98. Under an issue formed upon a plea of the statute of limitations, the plaintiff proved that the defendant had admitted, on the day of a former trial, "that the plaintiff had an old judgment against him, then on trial, and that he was willing to pay it, and would pay it the next fall in cash, or labor." Held, that this was legally sufficient to authorize the finding of the issue against the plea. *Stevens v. Hewitt*, 30 Vt. 262.

99. An acknowledgment that an account is open and unadjusted, or a promise to settle and

adjust it, will take the account out of the statute, unless accompanied by language showing that the party was unwilling to pay the balance found due, if it should be found against him. *Prentiss v. Stevens*, 88 Vt. 159. *Blake v. Parleman*, 18 Vt. 574. *Minkler v. Minkler*, 16 Vt. 193. *Williams v. Finney*, 16 Vt. 297. *Cooper v. Parker*, 25 Vt. 502.

100. An acknowledgment of an open and unsettled account was held sufficient to take the whole account out of the statute, in the absence of proof of any other dealings to which the acknowledgment could apply. In the absence of such proof, such is the only reasonable presumption. *Prentiss v. Stevens*, 88 Vt. 159, distinguished from *Kimball v. Baxter*, 27 Vt. 628.

101. An acknowledgment that an account is open and unadjusted, and a promise to settle and adjust it, where part of the account was barred by the statute, was held to apply to the whole account, like a payment on account, and to remove the statute bar. *Prentiss v. Stevens*.

102. An unqualified promise "to settle book accounts" which are barred by the statute, is a direct admission of unsettled accounts existing between the parties at the time of such admission, and such promise, when unaccompanied by any unwillingness to pay the balance, if any, implies a promise to pay whatever balance should, upon such settlement, be found due. *Hunter v. Kittredge*, 41 Vt. 359.

103. Agreement not to take advantage of the statute. A mutual agreement between parties that they will take no advantage of the statute of limitations in the final settlement of their respective claims, prevents the running of the statute; and the expression of the opinion by one, that he shall not be owing upon a final settlement, will not affect the agreement. *Noyes v. Hall*, 28 Vt. 645.

104. The agreement of a debtor that he will not take advantage of the statute of limitations, operates as an estoppel, and also contains an acknowledgment of the debt and a promise to pay. It need not be pleaded as an estoppel, but may be shown in evidence under the issue formed by traversing the plea of the statute. *Burton v. Stevens*, 24 Vt. 131. *Stearns v. Stearns*, 32 Vt. 678. *Paddock v. Colby*, 18 Vt. 485.

105. Other instances. An offer, not accepted, to pay part of a debt barred by the statute, with a refusal to pay more, is not such an acknowledgment as will remove the statute bar. *Aldrich v. Morse*, 28 Vt. 642. *Slack v. Norwich*, 32 Vt. 818.

106. The defendant, after the commencement of the suit and about the time of the trial, admitted that the plaintiff's account was just when it accrued, but claimed that he had paid it to one E and that E was authorized by the

plaintiff to receive such payment; and promised to pay the account, if he did not prove that he had already paid the same. The auditor reported that he did not find that E was authorized to receive payment, and that the defendant failed to prove that he had ever paid the account. Held, that there was no such acknowledgment, or new promise, as to take the account out of the statute. *Moore v. Stevens*, 33 Vt. 808. (*Hill v. Kendall*, 25 Vt. 528, and *Steele v. Towne*, 28 Vt. 771, so far as they conflict herewith, questioned. *Id.* 810.)

107. In a conversation about the plaintiff's account, the defendant claimed that he did not owe it, but added, "if he will swear to that account I will pay it"; and afterwards said, "I do not think that account is just, but if it is just I will pay it." Held, that these were not such acknowledgments as took the account out of the statute. *Goodwin v. Buzzell*, 35 Vt. 9.

108. The defendant's note, signed in his name by an agent, which was given in the agent's business and which it was his duty to pay, was presented by the holder to the defendant for payment. The defendant told the holder that he ought to have his pay, that it was right he should have it, but that he (the defendant) had lost a great deal in this business, and was not worth anything, and could not pay it. Held, that such acknowledgment was not sufficient to take the case out of the statute. *Galpin v. Barney*, 37 Vt. 627.

109. Where the plaintiff applied to the defendant to renew some notes barred by the statute, the defendant declined, but said, "I will come up soon and have a general settlement of accounts, and if all accounts are all right, other matters will be all right." And, on a second application to renew, the defendant refused, saying: "We have a long string of accounts to look over. If I find that all right and satisfactory, the notes will be all right." Held, that this did not remove the statute bar. *Brayton v. Rockwell*, 41 Vt. 631.

110. New promise to be in writing. G. S. c. 68, s. 25, requiring the new promise to be in writing in order to take a case out of the statute of limitations, was held, on construction, not to apply to a pre-existing debt and a verbal new promise made before the passage of the act. *Richardson v. Cook*, 37 Vt. 599.

111. Part payment. Part payment of a debt barred by the statute, if made without protestation against further liability, is a recognition and acknowledgment of the debt, from which a promise to pay the residue will be implied. *Ayer v. Hawkins*, 19 Vt. 26. 35 Vt. 11.

112. A general payment or credit upon an account, within six years, has the effect to take the whole account out of the statute, upon the ground that it is an acknowledgment of an un-

settled account between the parties. *Hutchinson v. Pratt*, 2 Vt. 146. *Strong v. McConnell*, 5 Vt. 338. 38 Vt. 162.

113. In order that the items of an account may be saved from the statute by a payment, such payment must be made on the general account, and with a view to affect the general balance, thereby acknowledging the existence of an open, running account, which is to be the subject of future adjustment. Payment of specific items of charge, unaccompanied by any circumstances showing a recognition of any other account, will not remove the operation of the statute. *Hodge v. Manley*, 25 Vt. 310.

114. Where one pays, or promises to pay, part of a debt to be in full of the debt, or refuses to pay the other part, such promise or payment of part will not take the balance of the debt out of the statute. *Phelps v. Stewart*, 12 Vt. 256. *Bowker v. Harris*, 30 Vt. 424; and see *Aldrich v. Morse*, 28 Vt. 642.

115. One summoned as a trustee denied his liability, but, forgetting the day of trial, was adjudged trustee on default, and paid the judgment. *Held*, that this did not operate as such an acknowledgment of indebtedness, as to take his debt to the defendant in that suit out of the statute. *Goodwin v. Bussell*, 35 Vt. 9.

116. The defendant assigned to a trustee for certain creditors all his demands, to be collected by the assignee and paid to such creditors. Within six years before suit the assignee received payment of one of said demands, and an entry of the payment was made on the books of the assignee by the defendant, who was his clerk. *Held*, that the case was not thereby taken out of the statute. *Hard v. Edgell*, 35 Vt. 510.

117. An indorsement of part payment upon a written contract, as affecting the statute of limitations, operates as an acknowledgment only at the time when the payment was in fact made, and not at the time when the indorsement was made, when that was made at some other time. *Hayes v. Morse*, 8 Vt. 316.

118. The plaintiff proposed to take certain specified property then at defendant's house, and of less value than \$40, and apply it on a note which he held against the defendant. The defendant assented. No price was named, nor time named for the defendant to deliver the property, nor for the plaintiff to send for it. The plaintiff, some six months afterwards, sent a man who got the property and brought it to him, and he then indorsed it, as of that date, on the note. *Held*, for the purposes of the statute of limitations, that the payment must be reckoned as of the date of the agreement, and not the date of the taking of the property. *Lincoln v. Johnson*, 43 Vt. 74.

119. A promissory note executed by B, as agent, in the name of the defendant, but really

made in B's own business, and barred by the statute, was presented by the holder to the defendant who, though acknowledging the debt, declined any promise to pay. The holder then presented the note to B for payment or renewal, who said he had no authority to make a new note, but offered to pay a dollar upon the note and have it indorsed, saying, that would renew it, and then paid the dollar from his own money, and indorsed it upon the note. *Held*, that this did not revive the note as to the defendant. *Galpin v. Barney*, 37 Vt. 627.

## 2. Mutual accounts.

120. Where there are mutual, current, and unsettled dealings and accounts between parties, if any of the items are within six years, the whole accounts are taken out of the statute of limitations. *Wood v. Barney*, 2 Vt. 369.

121. In the case of mutual accounts, each item of debt or credit draws after it such as are within six years preceding, and the statute is no bar to a recovery of the balance, if the suit be brought within six years of the date of the last item;—and this is so, although the accounts were kept by only one of the parties. *Hutchinson v. Pratt*, 2 Vt. 146.

122. But where the account is all of one side, without credits, and without charges by the other party, the statute will bar all such items as are not within six years of the bringing of the suit. *Id. Chipman v. Bates*, 5 Vt. 143. *Munson v. Rice*, 18 Vt. 53.

123. Where the items of an account are all on the debit side, the cause of action arises from the date of each item, and has reference to that item separately, without regard to the general balance of the account, so that the entry of a new item has no effect upon the operation of the statute of limitations as to previous items; but in the case of mutual dealings and accounts, the cause of action dates from the last item of credit, and has reference to the balance of the general account, and each new item of credit, or part payment, is equivalent to a new promise to account and pay the balance due—that is, where such new item is with the mutual understanding, express or implied, that it is to enter into the mutual dealings or accounts of the parties, and be the subject of future adjustment in ascertaining the general balance due. *Abbott v. Keith*, 11 Vt. 525. *Hodge v. Manley*, 25 Vt. 310.

124. For a portion of the plaintiff's open account against the defendant, B, a third person, was liable to the defendant. Within six years before this suit, the several parties together examined the plaintiff's whole account, and the defendant and B selected the items which B was to pay for, and he paid the plaintiff therefor, and the plaintiff credited on the ac-

count the sum paid. *Held*, that such examination of the whole account by the defendant, without objection made to any part of it, accompanied by such payment of part of it, was such a recognition of the account, as to save it from the statute of limitations. *Sanderson v. Milton Stage Co.*, 18 Vt. 107.

125. In matters of account, one party may credit to the other items that represent a legal indebtedness that *should* go into the account, and thereby avoid the bar of the statute of limitations, although the other party has not charged such items, and insists that they should not be allowed him. *Davis v. Smith*, 48 Vt. 52.

#### V. PLEADING.

126. The taking out of a writ is the commencement of an action to save the statute of limitations, if delivered for service in season to be served and returned to the court to which it is made returnable, and is so served. *Allen v. Mann*, 1 D. Chip. 94. *Day v. Lamb*, 7 Vt. 426. And the date of the writ is *prima facie* evidence that it issued at that date. *Day v. Lamb*.

127. Where the statute of limitations was eight years (as in an action of debt on judgment);—*Held*, that a new promise, or acknowledgment, within eight years, was a sufficient answer to a plea of the statute. *Gailer v. Grinnel*, 2 Aik. 849. 22 Vt. 98. 8 Vt. 162.

128. To an action of debt on judgment the

plea was, that the cause of action *did not accrue* within eight years. A replication, that within six years, &c., the defendant *promised to pay* the judgment, was *held* ill on special demurrer. *Russell v. Stevens*, 20 Vt. 53.

129. Where a part payment, acknowledgment, or new promise is relied upon as against a plea of the statute of limitations, the usual replication, viz: a traverse of the plea, is sufficient. *Aldrich v. Williams*, 12 Vt. 413, 419. *Gailer v. Grinnel*, 2 Aik. 849. *Russell v. Stevens*.

130. So *held*, where there was an agreement not to take advantage of the statute. *Burton v. Stevens*, 24 Vt. 181. *Stearns v. Stearns*, 32 Vt. 678.

131. To a plea of the statute, a replication that within six years the defendant had paid part of the debt, was *held* ill on general demurrer. This was pleading the evidence, instead of the fact, of a new promise. *Aldrich v. Williams*, 12 Vt. 413.

132. Where the statute begins to run from the time of making the promise, a plea in assumpsit that the defendant did not *assume and promise* within six years, &c., is well enough; but in cases where the cause of action accrues after making the promise, as where the promise is to pay at a future day, the plea must be that *the cause of action did not accrue* within six years, &c. *Cook v. Kibbee*, 16 Vt. 484.

## M.

### MAINTENANCE.

1. The offense of *maintenance* seems now to be confined to the intermeddling of a stranger in a suit, for the purpose of stirring up strife and continuing litigation. *Dorwin v. Smith*, 35 Vt. 69.

2. It is not committed by parties who enter into an agreement to maintain and defend each other, in a matter in which they believe their interests to be identical. *Ib.*

See CONTRACT, 85.

3. The purchase of a pending suit for property converted, to be prosecuted at the purchaser's own risk and expense, was *held* not to be *maintenance*. *Semble*, that the common law offense of maintenance, or champerty, has not been adopted in this State. *Danforth v. Streeter*, 28 Vt. 490. See *Wright v. Whithead*, 14 Vt. 268.

See ATTORNEY, 29, 30.

### MALICIOUS PROSECUTION.

1. When an action lies therefor. An action on the case for malicious prosecution lies only where there has been a legal prosecution, a judicial proceeding. A declaration was *held* ill on demurrer, which was according to the form for a second count in 2 Ch. Pl. [611], averring only a charge made, an arrest, discharge and acquittal, but failing to state a judicial proceeding. *Drew v. Potter*, 39 Vt. 189.

2. An action will lie for the malicious prosecution of a civil suit, though that suit was commenced by a summons only. *Closon v. Staples*, 42 Vt. 209.

3. In an action for a malicious prosecution commenced by complaint to a justice, who had power only to bind over or discharge;—*Held*, that the prosecution was sufficiently ended to warrant the action, where the prosecuting attorney entered a *nolle prosequi* which the justice minuted upon his files, and where the justice



in fact discharged the party and the proceedings came in fact to an end. *Driggs v. Burton*, 44 Vt. 124.

4. A suggestion to the State's attorney by the respondent, that it was hard to hold him any longer before the examining magistrate, followed by the promise to enter and the entering of a *nolle prosequi*, and the discharge of the respondent, was held not to be such an ending of the prosecution by consent, as to bar the respondent of his action for a malicious prosecution, where it did not appear that the action of the State's attorney, or of the prosecutor, was influenced by such suggestion, but that the prosecution was ended for other reasons. *Ib.*

5. **Probable cause—Malice.** In an action for malicious prosecution, the plaintiff must prove both want of probable cause, and malice. *Ib.* *Barron v. Mason*, 81 Vt. 189.

6. **What is probable cause.** Probable cause is such a state of facts and circumstances as would induce a reasonable, prudent and conscientious man to believe the party guilty of the offense charged. *Ib.*

7. — **is a question of law.** What constitutes probable cause is a question of law for the court, and all inferences to be drawn from facts undisputed, or found by the jury to exist, are inferences of law, and not of fact, and are to be drawn by the court, and not by the jury. *Ib.* *French v. Smith*, 4 Vt. 363. *Hathaway v. Allen*, Brayt. 152.

8. **Rule how applied.** In practice, a true application of the rule seems to require that if none of the facts are in dispute, the question of probable cause arising upon them should be decided by the court as a question of law, without the intervention of the jury at all; that if some of the facts are undisputed and others are in controversy, and the question of probable cause cannot be determined upon the undisputed facts without determining the existence of those in dispute, then the case should be presented to the jury by stating which of the disputed facts are to be passed upon and how, so that by determining the mere existence or non-existence of them, the question of probable cause, or the want of it, will be determined according to the view of them, in law, taken by the court. *Driggs v. Burton*.

9. **Malice a fact of intent.** The question of malice, in this action, is always one of intent, and is a question for the jury. *Ib.*

10. The questions of probable cause and of malice present distinct issues, and there is no necessary, or even natural connection between them. *Redfield, C. J.*, 81 Vt. 197. Each must be proved, and the proof of either one will not, as matter of law, supply proof of the other. The same facts that would make out the want of probable cause in many, and probably in most cases, would tend to show malice. In

such case, the evidence should be submitted upon the question of malice independently, and that question should not be left to depend upon or follow the finding upon the other. 44 Vt. 149.

11. Although malice is a *prima facie* inference from want of probable cause, this may be rebutted by evidence, since one may act in good faith, and yet not from any reasonable or probable cause. *Redfield, C. J.*, 81 Vt. 196-7. (Limitation of this *prima facie* inference. *Closson v. Staples*, 42 Vt. 209. *Driggs v. Burton*, 44 Vt. 148.)

12. **Distinction.** The difference between proof of probable cause and malice consists chiefly in this: that probable cause has reference to the common standard of human judgment and conduct, while malice regards the mind and judgment of the defendant in the particular act charged as a malicious prosecution. *Redfield, C. J.*, 81 Vt. 198.

13. **Inference.** The burden is on the plaintiff to prove a want of probable cause, and that cannot be inferred from malice. *Closson v. Staples*, 42 Vt. 222.

14. The question of malice is a question of fact for the jury. The court below charged: "That the question of malice was a question of fact for the jury to find from the evidence; that from the nature of the question it was generally, to a considerable extent, a matter of inference to be drawn from circumstances proved in the case; that the jury might or might not infer malice from the want of probable cause; that it was for the jury to say, upon the whole evidence bearing upon this point, whether the defendant, in prosecuting that suit, acted maliciously or not." Held to be correct, for "from the whole charge we think the jury did not understand that the question of malice was to be treated as a mere inference from the want of probable cause, but a question for them to determine upon the whole evidence in the case." *Closson v. Staples*, 42 Vt. 211, 222. See *Barron v. Mason*, 81 Vt. 196.

15. **Evidence.** Evidence may be given, as tending to prove both probable cause and want of malice, that the defendant received information, with such directness and certainty as to gain credit with prudent men, of the existence and susceptibility of proof of such facts as show guilt, or which the defendant, upon proper advice, supposed would constitute guilt; and common repute, not only of the general bad character of the plaintiff, but also as to the particular offense, is evidence to rebut the inference of malice. *Barron v. Mason*, 81 Vt. 189. *French v. Smith*, 4 Vt. 363.

16. That the plaintiff had committed other like offenses, which had come to the knowledge of the defendant, is evidence of probable cause. *Barron v. Mason*.

17. **Pleading.** In an action for malicious prosecution, it is not necessary to set out the first process or proceedings fully, but only the substance. *Closson v. Staples*, 42 Vt. 209.

18. The declaration alleged facts which showed a want of probable cause, and added, "and all without cause"; and in another place, "and so the defendant has without any probable cause wronged and injured the plaintiff unlawfully." *Held* sufficient on motion in arrest, although the declaration contained no averment in terms, that the suit was without probable cause. *Id.*

19. **Damages.** In an action for the malicious prosecution of a civil suit which had been brought by the present defendant in the name of another person, the plaintiff may recover, as part of his general damages, the excess of his taxable costs unpaid in the first suit, beyond the amount for which bail had been given, such nominal plaintiff then being and remaining insolvent. *Id.*

20. In an action for a malicious prosecution for perjury, the plaintiff was allowed to read a newspaper account of the prosecution, as bearing on the question of damages. *Held* correct, as being a natural consequence of the act of prosecution and as giving notoriety to the fact of the prosecution. *Driggs v. Burton*, 44 Vt. 124.

### MANDAMUS.

1. Where an act is of a judicial nature, its performance cannot be enforced by *mandamus*, except where the law has peremptorily directed it to be performed, or where the right is clear and no discretion exists in the inferior court in relation to it. Thus, it does not lie to compel the county court to accept a report of auditors, although it does lie to compel them to proceed to judgment, if they unreasonably refuse so to do, but without prescribing what judgment they shall give. *Richards v. Wheeler*, 2 Aik. 369.

2. *Mandamus* issued commanding jail commissioners to receive and hear the application of a prisoner to take the poor debtor's oath. *Hoar v. Jail Commissioners*, 2 Vt. 402.

3. A writ of *mandamus* will not be issued to compel the performance of a mere service, but only to compel the discharge of duties imposed by law, as distinguished from duties imposed by contract merely. Thus, where a legislative committee, appointed by joint resolution to make certain inquiries and to investigate and make report, with power to send for persons and papers and employ counsel, but not expressly empowered to appoint a clerk, employed a stenographer to take down the

testimony given before the committee, the court refused a *mandamus* to compel him to write out and furnish the committee a transcript of his minutes, that it might be made a part of their report. *Bailey v. Oviatt*, 46 Vt. 627.

4. The writ of *mandamus* is subject to the legal and equitable discretion of the court, and ought not to be issued in cases of doubtful right. *Free Press Ass'n. v. Nichols*, 45 Vt. 7.

5. An act of incorporation provided for the opening of books for receiving subscriptions to its capital stock, under the direction of seven commissioners named, or a majority of them, and one of them refused to act. The court refused a *mandamus* upon him, for the reason that the other commissioners were ready to act, and could act effectually without him, and so the writ was not needed. *In re White River Bank*, 23 Vt. 478.

6. Where the county court has committed a legal error in highway proceedings—as, in dismissing an appeal from the assessment of land damages, or in refusing to establish a highway upon the report of commissioners—the supreme court, upon proper petition, will issue to the county court a *mandamus* in the nature of a *procedendo*, disregarding its former judgment. *Rand v. Townshend*, 26 Vt. 670. *Woodstock v. Gallup*, 28 Vt. 587.

7. An application for a *mandamus*, requiring a justice to amend his record by stating the fact that a demand was pleaded in set-off, was refused, on the ground that the demand was of insignificant consequence [\$3.00], and because the amendment would not avail the petitioner. But this was done without costs, because it was the fault of the justice that he had not made his record according to the fact. *Hall v. Crossman*, 27 Vt. 297.

8. Writs of *certiorari* and *mandamus*, and their offices, and distinction between them, discussed. *Woodstock v. Gallup*, 28 Vt. 587.

9. A writ of *certiorari* is adapted to quashing the whole or some distinct part of erroneous or irregular proceedings, but not to requiring further proceedings. A petition for a *certiorari*, where the county court had erroneously dismissed a petition for the laying out of a highway, was allowed to be amended, and the supreme court thereupon awarded a *mandamus* in the nature of a *procedendo*. *Moore v. Chester*, 45 Vt. 503.

10. Proceedings under a petition by the town agent, in behalf of the town, for a writ of *quo warranto*, or *mandamus*, against a usurping town clerk, and rule thereon to show cause why, &c., were sustained, although the writ of *mandamus* for possession of the town records might more properly have been supplicated by the lawful town clerk. *Walter v. Belding*, 24 Vt. 658.

11. A petition for a *mandamus*—as, that a

collector shall execute a deed of lands bid in for taxes—will not be dismissed on motion because it does not allege all the particular facts so that the case can be tried upon a demurrer. All that is requisite is, to state the right and duty in general terms. *Kidder v. Morse*, 26 Vt. 74.

12. In such case, *held*, that it was not necessary to show that all the previous proceedings had been regular, or to contest these questions with the collector; but that the land having been sold by the collector, the price paid, and the land not redeemed, he was bound to execute the deed, and let the purchaser make what he could of it. *Ib.*

13. Instance of *mandamus* on State treasurer to pay to the receiver of an insolvent bank the amount of the "bank fund," as ordered and decreed by the court of chancery against a former treasurer. *Miner v. State Treasurer*, 39 Vt. 92.

14. A petition for a *mandamus* by the receiver, in such case, is not a continuation, by way of supplement to the original proceeding, in such sense that the venue of that proceeding draws to it and fixes the venue of the petition; but it may be brought in the county where the petitioner resides. *Ib.*

15. Instance of *mandamus* to justices, to certify an appeal from an order of removal in a pauper case. *Orange v. Bill*, 29 Vt. 442. 32 Vt. 680.

## MARRIAGE.

1. **What is.** An agreement of marriage *per verba de presenti* before a justice of the peace in Canada, not there authorized to solemnize marriage, followed by uninterrupted cohabitation of the parties there and in this State for some 18 years, was *held* a sufficient marriage, in a settlement case. *Newbury v. Brunswick*, 2 Vt. 151.

2. That a marriage *per verba de presenti*, if followed by cohabitation, is valid, could, I think, hardly be regarded as law in this State, without virtually repealing our statute upon that subject. *Redfield, J.*, in *Northfield v. Plymouth*, 20 Vt. 582.

3. **Void.** A marriage celebrated by a justice, but without consent of the parties, or by force and duress, is void. *Mount Holly v. Andover*, 11 Vt. 226. 18 Vt. 467. 42 Vt. 725. **INSANE PERSON, 7, 8. DIVORCE, 7.**

4. Where a marriage is void, and it comes in controversy collaterally between those not parties to the contract, it may be impeached and treated as a nullity. *Mount Holly v. Andover*. *Manchester v. Springfield*, 15 Vt. 385.

5. **Chancery.** A contract of marriage, solemnized, was decreed void in chancery. *Clark v. Field*, 18 Vt. 460.

6. **Effect on suit.** Where a *feme sole* plaintiff marries pending the suit and the husband does not enter to prosecute, as prescribed by the statute, the suit may be dismissed without plea in abatement, by the defendant's filing a certificate of the marriage. *Campbell v. Kathare*, Brayt. 21.

7. The statute (G. S. c. 71, ss. 8, 9, 10) providing that when an unmarried woman, being plaintiff, marries before "final judgment," her husband shall come in as a party, otherwise, &c., does not apply to the case where she marries after final judgment in the county court in her favor and the case has passed to the supreme court on the defendant's exceptions. *Sweet v. Sherman*, 21 Vt. 23.

8. —**on power.** Where a *feme sole*, administratrix, submitted a matter to arbitration and appointed an attorney to attend before the arbitrators, but married before the award;—*Held*, that such marriage extinguished her powers as administratrix, and determined the power of the arbitrators, and that an award thereafter made was void. *Abbott v. Keith*, 11 Vt. 525.

9. —**on will.** *Semble*, that a woman's marriage does not operate to revoke her previously made will, except as to such property as the marriage conveys to the husband. *Morton v. Onion*, 45 Vt. 145. But see *S. C.*, 49 Vt.

10. **Proof of.** On trial for adultery, the marriage cannot be proved by reputation; it might be otherwise in an action for *crim. con.* *State v. Annice*, N. Chip. 9.

11. — **in another State.** On trial of an indictment for being found in bed with another man's wife, "under such circumstances," &c. (G. S. c. 117, s. 3), to prove a marriage in fact the witness testified, that about six years ago he went with the woman before one J B, whom the witness called a justice of the peace, at G, in the State of New York, and was there married to the woman by said J B, and that thereupon and thereafter, for two years, they lived together as man and wife, and that she was still his wife. *Held* sufficient to warrant the finding of a marriage in fact,—the court saying, that by the laws of New York a marriage is legal if the parties appear before a magistrate and declare their consent to a marriage; and that it was not necessary to prove the law, if it was known to the court at the trial, or if it is now known to be as decided on the trial. *State v. Rood*, 12 Vt. 396. But see *contra, infra*, 12.

12. In an indictment for bigamy, a paper purporting to be a marriage certificate signed by one as a justice of the peace of another State does not prove itself, and is not of itself evidence. To make it evidence of a former

marriage, the signature should be proved; also that the subscriber was a justice, and that by the laws of that State a justice had authority to solemnize marriages. *State v. Horn*, 48 Vt. 20; and see *State v. Abbey*, 29 Vt. 65.

13. **Divorce.** On petition for divorce, reputation was admitted as proof of marriage, where the solemnizing magistrate was dead, and no record could be found. *Mitchell v. Mitchell*, 11 Vt. 184.

14. **Presumption.** Where a woman was married and, after a short cohabitation, the husband absconded and was not afterwards heard of, and the woman after nearly two years from the desertion married another man;—*Held*, in a settlement case, that the ordinary presumption of the continuance of the life of the first husband must yield to the presumption against the commission of crime by the second marriage, and that the court would not presume the second marriage to be illegal and void. *Greensboro v. Underhill*, 12 Vt. 604. Questioned in *Northfield v. Plymouth*, 20 Vt. 590.

15. Where a woman abandoned her husband, and she and another man "took each other" for husband and wife before a justice, and lived together as such for some 25 years, when her husband died, after which she and the second man continued their cohabitation for some seven years, when he also died;—*Held*, that the presumption was forced and ought not to be made, that she was married to the second man after the death of the first, since her connection with the second was illicit in its origin; but that any presumption of the kind should be left to its natural force, as matter of fact, to the jury. *Northfield v. Plymouth*, 20 Vt. 582.

16. **Identity of parties.** An ancient record of a marriage in this form: "James Priest, Jr., married October 1, 1795, by James Smith, justice," was *held* good as far as it went, and proved the marriage of Priest to *some one*; and that the fact that as early as March, 1796, Priest was found living with a woman as his wife, and so on thereafter for some eleven years, they passing as husband and wife, and recognizing each other as such, was evidence from which the jury might find that that was the woman to whom Priest was married, as by the record. *Id.*

17. Proof of marriage regulated by G. S. c. 117, s. 7.

### MARRIAGE PROMISE.

1. **Infant.** A promise of marriage made by an infant is void. *Pool v. Pratt*, 1 D. Chip. 252.

2. **Attentions.** Mutual promises of mar-

riage may be inferred from proper and sufficient circumstances; but they cannot be implied from *mere attentions*, though exclusive, long-continued, and manifesting an apparently serious and settled attachment between the parties. *Munson v. Hastings*, 12 Vt. 846.

3. But those exclusive, long-continued and special attentions which, in the circle in which the parties move, are not expected to be paid or received unless during the pendency of a treaty of marriage, are to be taken into account with the other more direct evidence to prove the promise, and, *it seems*, are sufficient of themselves to warrant a jury in finding the promise. *Whitcomb v. Wolcott*, 21 Vt. 368.

4. **Survivorship.** *Dictum.* Some assumptions survive, and some—as for breach of promise of marriage—do not. *Conn. & Pass. R. R. Co. v. Bliss*, 24 Vt. 413.

5. **Damages.** See CONTRACT, 450.

### MARSHALING SECURITIES.

1. Where one holds security on two funds, with perfect liberty to resort to either for his pay, and another party has security upon only one of the same funds, equity will compel the first to exhaust the fund upon which he alone has the security, before taking any part of the other and thereby depriving the other party of his security; and parties will, sometimes be compelled to follow this principle without the direct interposition of the court in advance, and especially where the party was bound by contract to do so. *Poland, J., in Warren v. Warren*, 30 Vt. 590.

2. This doctrine applied to the creditor and a trustee under the trustee process. *Edgerton v. Martin*, 35 Vt. 116.

3. In marshaling assets in equity, it is indispensable that all the parties in interest should be before the court, or that the fund should be so before the court that the judgment may operate *in rem*. *Shedd v. Bank of Brattleboro*, 32 Vt. 709.

See MORTGAGE, 122 and *seq.*

### MASTER AND SERVANT.

1. **Liability of servant to master.** A servant is not liable for an injury to his master's beast through his mishap, while using it in performing any of the duties of his employment, and the beast is commonly used in such services, if he acted with common prudence and discretion, although he can show no special order of the master to use the particular beast

on such occasion. *Hathaway v. Smith*, 2 Tyl. 248.

2. — **of master to servant.** Whatever may be the agent which the master brings into his service, whether animate or inanimate, he is bound to exercise care and prudence in their selection, so as not to expose his servants to unreasonable risks and danger. *Noyes v. Smith*, 28 Vt. 59.

3. The declaration averred, that the plaintiff was hired and employed by the defendants as an engineer to have charge of, conduct and run a railroad engine, and that by virtue of such employment it became and was the duty of the defendants to furnish an engine that was well constructed and safe, &c., but that they carelessly and wrongfully furnished him an insufficient engine, &c.; that this insufficiency was unknown to the plaintiff, but which, "but for want of all proper care and diligence, would have been known to the defendants"; and that while the plaintiff was in the careful and prudent use of said engine it exploded from such insufficiency, and injured the plaintiff, &c. *Held*, on demurrer, that the declaration disclosed a sufficient cause of action. *Id.*; and see *Hard v. Vt. & Canada R. Co.*, 32 Vt. 478.

For act of fellow servant, see RAILROAD COMPANY, VII., 2.

4. — **to strangers.** A master is liable for the act of his servant, if the act be done while employed in the business of the master, in the following cases, viz: (1), if the act was done by the express command of the master; (2), if it was the natural and probable result of the orders given to the servant, though not expressly commanded; (3), if the act was done by the servant in the business of the master which he was directed or expected to do, and he acts in good faith, and not willfully. *Aldis, J.*, in *Andrus v. Howard*, 36 Vt. 251. See *May v. Bliss*, 22 Vt. 477. *Tuel v. Weston*, 47 Vt. 684.

5. Where A, although a volunteer, was assisting the defendant in performing a certain work for the defendant, and while he was present;—*Held*, that the relation of master and servant existed between them, so as to make the defendant liable as a trespasser for the act of A in such service. *Hill v. Morey*, 26 Vt. 178.

6. Where the defendant set his servant to cutting trees upon his land, and the servant negligently, and for want of proper information, cut beyond the defendant's line upon the land of the plaintiff adjoining;—*Held*, that the defendant was liable in trespass therefor, although the defendant instructed him to be careful and not cut over the line. *Id.*

7. The old distinction between trespass and case has practically become of but little import-

ance, since, by statute (G. S. c. 33, s. 14), counts therefor can be joined, if for the same cause of action. Therefore, *held*, that a master may be liable in trespass for an act of his servant, which is a trespass, though it occur through the neglect or unskillfulness of the servant. *Id.* *Andrus v. Howard*, 36 Vt. 248. *May v. Bliss*, 22 Vt. 477.

8. The defendant took a bag of corn to the plaintiff's mill to be ground, containing an iron bolt which the defendant's hired servant, in the course of business and within the scope of his employment, had put in the bag, but without any notice to the defendant. In attempting to grind the corn the plaintiff's mill was injured by the bolt. *Held*, that the defendant was responsible for his act in so offering the grain to be ground, and could not shield himself by reason of the negligence of his servant. *Tuel v. Weston*, 47 Vt. 684.

9. **Middleman.** A mere middleman, being an agent intermediate between the common master and the direct agent, though the former be the general and the latter a special agent and under the general supervision of the former, is not constructively liable for the acts of the latter. *Brown v. Lent*, 20 Vt. 529.

10. **Lessor.** The lessor of a farm, and of an authorized ferry and ferry boat connected with it, was *held* not liable for the negligence of the lessee in ferrying the plaintiff; that his character of lessee was not changed to that of servant of the lessor, by a provision in the lease that the lessee should pay the lessor one-half the receipts of the ferry boat weekly. *Felton v. Deall*, 22 Vt. 170.

11. **Remote agent.** The defendants, a railroad company, contracted with E to construct certain sections of their railroad. E sublet to C the building of the abutments of a bridge. An employe of C, in drawing stone for such abutment, left one in the highway, by reason of which one P got injured, and recovered damages therefor of the plaintiff town. In an action by the town against the railroad company for reimbursement;—*Held*, that the employe of C was not the servant of the defendants, nor under their control, and that no privity existed between them, therefore they were not liable. *Pawlet v. Rutland & Wash. R. Co.*, 28 Vt. 297.

12. **Criminal matters.** In a criminal prosecution, a master cannot be made liable for the acts of his servant, merely by reason of the legal relation which exists between them, and where the facts exculpate the master from all fault and negligence. *State v. Bacon*, 40 Vt. 456.

For other kindred cases, see AGENT.

## MEETING HOUSE.

1. **Pews real estate.** Pews or slips in a meeting house are, in the absence of any statute provision, considered in this country as real estate, in all cases arising under the statute of frauds, or of conveyances, or of descents and distributions. They are declared to be real estate by G. S. c. 4, s. 8. *O'Hear v. DeGoesbriand*, 33 Vt. 598. *Kellogg v. Dickinson*, 18 Vt. 266. *Hodges v. Green*, 28 Vt. 358. *Barnard v. Whipple*, 29 Vt. 401. *Perrin v. Granger*, 33 Vt. 101.

2. **Ejectment therefor.** A pew in a meeting house is real estate, and to be conveyed as such. In ejectment therefor;—*Held*, that a levy of execution upon it as real estate should prevail over a prior assignment of a certificate of ownership and record thereof by the clerk of the society according to the by-laws; and that the latter conveyed no legal title. *Barnard v. Whipple*.

3. **Trespass qua. clau.** The owner of a pew in a meeting house may maintain trespass *qua. clau.* for the destruction of his pew against even the society or person who has the legal title to the land and building. *O'Hear v. DeGoesbriand*, 33 Vt. 598.

4. Notwithstanding the canon law of the Roman Catholic church forbids the ownership or control of a pew in a church by a layman, yet, whether that law was recognized or adopted by the signers of a subscription for the building of a "Roman Catholic chapel," is a question of fact, and not of law, and is provable by parol evidence. And on proof that it was originally agreed among the subscribers that they should have choice of pews and hold them as their property in severalty, and that such division had been made, the plaintiff, a subscriber, recovered, in an action of trespass *qua. clau.*, against his bishop for the destruction of his pew, although the legal title to the land and the building had become vested in the defendant. *Ib.*

5. A pew-holder cannot maintain trespass for the mere breaking and entry of a meeting house in which his pew is situate; but he may for the destruction of his pew, and this, although he sue for the entry with it,—for the destruction of the pew is not mere matter of aggravation, but is of the gist of the action. *Hove v. Stevens*, 47 Vt. 262.

6. Although others may have so far obtained possession of a meeting house as to oust the society in charge, yet a pew-holder may maintain trespass for the first invasion of his individual right, by the destruction of his pew, after such ouster. *Ib.*

7. **Case for disturbance.** Case is the appropriate, and ordinarily the only remedy for a disturbance in the enjoyment by a pew-holder

of his right, as such. For a mere disturbance in the use of his pew, trespass or ejectment will not lie. *Perrin v. Granger*, 33 Vt. 101. *Bakersfield Soc'y. v. Baker*, 15 Vt. 119. *Kellogg v. Dickinson*, 18 Vt. 266.

8. The collector of a religious society unlawfully sold the plaintiff's pew in a meeting house, and the purchaser took possession of it under his purchase. *Held*, that both were jointly liable in case, for the disturbance of the plaintiff's use of his pew. *Perrin v. Granger*.

9. **Right qualified.** In ordinary cases, the pew-holders in meeting houses or churches built by incorporations under the statute, have only a right of occupancy in their seats, subject to the superior rights of the society owning the fee of the house. *Perrin v. Granger. Bakersfield Soc'y. v. Baker*, 15 Vt. 119. *Kellogg v. Dickinson*, 18 Vt. 266.

10. A religious society may repair, take down and rebuild its meeting house, with or without compensation to the pew-holders, as the case may be, and erect another, without any particular regard to the way or manner in which it was first built, or the religious tenets of those who first erected it, or made donations therefor. *Kellogg v. Dickinson. Ib.* 547.

11. The right of a pew-holder to a pew in a meeting house is a qualified right, and subordinate to the rights of the owners of the house. He has an exclusive right to occupy his pew, when the house is used for the purposes for which it was erected, but he cannot convert his pew to other uses, not contemplated. If the house be taken down as a matter of convenience, or taste, by the owners, he is entitled to compensation; but if of necessity, because the house has become ruinous and wholly unfit for the purposes for which it was erected, he is not entitled to compensation, although the owners use the materials of the old house, or their avails, in building a new one. *Ib.*

12. A town, under the act of 1787, built a meeting house upon land leased to it for that purpose, and sold the pews at auction in town meeting. In 1842 the town released all its right in the house and land to a religious society organized under the act of 1814, which continued to occupy the house, as it had been occupied, for purposes of public worship. *Held*, that the society had succeeded to the rights of the town as owner of the house and land, and might, in case of necessity, take down and rebuild the house without making compensation to the pew owners. *Ib.*

13. The right of a pew-holder is only a right to occupy his pew during public worship; and so, whenever the meeting-house becomes in such ruinous condition that it is not, and cannot be, occupied for public worship, he can recover only nominal damages for a destruction of the pew. *Hove v. Stevens*, 47 Vt. 262.

14. A meeting house was built upon land with permission of the owner, who afterwards conveyed the land to trustees in trust for the purpose of continuing the meeting house thereon, and for a common or green; and when ceased to be occupied for that purpose to revert to the grantor. *Held*, that the failure to keep the house in such repair that it could be occupied for public worship would not, of itself, terminate the right of a pew-holder to his pew, nor leave him without right to maintain an action for an injury done thereto by a stranger; but would only make his right to it less valuable, and so lessen the amount he could recover. *Id.*

15. **Conveyance.** A parcel of land, described as a meeting house green with a meeting house thereon, was conveyed to three persons, their heirs and assigns and the survivor of them, in joint tenancy, in trust for that use, and for the owners and proprietors of said meeting house, with a condition of reverter to the grantor and his heirs, on failure to occupy the premises for the purposes of a meeting house and green. The survivor of the trustees and the heir of the grantor afterwards conveyed the premises to the defendant, a school district, which claimed under the condition of reverter and purposed to convert the property into a school house and grounds. On a bill in equity by the pew owners for an injunction;—*Held*, that the defendant took the estate charged with the trust, and that the pew owners, the use of the property for the purposes named in the original grant not having been in intent and fact abandoned or discontinued, though a good deal neglected, were entitled to the injunction. *Howe v. School Dist. in Jericho*, 43 Vt. 282.

16. A deed of lands was to a religious society, *habendum* "during the time said society or their heirs shall meet on said land for public worship, or have a meeting house standing on said land and appropriate the use of the same to Congregational or Presbyterian public worship." After building a meeting house upon the land and occupying it for many years, a majority of the society and church moved to another place, taking with them the corporate organization, and erected and occupied a new meeting house, abandoning and ceasing further to meet in the old house; but a small minority remaining formed a new religious society, and were authorized by the old society to occupy the old house for Congregational public worship, which was done. *Held*, that under the second clause of the *habendum* the land was saved from reverting to the grantor. *Cong. Soc'y. of Hakifas v. Stark*, 34 Vt. 243.

17. **Administrator's right.** An administrator, before distribution or surrender, may himself occupy a pew belonging to his intestate's estate, or may lease it; and for a distur-

bance of his personal use of the pew may maintain an action *as administrator*; or, *semble*, he might sue in his personal capacity, making title by his letters of administration. *Perrin v. Granger*, 33 Vt. 101.

18. **Setting off meeting house on execution.** The meeting house of a religious society cannot be taken on an execution against the society, although the fee of the land may be in the society, where the several pew-holders have an individual interest in the house. *Bigelow v. Congregational Society*, 11 Vt. 288.

19. **Disturbance of society.** A meeting house was built by the "Union Society," an incorporated association, exclusively for the use of the "Religious Congregational Society," another incorporated association, the fee of the land remaining in the Union Society. *Held*, that the Congregational Society could not maintain trespass *quare clausum* against a pew-holder and an outside minister who, by his invitation, occupied the pulpit on Sunday, and prevented that society from holding their accustomed worship there;—that trespass was not the proper remedy. *Bakersfield Society v. Baker*, 15 Vt. 119. 24 Vt. 533. 33 Vt. 105.

See ASSOCIATIONS.

20. **Catholic chapel.** The term "Catholic chapel," as used in a writing, has no such precise and definite signification as to exclude extrinsic oral evidence to interpret its meaning, or to point its application to the subject matter,—as, a Roman Catholic Chapel, to be used as a place of public worship, according to the rites and ceremonies of the Roman Catholic Church. *O'Hear v. DeGoesbriand*, 33 Vt. 593.

## MEMORIALS.

NOTICE of death of Samuel Miller, Esq., 2 Tyl. 371, *note*.

NOTICE of death of Hon. Cornelius P. Van Ness, Ex-Chief Justice. 25 Vt. 19.

MEMORIAL of Hon. Charles K. Williams, Ex-Chief Justice. 24 Vt. 718.

ADDRESSES on the retirement of Hon. Isaac F. Redfield, Chief Justice. 36 Vt. 762.

## MERGER.

I. AS TO CONTRACTS.

II. AS TO ESTATES.

I. AS TO CONTRACTS.

1. Where a contract of a higher nature, and affording an adequate remedy, is taken as a substitute for one of an inferior nature, as, a

sealed for a simple contract, the first contract is merged in the last, and the last is a bar to an action upon the first. *Bryant v. Gale*, 5 Vt. 416. *Mott v. Harrington*, 12 Vt. 199. *Hall, J.*, in *Langdon v. Paul*, 20 Vt. 220.

2. Where there was an unsealed contract in writing for the conveyance of land free of incumbrances, and afterwards, in consummation of this contract, a deed of the land was given and a bond to indemnify against a supposed incumbrance;—*Held*, that the claim upon the simple contract became merged in the higher security, and that no action lay thereon. *Smith v. Higbee*, 12 Vt. 113.

3. The maker of certain negotiable promissory notes executed a sealed instrument, certifying "to all persons" that he had signed the notes, and waiving the statute of limitations thereon, and agreeing to pay them to the payee or his order, "the same as though the statute of limitations had not run on said notes." In an action upon one of the notes by an indorsee;—*Held*, that the instrument was not a bar to the action; that the plain intent of it was not to give an independent remedy, but to strengthen and keep alive the remedy upon the notes; and that any remedy upon it was not co-extensive with that upon the notes, and so was not a merger, but only collateral. *Langdon v. Paul*, 20 Vt. 217.

4. A simple contract debt is not merged in a bond, where the debt is recited in the bond, and it is provided in terms that *the payment of the debt shall be a release and discharge of the obligor*. *Hicks v. Clark*, 41 Vt. 188.

For merger of original debt in Judgment, see JUDGMENT; of account in Promissory note, see PROMISSORY NOTE.

## II. AS TO ESTATES.

5. The estates of mortgagor and mortgagee [or of lessor and lessee], when united, will not be treated as merged so as to operate as payment or extinguishment of the debt [or the rent reserved], unless such was the evident intention of the parties; nor will that result follow, if there exists some beneficial interest that requires to be protected, and where it is for the benefit of the party to keep the two estates separate and distinct. *Walker v. Baxter*, 26 Vt. 710, 715. *Spencer v. Austin*, 38 Vt. 258, 269. *Myers v. Brownell*, 1 D. Chip. 448. *Marshall v. Wood*, 5 Vt. 250. *Slocum v. Catlin*, 22 Vt. 137.

6. Where one having an equitable title, with possession, afterwards took a perpetual lease from the legal owner, it was *held* that this should not operate as a merger of the equitable title so as to give precedence to an intermediate incumbrance, but rather as a further assurance of title, and as taking date from the time of the entry. *Pope v. Henry*, 24 Vt. 560.

7. G and S, tenants in common of lands, joined in a perpetual lease of the same to W for a certain annual rent, with right of re-entry for non-payment. S afterwards assigned all his interest in the lease to A, and afterwards one-half of W's interest in the lease and premises came to A by conveyances. Rent being in arrear, the heirs of G, deceased, brought their bill setting up their right to one-half the original rent reserved, and praying that it should stand as a charge upon the whole premises, and for a foreclosure in case of non-payment. *Held*, that although the title to an undivided half of the premises had become vested in A, this did not so work a merger of the two estates as to extinguish the rent in arrear to A, or A's right under the lease to enjoy his moiety of the land for the rent in arrear and the rent to accrue, that not being for his benefit nor according to the intent of the parties; that the orators' rights were not superior to his, and that they could not extend their security over the whole land. *Spencer v. Austin*, 38 Vt. 258.

8. A mortgage is not merged in a subsequent conveyance to the mortgagee of the equity of redemption, if such merger would operate to the injury of the mortgagee. *Marshall v. Wood*, 5 Vt. 250. 26 Vt. 715.

9. Where a mortgagor conveyed his equity of redemption to the mortgagee in payment of the mortgage debt, by a deed of warranty with the usual covenants;—*Held*, in ejectment, that this did not operate as a merger of the mortgage, so as to give priority to an intervening incumbrance by way of an attachment and subsequent levy of execution. *Myers v. Brownell*, 1 D. Chip. 448. 27 Vt. 495.

10. Where a mortgagor conveys absolutely to the mortgagee in payment of the mortgage, if such conveyance be avoided by the creditors of the mortgagor as fraudulent, it leaves the mortgage in force, as to such creditors. *Irish v. Claves*, 10 Vt. 81. 29 Vt. 415.

11. Where a mortgagee has assigned the debt and mortgage, and the mortgagor afterwards releases his equity to the mortgagee, no merger takes place;—for, by the assignment, his assignee became mortgagee, and, by the release, himself became mortgagor. There can be no merger, unless the two estates unite in one and the same person, and in the same right. *Pratt v. Bank of Bennington*, 10 Vt. 293.

12. Where the defendant paid off a mortgage upon land and took an assignment from the mortgagee and a conveyance of the equity of redemption from the mortgagor, the court relieved the defendant from the legal consequences of a merger, and set up the mortgage in his behalf, as against a creditor of the mortgagor who had levied upon the equity before



record of the defendant's deed. *Slocum v. Catlin*, 22 Vt. 187. 26 Vt. 715. 27 Vt. 495. 31 Vt. 129.

13. The orator purchased of G his equity of redemption in lands mortgaged, which equity was then, as the orator knew, under an attachment by the defendant, the orator agreeing with G to pay the mortgage debt, but nothing being said as to keeping the mortgage on foot. The deed excepted the mortgage from the covenants. The orator paid the mortgage debt to the holder, under an arrangement with him that the orator should have the security, and the holder accordingly transferred the mortgage notes and mortgage to the orator, without recourse. The defendant, following up his attachment, obtained judgment and levied his execution. In a bill to foreclose the mortgage;—*Held*, that there was no merger of the mortgage, and the orator was entitled to a decree for the amount paid by him upon it. *Bullard v. Leach*, 27 Vt. 491.

### MILITIA.

1. The act of 1837, "for regulating and governing the militia," expressly repealed the militia act of 1818, and no new organization under the act of 1837 took place until July, 1838. *Held*, that, although the act of 1837 repealed the act of 1818, it did not disband the militia organized under the act of 1818, nor break up such organizations; and that for a delinquency at June training, 1838, the party was punishable, according to the act of 1837, and by a court-martial created and organized under that act. *Gilman v. Morse*, 12 Vt. 544. (*Redfield and Bennett, J. J., dissenting.*)

2. **Able-bodied.** Mere physical infirmity does not operate as an exemption from enrollment and military jurisdiction, under a provision requiring the enrollment of every "able-bodied" citizen; and of the extent of such infirmity, whether visible or not, the enrolling officer must judge in the first instance, leaving his error to be corrected by a disenrollment, as provided in the statute, and not by an action as for excess of jurisdiction. *Darling v. Bowen*, 10 Vt. 148. *Warner v. Stockwell*, 9 Vt. 9. 16 Vt. 254.

3. **Courts-martial.** In imposing and remitting fines, militia officers act judicially, and their final decisions are conclusive. *Mover v. Allen*, 1 D. Chp. 381. *Warner v. Stockwell*.

4. The adjudication of summary and special jurisdictions—as, of a court martial, in imposing a fine—having jurisdiction both of the subject matter and of the person of the party, cannot be voided by any circumstantial irregularity in the detail of the proceedings, either

before or at the time of trial. *Held*, that the judgment of a court-martial was not avoided by reason of a defective notice of the charges, and of service of process. *Brown v. Wadsworth*, 15 Vt. 170.

5. But where there was want of jurisdiction of the person, as where an alien, not subject to military duty, was amerced by court-martial;—*Held*, that the proceedings were void, and the officer liable for serving the execution. *Barrett v. Crane*, 16 Vt. 246. See *Darling v. Bowen*, 10 Vt. 148.

### MISTAKE.

1. **When equity will relieve.** Chancery will correct a mistake in a conveyance, where the mistake is undeniably proved, and perfect the conveyance according to the intent of the parties; and this, whether the mistake is in regard to a statutory or common law requisite; or whether the parties failed of executing such an instrument as they intended, or mistook in respect to the operation of the instrument. *Beardsley v. Knight*, 10 Vt. 185.

2. Where a mistake in a conveyance is of so fundamental a character that the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, either in falling into the error or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed *in statu quo*, equity will interfere, in its discretion, in order to prevent intolerable injustice. (Relief granted in this case, where the orator omitted in the deed to make a reservation of a spring of water.) *Brown v. Lamphear*, 35 Vt. 252.

3. In order for chancery to correct alleged mistakes in written contracts, or deeds, the mistake must be either admitted by the defendant, or else be proved by such evidence "as admits of no doubt"—"the most conclusive evidence"—"the most irrefragable evidence." *Redfield, J., in Griswold v. Smith*, 10 Vt. 452. *Cleveland v. Burton*, 11 Vt. 138. *Goodell v. Field*, 15 Vt. 448. *Preston v. Whitcomb*, 17 Vt. 188. *Shattuck v. Gay*, 45 Vt. 87.

4. **Instances.** The parties owning a farm in common, which the orator had a right to flow by means of his mill dam, made partition by mutual quit-claim deeds. *Held*, that the legal effect was to release the orator's right of flowage; but, such not being the effect intended, the defendant was restrained in chancery from setting up the deed as such release. *Mover v. Hutchinson*, 9 Vt. 242. 22 Vt. 268.

5. The defendant, being the owner of the

one-half of a saw-mill, contracted to sell the same to the orator for the price of a full title to such half, and to give a warranty deed thereof. The deed given was of the defendant's "right, title and interest" in the mill, and contained no covenant except to "warrant and defend the aforesaid premises." The premises were then in fact subject to a mortgage. *Held*, that the contract was for a deed including covenants of seisin and against incumbrances, and it being found that the deed was not according to the contract, the defendant was enjoined from suit upon a note given for part of the purchase price, until he had removed such incumbrance, the same as if such covenants had been inserted in the deed. *Bowen v. Thrall*, 28 Vt. 882.

6. Where the parties to a contract of sale of land were under a mutual mistake as to the grantor's title, so that no title was conveyed, the purchaser was relieved in equity. *Hadlock v. Williams*, 10 Vt. 570. 31 Vt. 388.

7. A bond given to three jointly, without naming assignees, &c., was allowed in chancery to be reformed, so as to stand for the protection and benefit of a business and new parties becoming interested therein. *Smith v. Wainwright*, 24 Vt. 97.

8. The official bond of a constable, imperfect for want of sealing, was treated, as to him and his sureties, as sealed, where the defendants, in their answers to a bill by the town, admitted that it was their intention to have sealed it. *Rutland v. Paige*, 24 Vt. 181.

9. The orator, having a just claim against the estate of a decedent, presented it to the commissioners for allowance. No defense or objection was made to the allowance, and the orator had reason to believe, and did believe, that the claim was acted upon and allowed, and did not learn the contrary until after the statute time for opening the commission had expired. The commissioners, through mistake or forgetfulness, had omitted to embrace the claim in their report, as presented to or acted upon by them. *Held*, that it was within the jurisdiction of the court of equity, to afford relief against the consequences of such accident and mistake. *Diskey v. Corliss*, 41 Vt. 127.

10. A party having equitable rights in premises, different from what appeared on the face of the deeds, consented to the appointment of commissioners on the petition of his adversary to make partition, mistakenly supposing that his equitable rights would be available to him before the commissioners. *Held*, in chancery, that this was no waiver of his right; and no bar, there being no judgment. *Piper v. Farr*, 47 Vt. 721.

11. **Where relief must be refused.** Where the contracts of parties have produced results not anticipated, they have never been relieved from such results, unless that could be

done and leave the contract operative as to what they did intend. *Poland, C. J.*, in *Fletcher v. Bennett*, 36 Vt. 635; citing *Proctor v. Thrall*, 22 Vt. 262. *Fletcher v. Jackson*, 23 Vt. 581. *Barnes v. Lapham*, 28 Vt. 307.

12. If the different operation of the contract, beyond what was intended, is merely a legal effect or result of what the parties did intend, so that relief cannot be given except by annulling the very contract understandingly and intentionally entered into, chancery will not interfere. *Proctor v. Thrall*.

13. The owner of mortgaged premises, being about to sell them, procured the first mortgagee to execute to the purchaser a bond, conditioned that the seller should save him harmless from any incumbrance upon the land. *Held*, that the effect was to release the land from that incumbrance, not only as to the purchaser, but as to all intermediate owners and incumbrances; and that although this latter consequence was not intended by the parties, yet as it was the legal consequence of what they did intend, equity could not relieve the mortgagee. *Id.*

14. Mistake or misjudgment of counsel, is no ground for relief in equity against a judgment at law. *Burton v. Wiley*, 26 Vt. 430.

15. Less still, the mistake of the court. *Pettes v. Bank of Whitehall*, 17 Vt. 435.

16. Where a party has committed a tort in consequence of a mistake of law, though he acted under the advice of legal counsel in so doing, chancery cannot relieve him from the legal consequences of his tortious act, or omission;—as, where a sheriff neglected to commit a debtor upon execution, upon the erroneous belief, and the advice of counsel, that the execution was void. *Id.*

17. **Surprise.** Surprise, not accompanied with fraud and circumvention, is not ground for relief in equity. *McDaniels v. Bank of Rutland*, 29 Vt. 230.

18. **Ignorance.** Nor, is ignorance of facts merely, where actual knowledge could have been obtained by the exercise of due diligence and inquiry. *Id.*

19. Nor, is mistake of the law, except in peculiar circumstances involving other elements,—as, ignorance of title, imposition, misrepresentation, undue influence, misplaced confidence, and surprise. *Id.*

20. Nor, although the party in such case acted upon the advice of counsel. *Id.* *Pettes v. Bank of Whitehall*, 17 Vt. 435.

21. **Relief against judgment.** In order to obtain a new trial of a suit at law by bill in equity, the orator must show that he failed of obtaining redress in the suit at law by the fraud of the opposite party, or through inevitable accident, or mistake, without any default, either of himself, his counsel, or agents. *Burton v.*

*Wiley*, 26 Vt. 480. *Essex v. Berry*, 2 Vt. 161. *Fletcher v. Warren*, 18 Vt. 45. *Warner v. Conant*, 24 Vt. 351. *Emerson v. Udall*, 18 Vt. 477. *Pettes v. Bank of Whitehall*, 17 Vt. 435. *Briggs v. Shaw*, 15 Vt. 78.

22. That a judgment at law may have worked injustice is not, of itself, enough to authorize a court of equity to relieve against it. It is only upon collateral grounds, not directly passed upon by the court of law, that a court of equity can proceed in such cases; and then it acts upon the conscience of the party in fault, and not upon the court of law. It is therefore usual to allege and show, that the party seeking relief had a just defense, either legal or equitable, of which, through the fraud or wrongful act of his opponent, he was unable to avail himself in time. Mere accident or mistake on his own part is rather to be accounted his misfortune, than imputed as a wrong to the other party. *Fletcher v. Warren*.

23. Chancery refused relief against a judgment rendered on default, where the non-appearance arose from the accident that the party's attorney did not seasonably receive a letter requesting his appearance;—because (1), the accident might have been prevented by common prudence; (2), substantial justice had been done; (3), the relief prayed went only in reduction of damages; (4), the sum in controversy was small. *Essex v. Berry*, 2 Vt. 161.

24. Chancery will not relieve against a judgment rendered against one as trustee, on the ground that through forgetfulness or neglect of himself, or his agent, he failed to attend the court, even though it appear that he would have been discharged upon disclosure made, and though there be no redress at law, where no fraud is imputable to the party obtaining the judgment. *Warner v. Conant*, 24 Vt. 351. 46 Vt. 27.

25. **Lapse of time.** Chancery will not reform a contract, or set aside an award or proceeding, where the party affected has omitted for a long time to make objection to it. *Barker v. Belknap*, 27 Vt. 700.

26. **Other instances.** The defendant, having a contract and covenant from D to convey to him title to certain land upon certain conditions of payment, sold and assigned the same to the orators. They paid D the sums falling due upon the contract, but ascertaining that the title was not in D, and supposing it was in E, they obtained a conveyance from E, and gave up to D his contract. The title, in fact, was in neither, but was in the United States. *Held*, that the orators, by giving up to D his contract and covenant and taking a new security, had put it out of their power to rescind their contract with the defendant; and that they had no remedy in chancery against him, although he might have made false repre-

sentations as to the title upon making the assignment. *Blanchard v. Stone*, 15 Vt. 271.

27. The orator claimed relief against the defendant's claim, at law, for an annuity agreed to be paid upon the purchase of the defendant's interest in an estate, conveyed by quit-claim, on the ground of a lien of the administrator for payment of debts and expenses larger than was supposed. The court not finding any guaranty, fraud, or material mutual mistake, the bill was dismissed. *Newton v. Bennett*, 38 Vt. 181.

28. One, by mistake of description in his deed, conveyed to the defendant more land than was intended, and afterwards devised "all his real estate" to his wife, and this descended to their son, who, without consideration, quit-claimed to the orator the land mistakenly conveyed, but with notice that he asserted no claim thereto; and neither the devisee nor heir ever asserted or claimed any right as against the legal title conveyed by the deed of the testator. *Held*, that the orator had no standing for asserting a claim that the deed be reformed. *St. Johnsbury v. Bagley*, 48 Vt. 75.

## MORTGAGE.

### I. WHAT IS A MORTGAGE.

1. *Characteristics in general.*
2. *Form; Future advances; Equitable mortgage.*

### II. RELATIVE RIGHTS OF MORTGAGOR AND MORTGAGEE.

### III. ASSIGNMENT; SUBROGATION; CONTRIBUTION.

### IV. REMEDY AT LAW.

### V. REMEDY IN CHANCERY.

1. *Bill to foreclose;—to redeem.*
2. *Parties.*
3. *The account.*
4. *Decree.*

### VI. MORTGAGE OF CHATTELS.

#### I. WHAT IS A MORTGAGE.

##### 1. *Characteristics in general.*

1. **Pledge for a debt.** A mortgage is nothing else than a pledge of real estate as security for the payment of the mortgage debt. It is an accident of the debt, and liable at all times, before the equity of redemption is foreclosed, to be defeated by the payment of the debt. *Briggs v. Fish*, 2 D. Chip. 100.

2. The lien of a mortgage lasts as long as the debt, and a change of securities is no discharge of the mortgage, either as to the mortgagor or subsequent incumbrancers, unless that was the intention of the parties. *Seymour v. Darrow*, 81 Vt. 122. *Dana v. Binney*, 7 Vt.

498. *McDonald v. McDonald*, 16 Vt. 680. *Dunahoe v. Parmelee*, 19 Vt. 172.

3. Or, unless securities of a lower grade are merged in those of a higher one—as, a specialty for a simple contract—and then probably equity would relieve from the legal consequence of the merger. *Redfield, C. J.*, in *Seymour v. Darrow*, 81 Vt. 129, citing *Slocum v. Catlin*, 23 Vt. 137.

4. **Payment.** A executed to B and C a mortgage, conditioned to become void if he should pay a note which they had signed with him as surety. Afterwards he conveyed to B and D the premises subject to the incumbrance, which they were to pay and discharge. B afterwards paid the note on which he and C were sureties. *Held*, that the mortgage was discharged and could not be set up by B and C. *Harvey v. Hurlburt*, 8 Vt. 361.

5. Where a second mortgagee has purchased in the equity of redemption and has paid off the first mortgage, he cannot maintain an action upon the first mortgage notes against the original debtor, or his sureties. *Viles v. Moulton*, 11 Vt. 470. *Converse v. Cook*, 8 Vt. 164.

6. A second mortgagee, who had acquired the equity of redemption and sold the premises for a sum larger than the first mortgage, purchased one of the notes secured by the first mortgage, which note had been indorsed by the first mortgagee, and sued him thereon as indorser. *Held*, that such purchase should be treated as payment and satisfaction of the note. *Smith v. Day*, 23 Vt. 656.

7. In an action on a mortgage bond executed in the State of New York;—*Held*, that the purchase of the mortgaged premises at the mortgage sale by the mortgagee, the same being authorized by the law of New York, operated only as payment *pro tanto*, although he afterwards sold the premises at a greater price,—no fraud being shown. *Sabin v. Stickney*, 9 Vt. 155.

8. **Right of redemption inseparable.** If a transaction between parties is in fact a mortgage, the right of redemption attaches as an inseparable incident, created by law, which cannot be waived by agreement made at the time of the execution of the deed of conveyance, nor upon any future contingency whatever. *Wing v. Cooper*, 37 Vt. 169, 181. *Cutlin v. Chittenden*, *Brayt*. 163. *Baxter v. Willey*, 9 Vt. 276. *Wright v. Bates*, 18 Vt. 341. *Davis v. Hemenway*, 27 Vt. 589.

9. **Particular cases.** A tenant in common of land mortgaged it to his co-tenant, his late partner, to indemnify him against the partnership debts, of which a debt due the orators was one, and then mortgaged the same land to the orators to secure their debt. Afterwards both tenants sold and conveyed the land to a stranger. *Held*, on a bill to foreclose, that the

orators were entitled to a foreclosure; as to a moiety, against both tenants and their grantee. *Prothingham v. Shepard*, 1 Aik. 65.

10. One mortgaged *white acre* to secure the payment of notes on a day certain, and also *black acre* conditioned for the payment of the same notes, or, in case of failure, to surrender *white acre* without suit or trouble. The notes were not paid, and the mortgagor abandoned *white acre*, without formal surrender, and after ten months the mortgagee took possession, and the mortgagor conveyed *black acre* to S. On a bill against the mortgagor and S to foreclose as to both parcels, it was *decreed*, that the defendants might redeem *black acre* by paying the costs and interest on the orator's debt while he was out of possession of *white acre*, and by surrendering all claim to *white acre*; but, in case of failure, that they be foreclosed as to both parcels, for the whole mortgage debt. *Hunt v. Tyler*, 2 Aik. 238.

11. Where a mortgage is taken from one of two joint debtors, as a security for the payment of a ratable proportion of the debt, it cannot be enforced beyond the purpose intended by it, though the other part remains unpaid. *Newell v. Hurlburt*, 2 Vt. 351. 8 Vt. 277.

12. A party conveying land in consideration of an agreement to support, secured by mortgage, was quieted in his title by decree, under the circumstances of the case, the mortgagor having failed to perform his contract. *Devereaux v. Cooper*, 11 Vt. 103. *Frisbie v. Dearth*, 28 Vt. 787.

13. The defendant assigned and indorsed to the orator a negotiable promissory note, and executed to him a mortgage conditioned that the defendant should "well and truly pay or cause to be paid" said note. *Held*, on a petition to foreclose the mortgage, that it was not discharged by the mere failure of the orator to charge the defendant as indorser of the note. *Mitchell v. Clark*, 35 Vt. 104.

14. **Equitable set-off.** Equity will not permit a grantor of lands to recover the entire purchase money and leave an unpaid incumbrance upon the land, which he is under obligation to discharge. The purchaser has the right, in equity, to retain of the purchase money sufficient to secure him against such incumbrance, particularly where the grantor is insolvent, and no adequate remedy can be had on his covenants. *Bowen v. Thrall*, 28 Vt. 382.

15. In negotiating the sale of a farm at a gross price, the vendor represented that the meadow part contained not less than 80 acres, whereas in fact the meadow contained but 60 acres. He made these representations with professed knowledge on the subject, knowing that the vendee relied upon them as true; and the vendee had a right, under the circumstances,

so to rely upon them and made his purchase in faith of them. *Held*, on a bill to foreclose the mortgage given for the purchase price, that the difference between the value of the farm at 80 acres and at 60 acres, of meadow, should be deducted from the mortgage note. *Twitchell v. Bridge*, 42 Vt. 68.

16. The law is the same as to a misrepresentation of the productiveness of the land. *Ib.*

17. **Particular phrases.** Where a note was given for land incumbered by mortgages, with a condition added, that before payment should be made or demanded all incumbrances on the land should "be removed therefrom";—*Held*, in an action at law, that the clear meaning was, that the incumbrances should be removed in a manner known to the law,—that is, by deed from the mortgagee, or his discharge on the record according to the statute. *Hoyt v. Swift*, 18 Vt. 129.

18. The plaintiff deposited with the defendant certain notes, to hold until the plaintiff should "get up" two mortgages which appeared on the record as incumbrances upon land conveyed by him to a third person, and by that person to the defendant. He procured all the notes mentioned in both mortgages, a recorded release of one of them, and, the other mortgagee being dead, tendered to the defendant all said notes and a bond of indemnity against such other mortgage, which the defendant accepted. *Held*, that the condition of the deposit was sufficiently complied with to entitle the plaintiff to a surrender of the notes deposited, and to maintain trover for a refusal. *Robbins v. Packard*, 81 Vt. 570.

19. **Priorities.** One of the defendants sold a farm to the orator by warranty deed and took his notes therefor, secured by mortgage thereon. There was a mortgage on the farm at the time, unknown to the orator. That defendant was under legal obligation to his mother, the other defendant, to support her through her life, and towards the discharge of this obligation and as a means for her current support he transferred to her the orator's notes, not due, and absconded from the State, leaving no property. The mother took the notes in good faith, without intent to defraud the orator. *Held*, that the orator had no equity as against the mother to restrain her in the negotiation and use of the notes, but that she had the legal right, and the superior equity. *Kittridge v. Batchelder*, 47 Vt. 64.

20. Where the defendant took from the orators their mortgage to get it recorded, not disclosing to them his prior unrecorded mortgage from the same debtor, and procured his own mortgage to be first recorded;—*Held*, under the circumstances of the case, and as the orators had proved no damage to them from such concealment, that the mortgage first re-

corded had the priority. *Palmer v. Palmer*, 48 Vt. 69.

## 2. Form.

21. A penal bond to re-convey lands is a mortgage. *Reynolds v. Scott*, Brayt. 75.

22. An absolute deed, if intended, given and held to secure a debt, or duty, is a valid mortgage, not only as to existing debts, but also as to subsequent advances and liabilities assumed by the grantee for the grantor. *Gibson v. Seymour*, 4 Vt. 518. 81 Vt. 181.

23. Where lands are conveyed in fact as a security for a debt which is kept on foot, the instrument is a mortgage, although there is no covenant or other personal obligation to pay the money. *Wing v. Cooper*, 37 Vt. 169, 180. *Graham v. Stevens*, 84 Vt. 166. *Campbell v. Worthington*, 6 Vt. 448. *Mott v. Harrington*, 12 Vt. 199.

24. Where there had been a negotiation for a loan to be secured by a mortgage, and a loan made, and a deed given, which, though absolute upon its face, was, by parol agreement, only to stand as a security, and the grantor had remained in possession, paying interest for the money loaned;—*Held*, that this was a mortgage in equity; that the grantor's equity of redemption was not tolled, nor the transaction converted into a conditional sale by the mortgagee's giving him a lease for years at a certain rent and an obligation to convey upon being paid a certain sum; and that the grantee of the mortgage, having notice of the claim of the mortgagor, came in subject to his equitable right to redeem. *Wright v. Bates*, 13 Vt. 341. See also *Davis v. Hemenway*, 27 Vt. 589.

25. The orator, being indebted to the defendant, gave him an absolute deed of a farm, taking back a writing of defeasance. The orator afterwards received further advances, until the whole sum due was \$600. The parties then agreed that the defendant should have the farm for \$800, and the defendant gave the orator his note for the difference, and the orator surrendered the defeasance; but it was verbally agreed that the defendant should sell the farm, and the orator should have what it brought over \$800 after paying the defendant for his time and trouble. The defendant sold the farm at auction and became himself the purchaser at \$1,000, and offered to pay the orator such excess, which the orator declined. The farm was worth \$1,100 or \$1,200. The orator was a poor man and sore pressed. *Held*, that the contract was in equity a mortgage, with power of sale in the mortgagee, and the orator was allowed to redeem. *Hyndman v. Hyndman*, 19 Vt. 9. 27 Vt. 598.

26. On a bill to redeem, parol evidence is admissible to prove that a conveyance absolute

in form was a security, and in equity a mortgage, the possession of the premises having remained in the grantor and the paper title in the grantee. *Hills v. Loomis*, 42 Vt. 562. *Wright v. Bates*, 18 Vt. 341. *Wing v. Cooper*, 37 Vt. 182.

27. Otherwise, where the grantor conveys with warranty, and possession follows the deed through several successive grantees, unless the purchasers had full knowledge of the character and nature of the contract between the original parties, and purchased fraudulently, with intent to defeat the right of the grantor. *Connor v. Chase*, 15 Vt. 764.

28. In the case of a conveyance, where a right to redeem is not plain upon paper, lapse of time without claim made, though short of the period of legal limitation, bears strongly against the right. *Ib. Mellish v. Robertson*, 25 Vt. 608.

29. On bill to redeem from a conveyance absolute in form, but claimed to be a mortgage, relief was refused upon the facts stated. *Ib.*

30. A deed absolute on its face, but intended merely as security for existing and future liabilities, was held not fraudulent and void as against a later incumbrance, but to be valid as a mortgage. *Bigelow v. Topliff*, 25 Vt. 273.

31. A deed conditioned to become void unless a certain sum be paid by a day certain, has been regarded as in effect a mortgage from the debtor to the creditor. *Austin v. Downer*, 25 Vt. 558. *S. C.* 27 Vt. 636.

32. A quit-claim deed upon a consideration in money named, with a condition for redemption by giving good security in ninety days that the same sum and interest should be paid in two years, was held not to be a mortgage, and that the condition only secured a right of repurchase. *Henry v. Bell*, 5 Vt. 393. But see *Graham v. Stevens*, 34 Vt. 166.

33. A conveyance and bond for a reconveyance were held not to be a mortgage, upon the facts stated. *Rich v. Doane*, 35 Vt. 125.

34. A deed with a bond for a re-conveyance, construed as a mortgage, in *Wing v. Cooper*, 37 Vt. 169. *Davis v. Hemenway*, 27 Vt. 589.

35. Where a deed of land was absolute upon its face, but a condition was written on the back, of the same date, although not signed, that if the grantor should pay a certain note to the grantee, as described in the condition, then said deed should be void;—Held, that the condition should be presumed to have formed a part of the deed at the time of the delivery, and that the deed was *prima facie* subject to such condition, which made it a mortgage. *Whitney v. French*, 25 Vt. 663.

36. S and his wife executed to G a deed of a farm for the expressed consideration of \$800, and before delivery G signed an agreement not

sealed, but indorsed upon the deed, that if S should within five years pay him \$851, "together with the use of said farm," then he should execute to S a good and sufficient deed of said farm. The farm was worth \$1000, and S remained in possession. In an action of ejectment by G against S, brought before the expiration of the five years;—Held, that the deed was subject to the indorsed agreement as a condition, and was a mortgage to secure a debt of \$851; and that, the condition not being broken, the plaintiff could not recover. *Graham v. Stevens*, 34 Vt. 166.

37. S, the mortgagor under the deed above named, remained in possession and made a second mortgage to W. Held, that S was not in possession as lessee of G, and that W was not liable, as assignee of S, to pay rent to G. *Graham v. Way*, 38 Vt. 19.

38. If a deed clearly appears on its face to be a mortgage, parol evidence is not admissible to show that it was a conditional sale only, and not a mortgage. *Ib. Wing v. Cooper*, 37 Vt. 169.

39. A power of sale in a mortgage is in practice unusual, if not unknown, in this State, and ought not to be recognized in any case unless it is conveyed by an express grant and in clear and explicit terms. *Ib.*

40. A mortgagee of certain land conveyed another piece, and, in the conveyance, expressly subjected it to his mortgage. Held, that, as against the grantee and those holding under him, this was equivalent to a reservation of a lien for the payment of his mortgage, and as effectually charged the land conveyed as would a direct mortgage. *Sweetser v. Jones*, 35 Vt. 317.

41. Future advances. A mortgage to secure future advances is good, and all that is required in the way of description of the debt is, that the extent of the mortgage should be described in general terms, as, "all I now owe or may hereafter owe" the mortgagee. *Redfield, C. J.*, in *Seymour v. Darrow*, 31 Vt. 138.

42. Where the description in the condition was: "Also what I may owe him on book," and there was then no existing account between the parties;—Held good to secure a subsequently accruing account, as against a subsequent and recorded mortgage, and until express notice given by the subsequent mortgagee against further advances—the record of the later mortgage not being constructive notice to the previous mortgagee. *McDaniels v. Colwin*, 16 Vt. 300.

43. Where the description was: "All the notes and agreements I now owe or have with him (the mortgagee), or I and others jointly and severally have with him";—Held, by three judges (*Poland* and *Barrett*, J. J., dissenting), that, as against a subsequent mortgagee, this

embraced an existing contract to indemnify against indorsements thereafter made. *Seymour v. Darrow*, 81 Vt. 122.

44. The description in the condition was: "All sums that he (the mortgagee) may become liable to pay by signing or otherwise," &c., without limitation as to amount. Held to be a sufficient description of all future liabilities for the mortgagor, and that it was not material that no sum or limitation was stated. *Soule v. Albee*, 31 Vt. 142.

45. **Equitable mortgage.** A mere parol agreement that advances made towards the improvement of real estate shall be secured upon the estate, as by mortgage, will have no effect against a *bona fide* purchaser, or attaching creditor without notice. *Bailey v. Warner*, 28 Vt. 87.

46. Whether, under the laws of this State, an equitable mortgage can be created by the deposit of title deeds as a security for the loan or advance of money—*dubitatur*. *Bicknell v. Bicknell*, 81 Vt. 498.

47. B, owning land by deed not recorded, deposited his deed with H as security for advances made, until he should execute a mortgage therefor. B afterwards, for valuable consideration, quit-claimed to the orator, who had notice of the agreement between B and H. Held, without determining the respective rights of the parties in the land, that the orator was entitled to a decree that B and H should procure the deed to be recorded. *Id.*

## II. RELATIVE RIGHTS OF MORTGAGOR AND MORTGAGEE.

48. **The mortgagor's tenancy.** A mortgagor, though in possession, cannot effectually surrender or pass any right of the mortgagee in the premises,—as, to yield to a false division line. *Ellithorp v. Dewing*, 1 D. Chip. 141.

49. There is such a relation between the mortgagor and mortgagee of land as constitutes a tenancy, and makes the joinder of them in an action of ejectment proper, under the statute, although the mortgagee may never have been in actual possession. *Marvin v. Dennison* (U. S. C. C.), 20 Vt. 662. 27 Vt. 257.

50. The doctrine that a mortgagor is *quasi* tenant of the mortgagee and cannot dispute his title, or set up an outstanding title against him, &c., applies as well to a second or subordinate mortgagee as to a first. *Wires v. Nelson*, 26 Vt. 13.

51. Where a mortgagor took a lease from his mortgagee for a definite term, but continued in possession after the termination of the lease;—Held, that his original liability as mortgagor revived at the termination of the lease, and he became again a tenant at sufferance, and

not a tenant from year to year. *Stedman v. Gassett*, 18 Vt. 346.

52. After the expiration of the law day in a mortgage, the mortgagor, or one occupying his position, is considered as tenant at sufferance of the mortgagee, and liable to be evicted without notice to quit. The mortgagee, in such case, has a right of entry which he may peaceably assert without notice and without action; or he may, with or without notice to quit, bring ejectment, and may recover possession of the land and damages for use and occupation after notice to quit, and if no notice, then after the service of the writ—and this against either the mortgagor or his assignee. *Mason v. Gray*, 36 Vt. 311-12. *Stanbury v. Dean*, Brayt. 166. *Atkinson v. Burt*, 1 Aik. 329. *Babcock v. Kennedy*, 1 Vt. 457. *Lyman v. Mower*, 6 Vt. 345. *Wilson v. Hooper*, 13 Vt. 653. *Stedman v. Gassett*, 18 Vt. 346. *Lull v. Matthews*, 19 Vt. 322. *Pierce v. Brown*, 24 Vt. 165. *Collamer v. Langdon*, 29 Vt. 82.

53. **Mortgagor's ownership.** The mortgagor is owner of the land mortgaged, and, under the statute, is entitled to possession until condition broken. Even after this he is owner, and the mortgagee is a creditor having a lien on the land for his debt, with the right of possession. The mortgagor, or his assignee, is so far a tenant of the mortgagee, that the mortgagee cannot maintain trespass *qua. clau.* until he has taken actual possession. Merely forbidding the mortgagor to enter or occupy does not make him a trespasser by so doing. *Hooper v. Wilson*, 12 Vt. 695.

54. Where a mortgagor with right of redemption took a lease from the mortgagee at a specified rent, under a stipulation that the crops to be raised should be the property of the lessor until payment of the rent;—Held, that the crops raised by the mortgagor were subject to attachment by his creditors, the mortgagee not being absolute owner of the premises leased. The mortgagor, in possession, is to be treated, as to third persons, as remaining the owner. *Cooper v. Cole*, 88 Vt. 185.

55. The mortgagor and those standing in his right are entitled to the rents and profits of the premises mortgaged, without accountability to the mortgagee. *Walker v. King*, 44 Vt. 601. *S. C.* 45 Vt. 525.

56. Where a mortgagor, before condition broken, in good faith cut wood upon the premises for his necessary fire-wood;—Held, that the title to the wood vested in the mortgagor by the severance, and that he was not liable to the mortgagee for removing it from the premises, after the law day had expired, although the mortgage debt exceeded the value of the premises. *Wright v. Lake*, 30 Vt. 206.

57. **Lapse of time as affecting mortgagor's rights.** An equity of redemption is not

barred by the possession of the mortgagee for a time less than 15 years, though there may be a difficulty in taking the accounts. *Morriam v. Barton*, 14 Vt. 501.

58. Where a party had an equitable right in lands, somewhat in the nature of a mortgage with an equitable right of redemption after forfeiture, but surrendered possession and took no steps whatever to pay the sum due, and offered no excuse for not doing so, the court was not inclined, after the lapse of some six years before claim made, to allow a redemption; but relief was granted, on other grounds, to a purchaser from him. *Smith v. Blaisdell*, 17 Vt. 199.

59. **The mortgagee—His interest.** The estate of a mortgagee may be attached and execution extended thereon. *Wilkinson v. Lathrop*, Brayt. 168. (Overruled.)

60. A mere mortgagee has no attachable interest in the lands mortgaged. So held, where the mortgagee had obtained judgment by default in an action of ejectment upon his mortgage, but without foreclosure of the equity of redemption. *Barrett v. Sargeant*, 18 Vt. 365.

61. **Tacking.** A mortgagee cannot purchase in a mortgage on a different piece of land and tack it to his own mortgage, and so compel a redemption of both, or neither. *Cleveland v. Clark*, Brayt. 165.

62. The doctrine of tacking mortgages, so as to squeeze out an intermediate incumbrancer, though he be an attaching creditor, is not adopted in Vermont. *Chandler v. Dyer*, 37 Vt. 345.

63. **Distinct remedies.** A mortgagee has a right to collect his debt independent of the mortgage. *Catlin v. Chittenden*, Brayt. 168.

64. A mortgagee does not lose his right to pursue the land, by allowing an action to recover the debt to become barred by the statute of limitations. *Richmond v. Aiken*, 25 Vt. 324.

65. The neglect to present a mortgage note for allowance to the commissioners of claims against the mortgagor's estate, does not preclude the enforcement of the mortgage security. *Grafton Bank v. Doe*, 19 Vt. 463.

66. If so presented and allowed, the mortgage security is not affected thereby, nor the right to foreclose. *Putnam v. Russell*, 17 Vt. 54.

67. Where claims secured by mortgage are allowed against the estate of the mortgagor, the mortgagee will be entitled to the same proportionate dividend as the other creditors; nor will his mortgage security be defeated or impaired thereby, nor lessened beyond the dividend paid. *Walker v. Barker*, 26 Vt. 710.

68. Where a mortgagee has procured an allowance of the mortgage claims against the estate of the mortgagor, and afterwards, at the

administrator's sale, bought in the equity of redemption, subject to the application upon the mortgage of the dividend to be struck upon the allowed claims;—*Held*, that he was entitled to such dividend. *Id.*

69. A mortgagee is not obliged to foreclose for all the mortgage notes. He may withhold a part from entering into the decree, and afterwards sue them at law. *Langdon v. Paul*, 20 Vt. 217.

70. A mortgagee may legally hold two mortgages on different pieces of land to secure the same debt, and may foreclose the mortgage upon one piece without the other; and a foreclosure of the one would bar a foreclosure of the other only in case the land foreclosed should be equal in value to the debt. In that case it would be a bar, for the debt would be thereby paid. *Burpee v. Parker*, 24 Vt. 567.

71. **Lapse of time.** Where there has been no entry by the mortgagee nor payment of interest by the mortgagor, the presumption of payment of the mortgage becomes absolute after the lapse of fifteen years, like the bar of the statute of limitations. It is a presumption of law, and conclusive, unless encountered by distinct proof of recognition of the subsistence of the mortgage. *Whitney v. French*, 25 Vt. 663.

72. The interest of a mortgagee, being but a chattel interest, and always in a condition to be enforced by some one, the operation of the presumption of payment by lapse of time is not interrupted by the succession of rights to the mortgage—as, by death of the mortgagee, &c. *Id.*

73. **Injunction against waste.** A mortgagee is entitled to an injunction to restrain waste by the mortgagor, by which the mortgage security is in danger of being reduced in value below the amount of the mortgage debt. *Hastings v. Perry*, 20 Vt. 373.

74. The court, in such case, will not only restrain future waste by injunction, but, if the bill be framed to that end, will, as incident to the injunction, proceed to take an account of the waste committed, and decree satisfaction therefor. *Id.*

75. And such decree will be made, not only against the mortgagor, but against such as acted under license from him, having knowledge of the rights of the mortgagee. *Id.*

76. **Right of entry.** A mortgagee, after condition broken, has a right of entry which he may assert by peaceably entering, without notice and without an action of ejectment. *Wilson v. Hooper*, 18 Vt. 653.

77. —and right of action. A mortgagee of lands after condition broken (but not before) is entitled to possession, and may then maintain trespass for an injury thereto done after breach of the condition. *Harris v. Haynes*, 34 Vt. 220.



78. After the condition of a mortgage is broken, the mortgagee is to be regarded at law as the owner of the mortgaged premises, and entitled to immediate possession; and any timber thereafter cut upon the premises by the mortgagor, or those acting under him, is to be regarded as tortiously taken, and the title thereto remains in the mortgagee, the same as before severance. *Wright v. Lake*, 30 Vt. 206. *Morey v. McGuire*, 4 Vt. 327. *Lull v. Matthews*, 19 Vt. 323. *Langdon v. Paul*, 22 Vt. 205. 44 Vt. 302.

79. After condition broken, the interest of the mortgagor in the premises mortgaged becomes, at law, absolutely vested in the mortgagee, and he has the right of immediate possession; and for any act essentially impairing the inheritance, and not mere acts of occupation, he may maintain trespass *qua. clau.* *Hagar v. Brainerd*, 44 Vt. 294.

80. The right of entry upon land mortgaged is not lost to the mortgagee, either by presumption or the statute of limitations, except by a continued interruption and ouster for the term of fifteen years. This interruption, or ouster, ceases upon the acknowledgment of the title of the mortgagee by the owner of the equity of redemption, or by the owner of the equity in part, if the title subsequently comes to him. Such acknowledgment is a virtual compromise of any prior ouster. *Richmond v. Aiken*, 25 Vt. 324.

81. For wood or timber cut by the mortgagor upon the mortgaged premises after condition broken, and converted, the mortgagee may maintain trover, or (*semble*) an action on the case in the nature of waste. *Langdon v. Paul*, 22 Vt. 205. *Hutchins v. Lathrop*. *Ib.* 210.

82. Rents and profits. Notice given by a mortgagee to a tenant or assignee of the mortgagor, after the law day has expired, that the mortgagee claims the possession and payment of the rents and profits, is equivalent to a notice to quit; after which, the mortgagor cannot recover therefor, but they may be recovered by the mortgagee as damages in ejectment. *Babcock v. Kennedy*, 1 Vt. 457, 462. *Stedman v. Gassett*, 18 Vt. 352. *Mason v. Gray*, 36 Vt. 308.

83. A had mortgaged land to the defendant and, after condition broken, conveyed it to the plaintiff, who had notice of the mortgage. In May, one K went into possession under separate contracts with the plaintiff and the defendant, to hold as tenant of each, neither knowing of the contract made by K with the other until the next December, although the plaintiff, soon after his contract with K, knew that the defendant claimed of K the rents and profits. *Held*, that in law K was the tenant of the defendant, and that he was entitled to the rents

and profits as against the plaintiff. *Mason v. Gray*.

84. Mortgagee in possession. A mortgagee in possession after condition broken, whether before or after the entering of a decree of foreclosure, is not accountable at law to the mortgagor for rents, profits, or management of the estate, or for waste committed, while he was so in possession. The only remedy of the mortgagor is in equity, as incident to his equitable right to redeem. *Seaver v. Durant*, 39 Vt. 103. *Chapman v. Smith*, 9 Vt. 153.

85. M, a mortgagee in possession after condition broken, let D occupy under a covenant that D should keep the estate in repair. L, the mortgagor, redeemed, and, for his own benefit, sued D at law in the name of M, but against the will of M (though offering him an indemnity), for a breach of this covenant happening before the redemption. *Held*, that the action would not lie, and it was dismissed upon motion. *Seaver v. Durant*.

86. A mortgagee in possession is not required, in a suit against a stranger for an injury to his possession, to make proof of the mortgage debt. *Hull v. Fuller*, 7 Vt. 100.

### III. ASSIGNMENT; SUBROGATION; CONTRIBUTION.

87. Assignment. The assignment of a mortgage written on the back of the mortgage and executed as a deed of lands, quitting and assigning all the right, title and interest of the mortgagee "in or to the within mortgage deed," was *held* to convey such title as to sustain ejectment by the assignee. *Stewart v. Thompson*, 3 Vt. 255.

88. The law does not require the assignment of a mortgage to be recorded, as essential to its validity, nor is this necessary for the purposes of a foreclosure; and as the mortgage debt may be assigned by parol, it follows that the mortgage security, which is a mere incident of the debt, may be transferred in the same way. *Pratt v. Bank of Bennington*, 10 Vt. 293. 21 Vt. 338. 22 Vt. 139.

89. W mortgaged lands to H, who assigned the notes and mortgage to the orator. This assignment was not recorded. Afterwards, W, by general deed of quit-claim, released to H, and H mortgaged to the defendants, who had no notice of the assignment. On a bill to foreclose;—*Held*, that the orator's preference was not lost, and that he was entitled to a decree of foreclosure. *Pratt v. Bank of Bennington*.

90. The assignment of a debt secured by mortgage carries with it the security as an incident, unless there be an agreement to the contrary; and this, although the mortgage be not assigned or delivered, and though the assignee

may not know of the existence of the security. *Keyes v. Wood*, 21 Vt. 331.

91. H and T being joint mortgagees in a mortgage given to secure a debt due them jointly, T, by deed, assigned his moiety in the mortgaged premises to K. The mortgagor paid H his half of the mortgage debt, whereupon H delivered the mortgage notes to K. Afterwards, the mortgagor mortgaged the same lands to S who went into possession, H having in the meantime deceased. On a bill by K against the mortgagor and S, to foreclose for a moiety of the original mortgage debt;—*Held*, (1), that the conveyance by T to the orator entitled him to hold the premises until the mortgage debt was paid; (2), that the delivery of the mortgage notes by H to the orator was sufficient without a formal assignment or indorsement; (3), that the bill was properly brought by the orator alone, and that he was entitled to a decree of foreclosure for a moiety of the original mortgage debt, on production of the notes. *King v. Harrington*, 2 Aik. 33.

92. Upon the death of a mortgagee before foreclosure, his legal title and interest in the mortgaged premises vests in his executor or administrator, to be administered as assets of the estate; and this legal title the executor or administrator may convey by deed, so as to give his grantee all the rights of the mortgagee. *Pierce v. Brown*, 24 Vt. 165. *Collamer v. Langdon*, 29 Vt. 32.

93. Where an estate was settled and divided by amicable arrangement of the heirs, assigning to one of them a note and mortgage, part of the estate, without the appointment of an administrator or any proceedings in the probate court, a foreclosure was allowed in favor of such heir, no creditor of the estate objecting, upon the orator's filing an indemnity to protect the defendant against being again called upon for payment. *Babbitt v. Bowen*, 32 Vt. 437.

94. The debt in several notes. Where all the notes secured by a mortgage are assigned, the mortgage passes. Where a part are assigned and a part retained, it is entirely a matter of contract between the mortgagee and the assignee, how and for whose benefit the mortgage shall be held; it is matter of intention and mutual understanding. *Langdon v. Keith*, 9 Vt. 299. 10 Vt. 293. 21 Vt. 333. *Ib.* 554. *Wright v. Parker*, 2 Aik. 212.

95. Where a mortgage was given to secure several notes, and all the notes were assigned except one, and the whole mortgage was assigned;—*Held*, that, as between the mortgagee and the assignee, the assignee had acquired the whole interest in the mortgage, yet, as against the mortgagor, the mortgage remained to the mortgagee as a security for the note not assigned. *Langdon v. Keith*.

96. If part of a debt, as one or more of sev-

eral notes secured by the same mortgage, be assigned, a *pro rata* portion of the mortgage security accompanies the part of the debt assigned, in the absence of a contract to the contrary. *Keyes v. Wood*, 21 Vt. 331. 23 Vt. 662.

97. And this, although the residue of the debt, together with the mortgage, be afterwards assigned to another party. *Belding v. Manly*, 21 Vt. 550.

98. A held certain notes, payable at different dates and secured by the same mortgage, which he had received of B and held as collateral security for B's indebtedness to him. B afterwards procured A to transfer to C, to whom B was indebted, a portion of these notes, which C was to hold as collateral security for B's indebtedness to him, and B agreed with C that the mortgage should stand as a prior security to him for the notes so assigned; and B returned to A other securities of value equal to the notes so assigned. On a petition by A to foreclose;—*Held*, that C acquired a priority in the mortgage under his agreement with B; that B was the general owner of the notes and acted for himself and with reference to his own interest, as he properly might, in the making of that contract; and that he was agent for A only so far as to protect and keep good the collateral security to A. *George v. Woodward*, 40 Vt. 672.

99. After foreclosure by the assignee of part of certain mortgage notes, and no redemption, partition of the lands between him and the assignee of the other notes was ordered,—the several assignments having transferred to each a proportionate part of the mortgage security. *Wright v. Parker*, 2 Aik. 212.

100. Subrogation. Where several persons are interested in land incumbered by a mortgage, whether as owners of distinct parcels or as tenants in common of the whole, each is at liberty to redeem for the protection of his own interest, and when he so redeems he becomes substituted in equity, in the place of the mortgagee, and is entitled to hold the land, as if the mortgage existed, until the others pay him their shares of the incumbrance—their shares being the *pro rata* value of their respective interests—and may enforce this right by bill to foreclose. *Hubbard v. Ascutney Mill Co.*, 20 Vt. 402.

101. Payment of money due upon a mortgage may operate to cancel it, or in the nature of an assignment of it, as may best subserve the purposes of justice, and the just and true interest of the parties. The purpose, however, must be innocent, and injurious to no one. *Bullard v. Leach*, 27 Vt. 491. 44 Vt. 644.

102. A subsequent incumbrancer, or one who has acquired a legal or equitable interest in mortgaged premises, who so stands in refer-

ence to the property that it becomes his interest and duty to pay off the prior incumbrance for his own protection, may do so, and will then be treated as the equitable assignee of such prior mortgage, and may keep it on foot as against intervening incumbrancers. *Aliter*, as to a volunteer. *Downer v. Wilson*, 23 Vt. 1.

103. Where one advanced money to a mortgagor to redeem a first mortgage, and took a usurious note additional, or as *bonus*, and a mortgage on the same premises to secure such note;—*Held*, that as to intermediate incumbrancers, he was a volunteer, and could not be subrogated to the rights of the first incumbrancer. *Ib.*

104. Where the holder of an estate pays off a previous existing mortgage, a payment necessary to be made to save his estate, no assignment to him of the mortgage, nor proof of an intention on his part to keep it alive, is necessary to give him the benefit of it—his payment of it, together with its relation to his estate, being in aid of his title, to strengthen and uphold it,—except in certain exceptional cases. *Walker v. King*, 44 Vt. 601. *S. C.* 45 Vt. 525.

105. The petitioner took a mortgage of the equity of redemption of redeeming three prior mortgages—that is, a fourth mortgage. The defendants, F and M, purchased the mortgagor's final equity and paid therefor, as agreed, the first two mortgages and a certain agreed sum on the third, and thereupon went into possession, and they, and the other defendants, their assigns, ever after occupied the premises, taking the rents and profits to themselves. On this petition, both to redeem and to foreclose;—*Held*, (1), that the defendants were not liable to account for the rents and profits; (2), that the defendants, to the extent of their payments of the previous mortgages, were subrogated to the rights of those mortgagees, and those mortgages constituted part of their title; (3), that they were entitled to interest on such mortgages, to be computed according to the terms thereof (annual interest), except as to those which had been merged in a decree; and on those, simple running interest;—and a decree of foreclosure was ordered for the petitioner upon redemption of the previous mortgages. *Ib.*

106. A court of chancery will uphold a mortgage for the benefit of a party who has advanced money upon it, when equity requires it; and it is not indispensable that there should be an agreement that the mortgage should be kept on foot. This is often done when there is no agreement at all to that effect, but where the money paid was intended as a payment and satisfaction of the mortgage. But a court of equity will not convert a payment into a purchase, in favor of a party advancing the money, when there is a superior countervailing equity

in another party. *Peck, J.*, in *Miller v. Rut. & Wash. R. Co.*, 40 Vt. 408.

107. A mortgagee cannot be compelled to rely upon a portion of the mortgaged premises, though adequate security. To do this, would be to make contracts for the parties, not to enforce them. But where one's right arises out of the chancery principle of subrogation, this not being by force of the contract of mortgage, his right by substitution is not necessarily co-extensive with that of the mortgagee, but may be limited, as may be equitable. *Bailey v. Warner*, 28 Vt. 87.

108. A sold to B a piece of land subject to an outstanding mortgage, but, by mutual mistake, his deed described only an adjoining piece to which he had no title. B took possession of the parcel so sold and intended to be conveyed. The oratrix, a creditor of B, attached all B's real estate in the town, and levied her execution upon an undivided part of B's equity of redemption in the parcel so occupied by B. Before this, C had paid for B the outstanding mortgage, and, between the attachment and the levy, by agreement with B, took for his security a quit-claim deed from A of the premises, by a true description. *Held*, that the attachment and levy gave the oratrix an equitable title according to her levy; that the attachment was such constructive notice of her lien, that C could not thereafter defeat it by getting in the legal title, unless having a superior equity; that his equity, arising by way of subrogation under the mortgage, was not necessarily co-extensive with the rights of the mortgagee; and it appearing that the remainder of the premises, not levied upon, was sufficient to pay C's claim, a decree was ordered that B and C should convey to the oratrix the part embraced in her levy. *Ib.*

109. Where one, pending the running of a decree of foreclosure, set off upon execution the land mortgaged;—*Held*, that he incurred thereby no duty to the mortgagor to redeem, and that he might properly purchase in the right of the mortgagee and take a conveyance thereof, and thus, after the expiration of the decree without redemption by the mortgagor, he would become vested with the absolute title. *Tichout v. Harmon*, 2 Aik. 37.

110. A creditor levied his execution upon his debtor's equity of redemption in land, and, to protect the same, paid off a decree of foreclosure of the mortgage, about to expire. To do this, he borrowed money of the orator and gave a mortgage therefor upon the same land. The levy proved defective, and the debtor conveyed to the defendant. *Held*, that the money paid to discharge the first mortgage was a charge upon the land in the hands of the defendant. *Payne v. Hathaway*, 3 Vt. 212. 20 Vt. 888.

111. *Held*, also, that neither the original creditor, nor debtor, was a necessary party to the bill. *Id.*

112. One who levies upon an equity of redemption and pays off the mortgages to which his levy is subject, becomes thereby in equity the assignee of them, and is entitled to all the rights of the mortgagees in the premises, and to set up any defense to a prior mortgage which they might have. *Warren v. Warren*, 80 Vt. 580.

113. Where the defendant held the title of a levying creditor upon an undivided part of an equity of redemption, and had paid the mortgage after it had become due, and the plaintiff made a levy, subsequent to that of the defendant, upon an undivided part of the same equity;—*Held*, that the plaintiff could not maintain ejectment to be let into possession as a co-tenant, since the defendant by paying the mortgage stood upon the prior and paramount right of the mortgagee to possession. *Benton v. McFarland*, 26 Vt. 610.

114. Where the orator, by levy of execution, had become owner of part of an equity of redemption in lands, and as such had redeemed a previous decree of foreclosure;—*Held*, that he should be treated as assignee of the mortgage, although the payment of the money, received by the clerk, was certified on the record to be "a full discharge of the decree;" and that he could enforce contribution from the other part owners of the equity, according to their interests. *Wheeler v. Willard*, 44 Vt. 640.

115. B gave A a mortgage of lands of which S held a prior mortgage. Afterwards, B proposed to A that he should take the lands at an appraisal to apply upon his mortgage. To this A assented, provided the lands should be released from the mortgage to S. B then agreed with S to substitute other security for the mortgage to him, and thereupon S sent a letter to A, in which he agreed to discharge all his claims on the lands, in case B should make arrangements with A, and B should desire it. Relying upon this letter, A agreed with B to have the lands appraised and to receive them upon his debt, and notice of this arrangement was given to S. The lands were afterwards appraised, and B conveyed them to A, and A surrendered to him the mortgage notes. On a bill to foreclose brought by S against B and A;—*Held*, that the mortgage of S should be postponed to the title of A, although B had not fully performed his agreement with S. *Simonds v. Brown*, 18 Vt. 231.

116. A private corporation gave its note secured by mortgage, on which note C and several others were sureties. Afterwards C became owner of the entire capital stock, and, in consideration of the assignment to him by the other

sureties of their stock, agreed with them to pay all debts of the corporation on which they were sureties, and save them harmless. F afterwards became surety for C to the mortgagee and paid the mortgage debt, and the mortgagor assigned the mortgage to F, and F to the orator. On a bill to foreclose;—*Held*, that C remained surety for the corporation, notwithstanding his said agreement with the other sureties, and that F by his payment for C became subrogated to the rights of the mortgagee, as C would have been if the payment had been made by him; and that the orator could enforce the mortgage both against the corporation, and a creditor of the corporation who had attached the estate after the execution of the mortgage. *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274. 44 Vt. 610.

117. Certain land was subject to a mortgage, then to an attachment lien, and then to another mortgage. The first mortgagee brought his bill to foreclose, making the mortgagor and the subsequent mortgagee defendants, and obtained his decree. The attaching creditor then obtained his judgment and levied his execution on the land, subject to the first mortgage. The second mortgagee duly made redemption of the decree of foreclosure. *Held*, that the second mortgagee became thereby entitled to be subrogated to all the equitable rights of the first mortgagee, and to hold the land as his security for reimbursement of the redemption money paid, as against the attaching creditor, and a decree of foreclosure was granted him accordingly. *Downer v. Fox*, 20 Vt. 388.

118. An attachment of land creates a specific lien, and gives the attaching creditor a right to redeem from a previous incumbrance, even before he has obtained judgment. Hence, his payment of a previous mortgage is not regarded as a voluntary payment in extinguishment of the mortgage, but is the exercise of a legal right, and keeps such mortgage alive as against the mortgagor and all incumbrancers subsequent to the attachment, although he may satisfy his judgment upon other than the attached property. *Chandler v. Dyer*, 87 Vt. 345.

119. C attached lands subject to a mortgage to D. D then took a second mortgage of the same lands, and afterwards foreclosed each mortgage by separate bills. Before the first decree became absolute, C redeemed it by depositing the amount with the clerk of the court, which D received and retained. The second decree became absolute without redemption, and D took possession under it. C was not made a party to either bill of foreclosure. He did not obtain judgment in his attachment suit until after such second decree had run, and then levied his execution upon other property of his debtor. In a bill by C against D, pray-

ing that he pay the amount paid by C to redeem the first mortgage, or be foreclosed;—*Held*, that he was entitled to the relief claimed. *Ib.*

120. The defendant, while a married woman, bought a farm for \$700, and paid towards it \$500, and she and her husband mortgaged back the farm to secure her and her husband's note for the balance, \$200. She afterwards through a trustee conveyed an undivided interest in the farm to her husband, and he agreed to pay the mortgage. The mortgage was foreclosed, and during the running of the decree they were divorced, and she, afterwards, paid towards redeeming the decree such proportional part as her interest in the land bore to the whole, and the balance of the decree was paid by the orators, creditors of the husband, who had levied their executions on his equity of redemption. These levies turned out to be defective and void. The defendant afterwards got judgment against her former husband, and set off on her execution his interest in the land, disregarding the other levies. In a bill brought by such other creditors to compel the defendant to repay the sums paid by them in redemption of the mortgage, they were found to be chargeable with notice of the arrangement between her and her former husband, and that he was to pay the mortgage. *Held*, that her equity, by subrogation to the rights of the mortgagee, was superior to theirs as to the sum advanced by her, and that she had acquired the legal right by her levy; and the bill was dismissed. *Stevens v. Goodenough*, 26 Vt. 676.

121. The defendant, a widow, had a homestead right which had passed to her by the decease of her husband, and had been set out by the probate court, and which was covered by two mortgages executed in the lifetime of her husband. The first mortgagee had waived payment of his mortgage for the benefit of the defendant, who was his mother, and had discharged his mortgage. *Held*, that the second mortgagee was not entitled to a decree of foreclosure without first paying the defendant the amount of the first mortgage. *Spaulding v. Crane*, 46 Vt. 292.

122. Contribution. Where a third person became interested through necessity, or from motives other than voluntary speculation, in a portion of lands mortgaged, he was allowed his choice, whether to pay the whole mortgage debt and take an assignment of the whole mortgage, or to have the mortgage debt apportioned between the two parcels according to their value, and to redeem his parcel by paying according to the apportionment. *Chittenden v. Barney*, 1 Vt. 28. (Limited, or overruled, in *Gates v. Adams*, 24 Vt. 70. *Lyman v. Lyman*, 32 Vt. 79.

123. Where the orator, in order to free his

land of an existing incumbrance which covered also the land of the defendant, was compelled to pay such incumbrance, the court decreed contribution from the defendant proportioned to the relative value of the respective parcels. *Lyman v. Little*, 15 Vt. 576. *Payne v. Hathaway*, 3 Vt. 212.

124. Where two or more estates are subject to the same mortgage, the general rule of equity, as to contribution, is, that all the estates concerned, whether defined by quantity of interest and duration, or by extent of territory, shall contribute according to their relative values at the time the contribution becomes obligatory, which is when the debt falls due;—for, until then there is no power to compel payment, or contribution. *Danforth v. Smith*, 23 Vt. 247.

125. The orator having a mortgage of one parcel of land, afterwards took of the debtor a mortgage of another parcel to secure the same debt, and afterwards caused to be entered on the margin of the record of the first mortgage, under his hand and seal, the following: "This mortgage is discharged, a second mortgage having been given of other lands to secure the same debt." The lands embraced in the second mortgage had, before such entry on the record, been conveyed by the mortgagor in parcels to sundry persons, defendants. Upon a bill to foreclose the second mortgage;—*Held*, that, *prima facie*, the orator had the right to go against either piece of land for his debt, and if the defendants would compel him to go altogether against the other, they must show such a state of the title as would enable the orator to get his pay by so doing; or else, charge him with the release under such a state of facts and knowledge, as to make it an express fraud upon the defendants;—and, the answer lacking such allegations, a decree of foreclosure was ordered. *Gates v. Adams*, 24 Vt. 70.

126. A sale of mortgaged premises, under our practice, is never decreed. All, then, which could be consistent with the rights of the mortgagee, where the mortgaged estate has been conveyed away in parcels, is to apportion the mortgage upon the parcels according to value, and first foreclose the mortgage, then give a time for the owner of each parcel to redeem his portion, or be foreclosed; and if both or neither redeem, that will end it. If one redeems his portion, and the other not, then the one redeeming his own must also redeem the other, or forfeit the whole estate; and if he does redeem the whole, then he is to be allowed to take the whole. *Redfield, J. Ib.*

127. Such apportionment cannot be made compulsory upon the first incumbrancer of the whole estate, but the subsequent purchasers may redeem the whole and compel contribution among themselves. *Redfield, C. J., in Lyman*

v. *Lyman*, 82 Vt. 79; and see *Bailey v. Warner*, 28 Vt. 87.

**128. Rule of contribution.** Where lands subject to a common burden, as a mortgage, are sold in separate parcels to different purchasers, and the deeds are duly recorded, or actual notice is had of the state of the title and of the subsisting equities, the several purchasers, as between themselves, are charged and must contribute to the common burden in the inverse order of the time of their acquiring title. *Lyman v. Lyman*. *Root v. Collins*, 34 Vt. 173.

**129. Instances.** G mortgaged land to E, and afterwards conveyed a part thereof to L, with full covenants, and after that mortgaged the remainder to B. Each of these conveyances was recorded before the execution of the one next following. Afterwards, E, knowing of the mortgage to B, released from his own mortgage the part conveyed to L. On a bill of foreclosure by E against G and B;—*Held*, that the charge rested primarily upon the part conveyed to B, and that he was not entitled to a deduction from E's mortgage in proportion to the value of the part released, as compared with that of the whole land included in the mortgage. *Lyman v. Lyman*.

**130.** A parol sale of a part of land mortgaged, followed by possession and improvements on the same by the purchaser, was *held* sufficient, as between the purchaser and a subsequent grantee of another parcel of the mortgaged land who, at the time of his purchase, had actual notice of the previous parol sale, to throw the burden of the mortgage upon the parcel last conveyed; and such notice to the party for whose benefit the deed of the second parcel was given, though made to another person, but in fact in trust, was *held* sufficient. *Root v. Collins*, 34 Vt. 173.

**131. Tenant for life—Reversioner.** As to a mortgaged estate, the general rule is, that the tenant for life is holden in equity to pay the interest accruing during his enjoyment of the estate, and that the reversioner is holden to pay the principal. *Doane v. Doane*, 46 Vt. 485.

#### IV. REMEDY AT LAW.

**132. Ejectment.** The prohibition in the probate act (Slade's Stat., c. 44, s. 58), of any action against an executor, &c., until the expiration of the time allowed for payment of debts, &c., does not apply to ejectment upon a mortgage, or bill to foreclose. *Bradley v. Norris*, 3 Vt. 369.

**133.** A bill in chancery by a mortgagor does not lie to enjoin an action of ejectment brought upon the mortgage, where the bill is not brought for discovery and denies any breach of the condition of the mortgage;—his defense at law,

in such case, being full, clear and adequate, and the jurisdiction of the law court having first attached. *Henry v. Tupper*, 27 Vt. 518.

**134.** In order to sustain ejectment upon a mortgage given to secure a promissory note, the plaintiff must produce the note, in order to prove the existence of the debt. *Edgell v. Stanford*, 3 Vt. 202. 5 Vt. 253. (*Royce, J.*, dissenting.)

**135.** But not, if the equity of redemption has been conveyed in satisfaction of the note. *Marshall v. Wood*, 5 Vt. 250.

**136.** In ejectment upon a mortgage, where the note produced as the mortgage note varied from that described in the mortgage;—*Held*, that parol evidence was not admissible to prove that the note produced was the one intended by the description in the mortgage, and that the variance occurred through mistake;—that the plaintiff's remedy was in chancery. *Edgell v. Stanford*, 3 Vt. 202. 7 Vt. 502. 13 Vt. 495.

**137. Effect of payment.** Ejectment by mortgagee, commenced after a decree of foreclosure, is defeated by the mortgagor's paying the amount of the decree, which destroys the title of the mortgagee. *Burton v. Austin*, 4 Vt. 105. 18 Vt. 149. (Changed by G. S. c. 40, s. 4.)

**138.** But in such case, if the decree be not redeemed, the plaintiff in ejectment may recover nominal damages and costs, although he has entered into possession under the decree, and although the premises are worth the amount of such decree at the time it became absolute. *Barnes v. Beach*, 18 Vt. 146.

**139.** To an action of ejectment upon a mortgage, the defendant pleaded in bar payment of part of the debt, and an agreement to postpone payment of the balance for one year. *Held* ill, for (1) the agreement was without consideration; (2), if otherwise, as an agreement not to sue for a given time, it would be no bar; and (3), if this, possibly, amounted to a parol lease for a year, it should have been so pleaded. *Mason v. Peters*, 4 Vt. 101.

**140. — of tender.** A tender of the sum due upon a mortgage defeats an action of ejectment upon the mortgage; and a tender made at any time after suit commenced, with all the costs which had then accrued, has the same effect to defeat the action. *McDaniels v. Reed*, 17 Vt. 674. *Downer v. Bowman*, 17 Vt. 417. *Powers v. Powers*, 11 Vt. 262. 16 Vt. 148.

**141.** The same doctrine was applied to a decree of lands as alimony, but conditioned that such assignment should be void upon the payment of a certain sum. *Powers v. Powers*.

**142.** In such case, the money tendered need not be brought into court. It is enough that the defendant have it ready, if called for. *McDaniels v. Reed*, 17 Vt. 674.

**143.** In ejectment based upon several mort-

gages, each describing a distinct parcel of land and each given to secure a distinct and particular debt, which mortgages had come to the plaintiff by assignment;—*Held*, that a tender, during the pendency of the suit, of the debt due upon part of the mortgages, and the costs, defeated the action as to the lands embraced in those mortgages. *Id.*

**144. Rents and profits.** Where a second mortgagee, or a creditor who has levied upon the equity of redemption, brings ejectment against the mortgagor after judgment in ejectment by a former mortgagee, and while the time given therein for redemption is running, he cannot recover the rents and profits, for they belong to the former mortgagee, but he may recover nominal damages. *Collins v. Gibson*, 5 Vt. 243.

**145.** A second or later mortgagee may maintain ejectment against the mortgagor, or any one in possession claiming title under him, and may, by way of damages, recover rents and profits from the time of notice given, or suit brought, unless the previous mortgagee has brought suit, or given notice to pay the rents to him. *Wires v. Nelson*, 26 Vt. 18, explaining *Collins v. Gibson*.

**146. Redemption.** The statute allowing the redemption of lands after judgment in an action of ejectment (G. S. c. 40, s. 7), applies only to the case of a technical mortgage, either by way of a conveyance to be void on condition, or with defeasance under seal. *Miller v. Hamblet*, 11 Vt. 499. *Olcott v. Dunklee*, 16 Vt. 478. *Harrington v. Donaldson*, 31 Vt. 585.

**147.** The defendant conveyed lands to the plaintiff by deed, with a condition of defeasance upon the payment of certain notes to the plaintiff, and that he "should also put a good cellar under the frame on said premises, and finish off the house in good style, and paint it white within one year," &c. In ejectment, the plaintiff proved a breach of this last condition, and recovered judgment. On motion by the defendant to redeem under G. S. c. 40, ss. 7-11;—*Held*, that the statute did not apply, and that the defendant's only relief was in a court of equity. *Harrington v. Donaldson*.

**148.** The plaintiff in ejectment held two mortgages of the premises, one of which was due when the suit was brought, and the other not, but it became due before the judgment. On the defendant's motion, after judgment, to redeem;—*Held*, that in ascertaining the sum due in equity, the sum due on the first mortgage only should be computed, and that the defendant was entitled to redeem on payment of that sum. *Lamson v. Sutherland*, 13 Vt. 309.

**149. Execution on judgment.** In ejectment upon a mortgage, where the defendant on motion gets time to redeem and fails to redeem,

the plaintiff is entitled, with his writ of possession, to an execution for his costs, although embraced in the decree. The day of the expiration of the time limited for redemption is the day of the rendition of final judgment, for the purposes of taking execution and charging bail upon the original writ. *Emerson v. Washburn*, 8 Vt. 9.

## V. REMEDY IN CHANCERY.

### 1. Bill to foreclose;—to redeem.

**150. Foreclosure.** A bill to foreclose need not allege that the mortgagor had any title in the premises mortgaged. *Shed v. Garfield*, 5 Vt. 39.

**151.** The foreclosure of mortgages by petition under the act of 1853 (G. S. c. 29, s. 75), applies as well to disputable cases, as to cases not disputable. *Wood v. Adams*, 35 Vt. 300.

**152.** Where a mortgage given to secure a promissory note misdescribed the note, by mistake;—*Held*, that the mortgagee was entitled to relief in equity, and to a decree of foreclosure against a subsequent mortgage. *Porter v. Smith*, 13 Vt. 492.

**153. Redemption.** A mortgage deed was decreed to be reformed in chancery, on bill brought by the mortgagee, so as to include some lands intended and agreed to be mortgaged, but which, by mutual mistake, were not included;—and this was done after the mortgagee had obtained a judgment in ejectment according to the mistaken description and the time given for redemption had expired, and after the mortgagee had conveyed the estate, according to such description, to a third person, but all before the mistake was discovered;—and the decree in the action of ejectment was opened, and the mortgagor, on his cross bill, was allowed to redeem the whole premises according to the reformed deed, by paying the whole mortgage debt. *Blodgett v. Hobart*, 18 Vt. 414.

**154.** A mortgagee sold at auction the mortgaged premises, and gave a warranty deed and possession, and applied the proceeds upon the mortgage debt,—all this, with the approval and concurrence of the mortgagor. The purchaser went into possession, and so held for more than 13 years, having made valuable improvements, and without any claim or dissent on the part of the mortgagor. *Held*, that the mortgagor could not be let in to redeem;—much less his assignee, who had taken a conveyance from him upon an agreement to pay a certain price in case a redemption was allowed, otherwise nothing;—that such bargain was unlawful, as being a species of champerty or maintenance. *Wright v. Whithead*, 14 Vt. 268.

**155.** The orator conveyed land to B, as a

security, taking back a bond of defeasance. By subsequent arrangement between these parties and C, C advanced to B what was then mutually understood and estimated as the sum due to B, and thereupon the orator surrendered to B his bond, and B conveyed the premises to C; and the orator also conveyed to C, and C gave the orator a bond of defeasance conditioned for the payment of the sum so advanced for him to B—thus, in effect, creating a new mortgage to C. The sum so estimated as due to B and advanced by C was, in fact, less than the sum due and secured. On a bill against B and C to redeem;—*Held*, that B retained no subsisting lien for such excess, and, on the case as thus made and heard on bill and answers, the orator was allowed to redeem by paying the amount due to C. *Hodgman v. Hitchcock*, 15 Vt. 374.

See *Coers*, II.

### 2. Parties.

156. Upon a bill to foreclose a mortgage given to one member of a copartnership, but to secure a debt due the firm;—*Held*, that all the partners must be joined. *Noyes v. Sawyer*, 8 Vt. 160.

157. A subsequent mortgagee is a proper but not necessary party defendant to a bill to foreclose. *Wood v. Beebe*, 31 Vt. 495.

158. A creditor who has levied his execution upon an equity of redemption is a proper party defendant to a bill to foreclose the mortgage, although the time for redemption from the levy has not expired. *Bullard v. Leach*, 27 Vt. 491.

159. A creditor who has attached lands previously mortgaged is a proper defendant in a bill to foreclose the mortgage—(overruling, on this point, *Nichols v. Holgate*, 2 Aik. 188, and *dictum* in *Downer v. Fox*, 20 Vt. 388). If not made a party, he is not bound by the decree rendered. *Chandler v. Dyer*, 37 Vt. 345. (Since provided for by Stat. 1864, No. 29.)

160. To a bill by a trustee to foreclose a mortgage, the *cestui que trust* is a necessary party. *Davis v. Hemingway*, 29 Vt. 488.

161. To a bill to foreclose a mortgage given by a surety, the principal should be made a party; but where objection was not taken for this cause in the outset, and the principal was present at the accounting, the court proceeded to render a complete decree. *Davis v. Converse*, 35 Vt. 508.

162. The purchaser of land subject to a mortgage, who afterwards conveys it with warranty, is not a necessary party to a bill to foreclose the mortgage; and the bill, as to him, may be dismissed on his motion. *Soule v. Albee*, 31 Vt. 142.

163. A decree of foreclosure will not be

opened to allow such person, not made a party, to redeem, although he conveyed with warranty against incumbrances, in ignorance of the mortgage lien. *Barton v. Kingsbury*, 43 Vt. 640.

164. The chancellor, in his discretion, might have allowed such person to come in and be heard in respect to the accounting; but, in a bill to foreclose, it is not necessary to make those parties who have no lien or interest in the premises. *Ib. Prout, J.*

165. The orator bought a farm of A, and gave A a mortgage back to secure his notes given for the purchase money. He afterwards sold the farm to B, and took back a mortgage conditioned for the payment of the notes given to A, as they should fall due. B sold the farm to C, who mortgaged it back to B with like condition. C made a second mortgage to D. Upon a bill against B, C and D to compel them to pay the orator's notes to A, and to release him from liability thereon, or be foreclosed;—*Held*, that A was a necessary party. *Morse v. Larkin*, 46 Vt. 371.

166. In case of the decease of a mortgagor, his administrator is the proper party to bring a bill to redeem. *Merriam v. Barton*, 14 Vt. 501.

167. On a bill to redeem, a party liable to account is a proper party defendant. *Wing v. Cooper*, 37 Vt. 169.

168. Where the assignee of a mortgage brings a bill to foreclose, he must see to it that the mortgagee is made a party, whenever that is necessary for his security, and cannot require the defendant to bring a cross bill for the purpose of bringing in the mortgagee. *Ward v. Sharp*, 15 Vt. 115.

### 3. The account.

169. Rents and profits. In determining the sum due upon a mortgage, where the mortgagee had been in possession, and there was no evidence as to the value of the rents and profits, the court balanced the interest by the rents. *Wright v. Parker*, 2 Aik. 212. *Hunt v. Tyler*, 2 Aik. 238.

170. In an accounting between mortgagor and mortgagee, where the latter had entered upon and occupied the premises;—*Held*, that he should account for rents and profits arising from improvements made by a third person, who claimed under neither, but occupied wrongfully. *Merriam v. Barton*, 14 Vt. 501.

171. A mortgagee in possession is bound to account only for what he receives or might receive from the mortgaged premises by the use of fair, reasonable diligence and prudence, and if he rents the premises, and the rents are lost by the failure of the tenant, without fault of the mortgagee, he is not liable to account



therefor; but where the mortgagee himself occupies, and especially where the premises are a farm under cultivation, upon which labor and expenditures are to be bestowed to produce annual crops and profits, he will be charged with such sum as will be a fair rent for the premises, without regard to what he may, in fact, have realized as profits from the use. *Sanders v. Wilson*, 34 Vt. 318.

172. Where a mortgagee takes possession of the mortgaged premises with full knowledge of the right to redeem, and there is nothing to show but that the mortgagor desires and intends to redeem, he has no right to expend the rents and profits for anything but such as are strictly necessary repairs. If he go beyond this, and make improvements, though they are such as are beneficial to the estate, and such as a judicious and prudent owner would make for the benefit of it, he will not be allowed for them. *Poland, C. J. Ib.*

173. In taking an account, with a mortgagee in possession, of the sum due upon the mortgage, the annual rents and profits should be applied annually, first in payment of the interest, and the balance in reduction of the principal. *Gladding v. Warner*, 36 Vt. 54.

174. Application of counter-claim. D, in his lifetime, gave the orator his notes and secured them by mortgage, and afterwards gave the orator other notes not secured. The orator afterwards became indebted to D, not in the way of payment upon the notes. D died insolvent, and all the notes were presented to and allowed by the commissioners, and D's claim was allowed in set-off thereto, and a general balance struck in favor of the orator, being something less than the amount of the mortgage notes. On a bill to foreclose the mortgage;—*Held*, that the administrator could not insist that the claim in favor of D's estate should be first applied upon the mortgage notes, but that the law would apply it first upon the notes not secured; and the orator was allowed a decree of foreclosure for the balance found by the commissioners. *Putnam v. Russell*, 17 Vt. 54.

175. Costs of former suit. Costs of a suit at law brought to recover a mortgage debt, but afterwards discontinued, are not to be included in a decree of foreclosure of the mortgage. *Woodstock Bank v. Lamson*, 36 Vt. 118.

176. Where a former decree of foreclosure has become absolute as to the mortgagor, an after decree against a subsequent mortgagee should embrace the costs in the first; for, by redeeming, he would acquire the benefit of the first decree free of redemption by the mortgagor. *Ib.*

177. Interest. In making up a decree of foreclosure against a subsequent mortgagee, the amount is to be ascertained by computing simply the sum due upon the mortgage; and

not by taking the amount of a previous decree of foreclosure of the same mortgage, and casting interest thereon, where the defendant was not a party to that decree. This would be to charge him with interest upon interest. *Ib.*

#### 4. Decree.

178. Form of decree. A sale of mortgaged premises under our practice is, never decreed. *Gates v. Adams*, 24 Vt. 70, 74.

179. A power of sale in a mortgage is in practice unusual, if not unknown, in this State. *Wing v. Cooper*, 37 Vt. 169.

180. The ordinary time allowed for redemption from a decree of foreclosure of a mortgage, fixed at one year and one week. *Langdon v. Stiles*, 2 Aik. 184.

181. In behalf of an administrator, the court extended the usual period of redemption in a decree of foreclosure, by ordering payment of the mortgage money, one-half in one year, and the remaining half in two years. *Austin v. Jackson*, 10 Vt. 267.

182. In this State, on a bill to redeem, the course is the same as on a bill to foreclose,—that is, the decree fixes a time when the money due on the mortgage is to be paid, and, on failure, that the equity of redemption be foreclosed. *Smith v. Bailey*, 10 Vt. 163.

183. Effect. A decree of foreclosure is conclusive as to the amount due on the mortgage, which, of course, settles all questions as to the rents received by the mortgagee before that time. *Chapman v. Smith*, 9 Vt. 153.

184. The purpose and effect of a decree of foreclosure are to cut off the right of redemption, and not to settle questions of construction of the deed; it simply converts the conditional title into an absolute one, and, in other respects, leaves the rights of the parties to be determined by the deed;—unless the question of construction is made in the bill, and is explicitly adjudicated in the decree. *Carpenter v. Millard*, 38 Vt. 9.

185. A foreclosure does not cut off a right or easement in the mortgaged premises which a defendant, not mortgagor, had acquired before the giving of the mortgage. A foreclosure simply cuts off an equity of redemption in the thing mortgaged. *Shaw v. Chamberlin*, 45 Vt. 512.

186. A stranger, by the consent of a mortgagor, built a barn upon the land mortgaged, after the law day of the mortgage had expired, and during the pendency of a suit for the foreclosure of the mortgage. *Held*, that the title to the barn passed to the mortgagee, the premises not being redeemed; and that the builder had no right to remove the barn after the time fixed in the decree for redemption had expired. *Preston v. Briggs*, 16 Vt. 124.

187. A decree of foreclosure, and expiration of the time for redemption, and possession taken under the decree, operate as a purchase of the estate by the mortgagee in satisfaction of the mortgage debt, if the value of the estate be equal to the amount of the decree at the expiration of the time given for redemption; if less than that value, then in satisfaction *pro tanto*. *Lovell v. Leland*, 3 Vt. 581. 15 Vt. 118. 36 Vt. 122. *Paris v. Hulett*, 26 Vt. 308, overruling *Strong v. Strong*, 2 Aik. 873.

188. The law is the same, where the foreclosure is by an action of ejectment and motion to redeem, under the statute. *Paris v. Hulett*. *Emerson v. Washburn*, 8 Vt. 14.

189. Held otherwise, where no decree, in form, had been made and enrolled, and the mortgagee had not taken possession, nor attempted to. *Austin v. Howe*, 17 Vt. 654.

190. Payments—Their effect. The payment of a decree of foreclosure stays its operation, not only as against the party paying, but as to the other defendants. *Wheeler v. Willard*, 44 Vt. 640.

191. As to opening decree. A decree of foreclosure, whether redeemed or not, is no bar to a suit upon the mortgage securities. The sum paid on the redemption, or the land taken on the decree, only operates as a payment *pro tanto*. But such suit lays the foundation for opening the decree, if the mortgagor so elect. *Smith v. Lamb*, 1 Vt. 896.

192. Where, after foreclosure of a mortgage and possession taken under the decree, the mortgagee sues to recover the balance of the mortgage debt, this, as it seems, operates to open the foreclosure, and to give the mortgagor an election to redeem. In such case, the mortgagee should have it in his power to reconvey on receiving the whole amount of his debt. *Lovell v. Leland*, 3 Vt. 581.

193. But if, pending the running of the decree, the mortgagee recovers judgment for damages in ejectment and collects such damages before forfeiture under the decree, this will not open the decree without an offer to pay the balance due, nor could the money so collected be recovered back. *Thomas v. Warner*, 15 Vt. 110.

194. If, after a decree of foreclosure has expired, the mortgagee receives payment of part of the sum decreed, this opens the foreclosure. *Converse v. Cook*, 8 Vt. 164.

195. After a decree of foreclosure had expired, but after the payment of some previous instalments, the assignee of the mortgagor contracted to pay the mortgagee a sum for the land, exceeding the amount of the decree, for a deed thereof. He paid the amount of the decree, and gave his note for the balance, and took a deed. Held, there being no fraud, nor any unauthorized advantage taken of circum-

stances, that chancery would not relieve the assignee from payment of the note. *Smalley v. Hickok*, 12 Vt. 153.

196. A decree of foreclosure was opened, where the failure of the mortgagor to pay according to the decree, was in consequence of propositions of settlement and payment to be carried into effect after the expiration of the time fixed, by the decree, for payment, and the failure to perform was on the part of the mortgagee. It would be otherwise, where the failure so to perform was on the part of the mortgagor. *Pierson v. Claves*, 15 Vt. 93, 104. 18 Vt. 422.

197. The failure of the mortgagor to pay a second installment of a decree of foreclosure, fallen due while his bill was pending to be relieved from the forfeiture for non-payment of an earlier installment, was held to be no obstacle to opening the decree. *Pierson v. Claves*.

198. Where one, at the request of a mortgagor and for the purpose of giving him further time to redeem, purchased and took an assignment of a decree of foreclosure, before the time limited for redemption had expired;—Held, that this opened the decree and left the mortgagor as if no decree had been made, and that the assignee took the place of the mortgagee without foreclosure. *Cooper v. Cole*, 38 Vt. 185.

199. A promise made by a mortgagee, after foreclosure of his mortgage, to a subsequent mortgagee, which is relied upon by the latter, that he might redeem after the expiration of such decree, will, in equity, bind the former, or any purchaser of his mortgage and of the decree after it has expired, who has knowledge of such agreement; and will entitle such second mortgagor to redeem. *Woodward v. Cowdery*, 41 Vt. 496.

200. In such case, the redemption by a subsequent mortgagee of the mortgage foreclosure would open the decree as to all persons interested in the mortgaged estate, and preserve their respective rights, according to the priority of their respective equities in the premises. *Id.*

## VI. MORTGAGE OF CHATTELS.

201. The mortgage of a personal chattel passes the general property to the mortgagee, subject to be redeemed according to the terms of the contract; and if not redeemed within the time limited, the property becomes absolute in the mortgagee. But in case of a pledge, the general property does not pass, but only a special property, or lien; and in this case, although the pledge may not be redeemed by the time limited, yet it still retains the character of a pledge. *Wood v. Dudley*, 8 Vt. 480.

202. By the mortgage of a chattel, the gen-

eral property passes; whereas, by a pledge, only a special property passes. Possession by the pledgee is essential to a pledge; whereas, in case of a mortgage, the mortgagor may, as between the parties, retain possession. The same terms which create a pledge, if possession passes, will generally be held to create a mortgage, if possession is to be retained. *Conner v. Carpenter*, 28 Vt. 237.

203. The mortgagor of a personal chattel cannot sustain trover against his mortgagee for a sale of it, unless it be redeemed. Without redemption, the title of the mortgagee becomes absolute at the date of the mortgage, by relation. *Wood v. Dudley*, 8 Vt. 430.

204. The defendant, being indebted to the plaintiff, gave him an absolute bill of sale of certain household goods, with receipt of payment therefor, and at the same time gave the plaintiff a receipt for the same goods, to be safely kept and returned on demand after a certain date. It was further agreed by parol, that if the defendant should pay said debt by the date named in the receipt, the goods should be his, otherwise they should be the plaintiff's absolutely. *Held*, that this was a mortgage, and that trover lay therefor, upon demand, after the time of payment named. *Gifford v. Ford*, 5 Vt. 532.

205. A writing by which a chattel was expressed to be "turned out and delivered," and which conferred a power of sale to satisfy a certain demand, where the property remained in the possession of the grantor, was *held* not to be a pledge, but a mortgage. *Atwater v. Mower*, 10 Vt. 75.

206. So, where it was expressed as "turned out" as "security" for a certain debt, and it was contemplated that the possession was to remain in the grantor. *Coty v. Barnes*, 20 Vt. 78. *Blodgett v. Blodgett*, 48 Vt. 32.

207. A mortgagee or pawnee of a chattel may assign over the thing mortgaged or pawned; and the assignee will take it under all the responsibility of the original party. *Russell v. Fillmore*, 15 Vt. 180. *Hammond v. Plimpton*, 30 Vt. 333.

208. A mortgagor of personal property, after condition broken, has an equity of redemption which may be asserted, if he bring his bill to redeem within a reasonable time. A tender of the debt after default, without acceptance, does not extinguish the legal title of the mortgagee; but where, after a tender and before final hearing, the mortgagee disposed of the property, he was *held* to account, on a bill to redeem, for the excess of value above the debt. *Blodgett v. Blodgett*, 48 Vt. 32.

209. **Change of possession.** The doctrine that a sale of personal property unaccompanied by a change of possession is inoperative and void as against the creditors of the vendor, is

applicable to a mortgage of chattels, even where it is a mortgage back of the property at the same time purchased. *Tobias v. Francis*, 3 Vt. 425. *Woodward v. Gates*, 9 Vt. 353.

210. **Executed in another State.** J., a resident of this State, purchased of the plaintiff in New Hampshire a horse, and gave back a mortgage of the same to secure the purchase price, and brought the horse into this State, where it was attached for his other debts. The Statute of New Hampshire required that the mortgage be recorded in the office of the clerk of the town where the mortgagor resides. It was, in fact, recorded in the town where the mortgagee (the plaintiff) resided. *Held*, that the statute of New Hampshire could apply only to contracts in that State, the mortgagor residing there, and that the attachment must prevail. *Woodward v. Gates*.

211. A mortgage of chattels, executed in New York and valid by the laws of that State without a change of possession, will not protect the property from attachment in this State by the creditors of the mortgagor, if found here in his possession, though brought here by him for a temporary purpose. *Skiff v. Solace*, 23 Vt. 279. Overruled, *infra*.

212. Our local rule of policy, requiring a change of possession of chattels sold, or mortgaged, in order to protect the property from attachment and execution for the debts of the vendor, or as against a *bona fide* purchaser, does not extend to a transfer made in another State where the parties to the contract resided, and where the property was located at the time of the transfer, so as to defeat a title which was perfect by the laws of that State, not only against the former owner, but against his creditors. *Cobb v. Russell*, 37 Vt. 337. *Taylor v. Boardman*, 25 Vt. 581. *Jones v. Taylor*, 30 Vt. 42.

213. Where certain carding machines, situate in Massachusetts, were there mortgaged, two of the three mortgagors and the mortgagee residing there, and the mortgage was assigned to the plaintiff and by him there foreclosed, so that his title by the laws of that State was absolute and valid as against creditors and purchasers of the mortgagors, without the taking of possession, and one of the mortgagors wrongfully brought the property into Vermont and here sold it to the defendant, a resident of Vermont, who purchased it *bona fide* and without notice of the mortgage;—*Held*, in an action of trover therefor, that the plaintiff's title was not defeated by want of possession, and that he was entitled to recover. *Taylor v. Boardman*.

214. A chattel mortgage executed in New York—both parties there residing, and the property having its visible locality there, and being valid by the laws of that State without a change of possession,—was *held* to prevail against an

attachment in Vermont by a Vermont creditor of the mortgagor, though the property was in the mortgagor's possession when attached, and the mortgage had not been foreclosed. *Jones v. Taylor*, 30 Vt. 42.

215. A like decision, upon like facts, as to a chattel mortgage executed in New Hampshire, although the mortgagor, by consent of the mortgagee, brought the property into this State, and held it in his possession and use for seven months, when it was attached as his property by a Vermont creditor. *Cobb v. Bunwell*, 37 Vt. 337.

216. But this local rule of policy is universal, in its application in Vermont, to all personal property actually within this State, though in the hands of a third person at the time of the transfer, and though the transfer, made in another State, be valid in that State without change of possession. *Rice v. Courtis*, 33 Vt. 460. *Martin v. Potter*, 34 Vt. 87.

217. The requirement as to a change of possession is no part of the contract. *Id. Cobb v. Bunwell*, 37 Vt. 337.

## N.

### NAMES.

1. The county court ruled that the name *N. B., Jr.*, and *N. B.* did not, *prima facie*, indicate the same person. *Held* erroneous, where the question of identity was not otherwise raised, nor made a point at the trial. *Allen v. Ogden*, 12 Vt. 9.

2. The addition of "junior" is in law no part of a man's name, but is used as merely descriptive of the person, and is assumed, applied, and discarded, at will. *Kellogg, J.*, in *Prentiss v. Blake*, 34 Vt. 465. *Brainard v. Stilphen*, 6 Vt. 9. *Keith v. Ware, Id.* 680. *Blake v. Tucker*, 12 Vt. 89. *Isaacs v. Wiley*, 12 Vt. 677. *Jameson v. Isaacs*, 12 Vt. 611.

3. A deed from E G, of H, to E G, Jr., of H, was presumed to be from father to son. *Cross v. Martin*, 46 Vt. 14.

4. An initial letter between the christian and surname is no part of the name, and the omission of it is not a misnomer or variance. *Alexander v. Wilmarth*, 2 Aik. 413.

5. An initial letter is not regarded as any part of a man's name; especially where one name is given in full. *Walbridge v. Kibbee*, 20 Vt. 543. *Isaacs v. Wiley*, 12 Vt. 674. *Allen v. Taylor*, 26 Vt. 599; and see *Blood v. Crandall*, 28 Vt. 396.

6. *Barnabas D. Balch* was sued, by that name, upon a recognizance of "*Barney D. Balch.*" *Held*, that there was no variance—*Barney* and *Barnabas* being used for the same name. *McGregor v. Balch*, 17 Vt. 562.

7. In an indictment for passing a counterfeit bank bill, in setting out the tenor, the name Thompson was stated as Thompson. *Held* to be *idem sonans* and no variance. *State v. Wheeler*, 35 Vt. 261.

8. So, as to the name *Heremon* for *Harri-man*, in an indictment for forgery. *State v. Bean*, 19 Vt. 530.

9. Aaron I. Boge was named as a proprietor in a town charter. In the proprietors' records, Aaron J. Boge in one instance, and Aaron Jordan Bogue in another, was named as a proprietor. No other person of the name of *Boge* or *Bogue* was named in the charter. The name of the plaintiff's ancestor was Aaron Jordan Bogue, formerly spelled by him and the family *Boge*, but afterwards changed by usage to *Bogue*. *Held*, that the names were *prima facie* identical, and that the plaintiff's ancestor was *prima facie* the person named in the charter. *Bogue v. Bigelow*, 29 Vt. 179.

10. Upon the question of the identity of a particular person with the one named in a town charter;—*Held*, that the fact that such person did not reside in the same place where the other proprietors are described as residing, is not legal proof of want of identity. *Id.*

11. Identity of name indicates identity of person—how far. *Dummerston v. Jamaica*, 5 Vt. 399.

12. Parties in successive deeds, constituting a chain of title, of the same name, are presumptively the same persons. So *held*, although the place of residence was set up differently in the two deeds, but twenty years intervened between the dates of the two deeds. *Cross v. Martin*, 46 Vt. 14.

13. The grantees in a mortgage deed were described as "*Morse & Houghton of Bakersfield.*" *Held*, in an action of ejectment thereon, that evidence was admissible that the plaintiffs, John Morse and Joel Houghton, had lately been in partnership at Bakersfield under the firm name of Morse & Houghton, and that the mortgage note, of the same date with the mortgage deed, was executed to them as such partners; and that, upon such proof, the grantees were sufficiently designated. *Morse v. Carpenter*, 19 Vt. 613.

14. A deed described the land conveyed as

in "Lington" in the county of Addison. *Held*, that this name was so like the name *Lincoln*, a town in that county, and so unlike the name of any other town in the county, that there was no error in admitting the deed, in connection with other evidence showing the situation and circumstances at the time, as tending to show that the lot in question, in Lincoln, was conveyed by that deed. *Armstrong v. Colby*, 47 Vt. 359.

15. An action lies on a judgment in which the christian name of the defendant is not given—the identity of the party being averred. *Newcomb v. Peck*, 17 Vt. 302.

16. Where, in describing a person, some other than his legal name is given, it is a sufficient answer to an objection taken thereto, that he is generally known by the name given. *St. Johnsbury v. Goodenough*, 44 Vt. 662.

### NEGLIGENCE.

1. **What is.** In any business involving the personal safety and lives of others, due care, reasonable diligence, is nothing less than the most watchful care and the most active diligence; anything short of this is negligence, and carelessness. *Poland, C. J.*, in *Hadley v. Cross*, 34 Vt. 536.

2. One may act in good faith, and still be guilty of the grossest, the most flagrant negligence, and want of care. *Redfield, C. J.*, in *Lincoln v. Buckmaster*, 32 Vt. 662.

3. **Whether a question of law, or of fact.** Whether a sheriff has used reasonable diligence in endeavoring to arrest a debtor upon execution, is a mixed question of law and fact. *Hopkinson v. Holmes*, 18 Vt. 18.

4. Whether certain facts should be considered by the jury as constituting negligence, *Redfield, J.*, says: I am not prepared to say that it could be determined, as a question of law, that any given proposition of fact, however absurd, was incapable of proof, unless it were a simple proposition contrary to the laws of nature. *Taylor v. Day*, 16 Vt. 566.

5. Questions of negligence, where the law has settled no rule of diligence, can never be determined as matter of law, except where the testimony is all one way. If there is no testimony tending to show negligence, then it may be determined by the court that there was no negligence; or, if the testimony is uncontradicted and makes a clear case of negligence, it becomes matter of law only. *Redfield, C. J.*, in *Barber v. Essex*, 27 Vt. 62.

6. The question of negligence may, in some cases, be taken from the jury—as, where there is no testimony tending to show it; or where a given course of conduct is admitted which

results in detriment, and no excuse is given. In the latter case, the liability follows as matter of law, and there is nothing for the jury but a question of damages. *Briggs v. Taylor*, 28 Vt. 180.

7. Where a carriage, wagons and sleighs, not past use, were attached and allowed by the officer to remain during the winter in the open fields, wholly exposed to the weather, for which no excuse was offered except the difficulty of finding a place for them under cover;—*Held*, that it was error to submit to the jury the question whether the officer had exercised proper care; that they should have been instructed that the officer was liable to the owner for the damage thereby done to the property. A judge is never bound to submit to a jury questions of fact resulting uniformly and inevitably from the course of nature, as that such carriages will be injured, more or less, by exposure to the weather during the whole winter; nor to submit to a jury the propriety of such a course, when it is perfectly notorious that all prudent men conduct their own affairs differently. This uniformity of the course of nature, or the conduct of business, becomes a rule of law. *Id.*

8. The question of negligence is not always a matter of law where there is no conflict in the testimony as to the particular facts. If it still rests upon discretion, experience and judgment to determine whether the acts complained of were a departure from the rules and usages which prudent and careful men have established in the conduct of similar business, under similar circumstances, it is a question of fact for the jury—as, whether it was negligence for a peddler to leave his horse unhitched in the highway under given circumstances. *Vinton v. Schwab*, 32 Vt. 612.

9. The only case in this State where the court have taken it upon them to decide that a particular course of conduct was, or was not, according to the requirements of common prudence, is the case of *Briggs v. Taylor*, 28 Vt. 180. *Poland, C. J.*, in *Hill v. New Haven*, 37 Vt. 510.

HIGHWAYS, 164 *et seq.* 208.

10. The court refused to instruct the jury that a certain course of conduct of the plaintiff in driving upon a highway was, as matter of law, negligence, *Held*, no error. *Durgin v. Danville*, 47 Vt. 95.

11. Plaintiff and defendant were farmers. Plaintiff went to defendant late in the evening to buy six bushels of oats. Defendant had no oats which he wished to sell, but, yielding to the plaintiff's importunity and necessities, consented to sell the oats. Defendant kept his granary constantly locked. He went some distance and got the key and went with the plaintiff to the oats lying in bulk on the open floor

above. He stepped back for his measure, and, while thus absent, the plaintiff walked across the floor in another direction, in the dark, and fell through an aperture in the floor, and received a severe injury. On these facts found by a referee;—*Held*, that the defendant was not liable. *Pierce v. Whitcomb*, 48 Vt. 127.

**12. Contributory negligence.** The question of contributory negligence is one of fact for the jury, and not of law for the court. *Allen v. Hancock*, 16 Vt. 230. *Rice v. Montpelier*, 19 Vt. 470. *Hill v. New Haven*, 37 Vt. 501.

**13.** In case for negligence, judgment was reversed for the refusal of the court, upon request, to charge (at least) that if the injury would not have happened but for want of ordinary care and diligence in the plaintiff, the jury must find for the defendant. *Washburn v. Tracy*, 2 D. Chip. 128.

**14.** If an injury is in whole or in part owing to the plaintiff's want of ordinary care or prudence, he cannot recover. *Briggs v. Guilford*, 8 Vt. 264. 24 Vt. 496. 27 Vt. 466.

**15.** In all cases where a party claims to have suffered damage by the carelessness or negligence of another, it is a rule nearly if not entirely universal, that if the negligence or carelessness of the person injured contributed in any material degree to the production of the injury complained of, he cannot recover,—as, in actions against towns for damages sustained through the insufficiencies of highways. *Poland, C. J.*, in *Hill v. New Haven*, 37 Vt. 507.

**16.** In an action for negligence, where the evidence tended to show that the plaintiff exercised some control over the manner of doing the act complained of as negligently done;—*Held* to be error, to submit the case to the jury simply upon the negligence of the defendant, without charging as to the legal effect of the plaintiff's negligence as contributory. *Willard v. Pinard*, 44 Vt. 34.

**17. Terms—"Ordinary care," &c.** In an action against a town for an injury received by the breaking down of a bridge, the defendants requested the court to charge that the plaintiff's conduct in driving upon the bridge, under the circumstances, must have been that of a *prudent* and *careful* man to entitle him to recover, and that if he had reasonable ground to apprehend that the bridge was unsafe for such a team and load, the driving upon the bridge with such a team and load was such an act of imprudence and want of care as to prevent a recovery. The court declined so to instruct the jury, but charged that if the plaintiff did not exercise *ordinary* care and prudence in attempting to cross the bridge, and this contributed to the injury, he could not recover; but that he had a right to presume the bridge safe for a proper load, and was not bound to

examine it before attempting to cross it, unless he had been informed that it was unsafe, or had reason to distrust or suspect its safety. *Held*, that the defendants were entitled to a charge in the terms of their request, and that the omission so to charge was error. (Comments on the terms "ordinary care and prudence," as being liable to misconstruction.) *Folsom v. Underhill*, 36 Vt. 591. These terms are calculated to mislead juries. *Briggs v. Taylor*, 28 Vt. 184.

**18. Proximate—Remote.** In cases of injuries occurring through the mutual negligence of the parties, if the negligence of the plaintiff was the proximate cause, *i. e.*, occurring at the time, and that of the defendant was the remote cause, *i. e.*, consisting of other matter than what occurred at the time of the injury, the plaintiff cannot recover. So, if the negligence of each was the proximate cause, or of each was the remote cause, both being of the same character and degree, there can be no recovery. But if the negligence of the defendant be proximate and that of the plaintiff remote, he may recover, although not wholly without fault himself, on the ground that the defendant was bound to exercise reasonable care to avoid the injury, though the plaintiff had been negligent in exposing himself to it. *Isham, J.*, in *Trow v. Vt. Central R. Co.*, 24 Vt. 487. 27 Vt. 458; and see *Robinson v. Cone*, 22 Vt. 218.

**19. Rule as to children, idiots, &c.** In an action by a child of four years old for an injury received by being run over in the highway, through the defendant's negligent driving of his team, the court charged that in determining the amount of care and prudence to be required of the plaintiff, the jury need not measure it by the rule that would be applicable to an adult, but might consider that he was a child, about four years of age, from whom a less degree of care and prudence might be expected. *Held* correct, and that all which can be required of a plaintiff in such case is care and prudence equal to his capacity. *Robinson v. Cone*.

**20.** Although a child, or idiot, or lunatic, may be in a highway through the fault or negligence of his parents or keeper, and so be improperly there, yet, if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one know that such person is in the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect, in regard to one whom the defendant supposed to be of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger. *Id.* 39 Vt. 459.

**21.** In order that the negligence of another should be imputed to the plaintiff, such relation must exist between them as to impose upon such person the duty of care towards the

plaintiff, in the matter in question. *Glidden v. Reading*, 38 Vt. 52.

**22. Surgeon—Physician.** In an action against a surgeon for improperly setting and dressing the plaintiff's broken arm;—*Held*, that a showing on the part of the defendant that the ultimate damage or injury to the arm resulted in part from the subsequent mismanagement and negligence of those having charge of the plaintiff, did not touch the cause or right of action, but only the measure and amount of damages; that the contributory negligence, which precludes a right of recovery, is such as enters into the creation of the cause of action, and not merely supervenes upon it, by way of aggravating the damaging results. *Wilmot v. Howard*, 39 Vt. 447.

**23.** Where a surgeon, through lack of proper skill, in setting a broken limb, bandaged the limb too tightly;—*Held*, that an action therefor was not defeated by the fact that another surgeon, who took the case, failed, through want of proper skill, to loosen the bandages and dress the limb, although if he had so done the ultimate injury might have been prevented. *Hathorn v. Richmond*, 48 Vt. 557.

**24.** Physicians and surgeons are bound to have and exercise ordinary skill, and nothing more, unless they profess more—that is, such skill as doctors in the same general neighborhood, in the same general lines of practice, ordinarily have and exercise in like cases. *Id.*

As to *actionable negligence* in particular cases, see appropriate titles,—as RAILROAD COMPANY, HIGHWAYS, ACTION, &c.

## NEW TRIAL.

### I. UPON WHAT GROUNDS GRANTED.

1. *In general.*
2. *Fault of, or in respect to, jury.*
3. *Error of court.*
4. *Surprise on trial.*
5. *Newly discovered evidence.*
6. *Statute provisions.*

### II. PROCEEDINGS AND PRACTICE.

#### I. UPON WHAT GROUNDS GRANTED.

##### 1. *In general.*

**1. On motion or petition.** The court will not grant a new trial where the equity is strongly in favor of the verdict, although what was stated as the law, and on which the verdict was founded, is doubtful. *Rogers v. Page*, *Brayt*, 169.

**2.** The court should never grant a new trial in favor of the plaintiff in a suit upon a jail-

bond, unless he failed in his former trial through some fraud of the defendant. *Perkins v. Dana*, 19 Vt. 589.

**3.** New trials will be granted in pauper cases, as in other cases, upon proper showing. *Kirby v. Waterford*, 14 Vt. 414.

**4.** As a general rule, in order to sustain a petition for a new trial, it must appear, not only that injustice has been done on the trial, but that there has been no want of diligence on the part of the petitioner; and in no case will a new trial be granted, unless there is a reasonable certainty that the subject matter on which the application is founded will, on another trial, produce a different result. *Noyes v. Spaulding*, 27 Vt. 420.

**5.** On a petition for a new trial, the apparent justice or injustice of the verdict is to be considered, and, to warrant the granting of it, it should appear that justice would be likely to be served by having the case tried again. *Gilman v. Nichols*, 43 Vt. 318. *Beckwith v. Middlesex*, 20 Vt. 593. *Bullock v. Beach*, 3 Vt. 73. *Dodge v. Kendall*, 4 Vt. 31. The court should feel assured that injustice has been done, and that a new trial would, in all probability, lead to a different result. *Middletown v. Adams*, 13 Vt. 286. *Briggs v. Gleason*, 27 Vt. 116. *State v. Camp*, 23 Vt. 551.

**6.** A new trial will not be granted on petition, to enable the party to avail himself of a defense which, though legal, is clearly inequitable, and where no injustice has been done. *McConnell v. Strong*, 11 Vt. 280.

**7.** That the amount in controversy is small, is a sufficient reason for refusing a new trial. *Bullock v. Beach*, 3 Vt. 73.

**8.** That the statute of limitations did not bar a new suit in ejectment was recognized as a reason for refusing a new trial to the plaintiff. *Smith v. Hubbard*, 1 Tyl. 142.

**9.** The refusal of the county court to grant a new trial, though not a bar conclusively, should have very considerable weight with the supreme court, in the exercise of a sound discretion, against granting a new trial for the same cause. *Briggs v. Gleason*, 27 Vt. 114; and see *Hill v. New Haven*, 37 Vt. 512.

**10.** A petition for a new trial is an appeal to the judicial discretion of the court, and, in the exercise of that discretion, such court is supreme, and its proceedings are not subject to be revised, or controlled by writ of error, exceptions, *certiorari*, or appeal, since the discretionary power of one court cannot be exercised by another. But for an error in law committed in such case, the proceedings may be revised. *Houghton v. Slack*, 10 Vt. 520. *Chase v. Davis*, 7 Vt. 476. *Myers v. Brownell*, 2 Aik. 407. *Minkler v. Minkler*, 16 Vt. 193. *Wheatley v. Waldo*, 36 Vt. 287. *Sheldon v. Perkins*, 37 Vt. 550.

11. Questions of law decided on exceptions cannot be again raised on a petition for a new trial. *McConnell v. Strong*, 11 Vt. 280. *Beardsley v. Gordon*, 8 Vt. 824.

12. On exceptions — Harmless error. Although there may have been error in the trial below, yet if from the whole case it clearly appears that on another trial the same verdict, or the same judgment, must inevitably be rendered, a new trial will not be granted. *Walworth v. Readsboro*, 24 Vt. 252. *Brayt*. 168. 1 Aik. 48. 17 Vt. 499. 19 Vt. 210.

13. If, upon the whole record, the court can see that a correct result followed and that the judgment was right, it will not be reversed for immaterial error. *Farmers & Mechanics v. Flint*, 17 Vt. 508. *Fitch v. Peckham*, 16 Vt. 160.

14. A new trial refused on exceptions, where a record, imperfect in the county court, had been perfected before hearing on the exceptions. *Paine v. Webster*, 1 Vt. 101. *Dixon v. Parmelee*, 2 Vt. 190.

## 2. Fault of, or in respect to, jury.

15. Qualifications. Where a juror was a freeholder when his name was put into the town jury-box, but was not a freeholder at the time of the trial;—*Held*, that this was not cause for setting aside the verdict, but should have been objected in challenge. *Orcutt v. Carpenter*, 1 Tyl. 250.

16. Under a statute, then in force, requiring that jurors should be freeholders;—*Held*, that want of such qualification in one of the jurors was ground for a new trial, when that fact was not known to the moving party at the trial;—that this was a mistrial. (*Bennett J.*, dissenting.) *Briggs v. Georgia*, 15 Vt. 61. 30 Vt. 474. (Changed by act of Nov. 12, 1842, G. S. c. 15, s. 18.)

17. By mistake of the sheriff in the name of a juror drawn from the box, he summoned another person whose name was not in the box, but who was legally competent to act as a juror, and he was sworn and sat in the cause. This irregularity was unknown to the parties and to the court, till after the verdict had been delivered and the panel discharged, and no fraud or collusion was suggested. *Held*, that the verdict should not, for this cause, be set aside. *Mann v. Fairlee*, 44 Vt. 672.

18. Oath. The fact that a juror in a civil cause is not sworn is an irregularity which may be waived, like a known cause of challenge to a juror. The county court refused to set aside a verdict, for such cause, upon the affidavit only of one of the defendant's counsel that the fact was unknown to him. *Held* correct. *Scott v. Moore*, 41 Vt. 205.

19. After this decision of the county court,

the defendant offered affidavits of the defendant and the other counsel of the defendant, that such fact was unknown to them. These the county court refused to receive. *Held*, that this was matter of discretion, and not subject to exceptions. *Ib.*

20. Expression of opinion. It is good cause for a new trial that one of the jury had, before the trial, expressed his opinion upon the merits in favor of the successful party. *Deming v. Hurlbut*, 2 D. Chip. 45. *French v. Smith*, 4 Vt. 368; and see *State v. Godfrey*, *Brayt*. 170, *State v. Clark*, 42 Vt. 639.

21. A new trial was refused, when the alleged reason was that a juror had, previous to the trial, formed and expressed an opinion,—there being but the oath of one witness to the fact against that of the juror, and the alleged opinion being upon a question of law;—and it appearing that the juror was not conscious of having formed or expressed any opinion. *Thrall v. Lincoln*, 28 Vt. 356.

22. Separation of jury. A motion for a new trial, for that the jury, after the case was submitted, separated before agreeing on their verdict, and after agreeing separated without sealing up their verdict, and returned it not sealed up, was *held* as addressed to the discretion of the county court, and not subject to revision. *Edgell v. Bennett*, 7 Vt. 584.

23. On a motion to set aside a verdict because the jury, after the charge and after they had retired for consultation and before agreeing upon their verdict, separated without an order of the court, and, without being under the charge of an officer, went to their dinners;—*Held*, that G. S. c. 30, s. 34, on this subject was purely directory; that this was not such an irregularity as, *per se* and as matter of law, avoided the verdict; but the motion was addressed to the discretion of the court that tried the cause,—the inquiry involving matters of fact as to whether the jury might have been tampered with, &c.; and that the decision was not revisable by the supreme court, no error in law being shown. *Downer v. Baxter*, 30 Vt. 467.

24. Verdict—Irregularity. A new trial was refused in ejectment, when the jury by mistake returned a verdict for the whole land, whereas a small part was proved to be in a third person, but the damages recovered were only nominal. *Pomeroy v. Taylor*, *Brayt*. 169.

25. It is no cause for setting aside a verdict, that, in ascertaining the damages, each juror marked a sum and the whole amount was divided by 12, when they afterwards deliberated and returned a different sum than such quotient. *Cheney v. Holgate*, *Brayt*. 171.

26. A verdict assented to in court in usual form by the jury, was refused to be set aside on the ground that the foreman had promised



one of the jurors to inform the court that he did not assent to it. *Id.*

27. The jury had settled their minds as to the rights of the parties, but, being in doubt as to the proper mode of making a computation of what was due upon an execution, called the county clerk into the jury room, and, upon their inquiry how the computation should be made, he told them, and told correctly. *Held*, that this was an irregularity, but, being without the fault of the parties and no error or injury having resulted, it furnished no sufficient cause for a new trial. *Dennison v. Powers*, 85 Vt. 89.

28. **Contrary to law.** When the verdict is manifestly contrary to law, a new trial will be granted. *Hall v. Downs*, Brayt. 168.

29. **Law or charge misunderstood.** A new trial will not be granted on the ground that the jury mistook the law when both matters of law and of fact were submitted, where they applied the law correctly, if they found certain facts. *Smith v. Hubbard*, 1 Tyl. 142.

30. A new trial is sometimes granted when there is reason to apprehend that the jury may have mistaken the purport of the instruction, and thus have been misled in an important particular materially affecting the merits; but *held* otherwise, where it was merely conjectural whether there was any misapprehension in the minds of the jury, and where the matter was indifferent, or of slight importance. *Sherman v. Champlain Transportation Co.*, 81 Vt. 162.

31. It is not the legal duty of the county court to set aside a verdict, because the jury misunderstood the charge of the court, as to damages. *Wheatley v. Waldo*, 36 Vt. 238.

32. Nor, because some of them were induced to agree to a verdict, through the erroneous belief that the cause was reviewable. *Newton v. Booth*, 13 Vt. 320.

33. Nor, because misinformed by the foreman that full costs would follow a verdict for a particular sum in damages. *Cutler v. Cutler*, 43 Vt. 660.

34. The setting aside of verdicts for such like causes, discountenanced. 13 Vt. 320. 36 Vt. 238. 43 Vt. 660. *Sheldon v. Perkins*, 37 Vt. 557.

35. **Verdict against evidence.** The supreme court has power, under the statute, to grant new trials of cases tried in the county court, for the cause that the verdict was contrary to and unsupported by the evidence; but this court will not set aside a verdict as being against the weight of evidence, except where it is clear that the verdict is wrong, and not warranted by any fair construction of the evidence, and where there is no room for difference of opinion, in fair judgment, as to which way the verdict should be. If there is any conflict of evidence, and any reasonable

ground for doubt on the evidence which way the fact is, the verdict is conclusive. *Northfield Bank v. Brown*, cited in *Hill v. New Haven*, 37 Vt. 512.

36. To warrant the setting aside of a verdict as against evidence or the weight of evidence, it is not sufficient that the verdict is merely against a preponderance of the testimony, but it should appear to be manifestly and palpably wrong. *Weeks v. Barron*, 86 Vt. 420.

37. **Outside interference.** Under G. S. c. 87, s. 16, providing that if "a party obtaining a verdict in his favor" shall give to a juror any victuals or drink "by way of treat," this shall be a sufficient reason to set aside the verdict;—*Held*, on a motion to set aside a verdict obtained by a town, (1), that the mere furnishing of food or drink to a juror, when confined within the limits of ordinary hospitality, and not furnished for any improper purpose, and where it had no improper influence upon the verdict, does not fall within the statute; (2) that merely a ratable inhabitant of the town is not such a "party;" and that the furnishing referred to must be at the expense of the town, or must be the act of some one of its authorized agents. *Carlisle v. Sheldon*, 88 Vt. 440.

38. The verdict of a jury may be properly set aside and a new trial granted, where, during the trial, conversations were had with and in the presence of the jury by the friends of the prevailing party, which were calculated and intended to influence them to render the verdict they did, though it is not shown that the verdict was in fact influenced thereby, and although such conversations were had without the procurement or knowledge of the prevailing party, and were listened to by the jurors without understanding that they were guilty of misconduct in so doing. *McDaniels v. McDaniels*, 40 Vt. 363.

39. It is not, as matter of law, necessary in such case, that the moving party should either allege in his motion, or prove, that he had not knowledge of such misconduct;—such case is distinguishable from cases where the objection to the juror is some matter that existed before the trial. *Id.*

40. In order to justify the granting of a new trial because a paper not used on the trial went to the jury with the other papers in the case, without design, the paper should be such as to convey some information which might, by some reasonable intentment, have influenced the verdict. *Peacham v. Carter*, 21 Vt. 516. *Winslow v. Campbell*, 46 Vt. 746.

### 3. Error of court.

41. It is no ground for a petition for a new trial, that the court below refused a continu-

ance; or committed an error in law not set forth in a bill of exceptions. *Durkee v. Fessenden*, Brayt. 167.

42. A petition for a new trial was dismissed without hearing on the merits, where the only cause alleged was that the court were mistaken in the law. *Purdy v. Walker*, Brayt. 78. Such objection must be raised upon a bill of exceptions allowed. *Durkee v. Fessenden*. *Nixon v. Phelps*, 29 Vt. 198.

43. It is cause for granting a new trial that the judge at the fact term refused to allow and sign exceptions, provided the cause designated in the exceptions, if allowed and signed, would have been sufficient to induce the court to set aside the verdict. *Fiak v. Steel*, Brayt. 168.

44. Where a party had good reason to believe that two material witnesses would be present at the trial and he commenced the trial without moving for a continuance, and the witnesses were prevented from attending, one by being taken suddenly sick and the other by breaking his leg, a new trial was granted on terms. *Barrett v. Barrett*, Brayt. 170.

#### 4. Surprise on trial.

45. New trial granted for surprise and mistake of counsel on trial. *Dow v. Hinesburgh*, 1 Aik. 85.

46. New trial granted for mistake, oversight, or surprise on the trial, where the real merits failed of being tried. *Stanton v. Banister*, 2 Vt. 464.

47. New trial granted in a criminal case, on the ground that the respondent was advised by his counsel that certain testimony against him would not be admitted, and hence he omitted to procure rebutting evidence; and that the admission of such testimony was a surprise to him and his counsel. *State v. Williams*, 27 Vt. 724.

48. A new trial will not be granted on the ground of surprise, because a witness was introduced directly to prove what was directly put in issue; nor because such witness was interested, where his interest appeared on the record, and no objection was taken. *Dodge v. Kendall*, 4 Vt. 81.

49. The surprise which affords ground for a new trial must be one which is not the petitioner's own fault. *Burr v. Palmer*, 23 Vt. 244.

50. Surprise of party, diligence, materiality of evidence, &c., on petition for new trial, considered. *Shepherd v. Hayes*, 16 Vt. 486.

51. The non-production of a witness on the final trial who had testified on a former trial, is not cause for a new trial on the ground of surprise. *Id.*

52. That the county court ruled the law different from what the party expected, and

that such ruling was affirmed by the supreme court, can never form the basis of a petition for a new trial, on the ground of surprise. *Morgan v. Houston*, 25 Vt. 570; and see *Pettes v. Bank of Whitehall*, 17 Vt. 485.

53. As the ground of an application for a new trial, surprise is scarcely ever tenable. That a witness for the party was rejected as incompetent by reason of interest, is not a sufficient reason for a new trial, as for a surprise; nor that the county court refused, on the argument to the jury, to treat certain papers as in evidence to be commented upon, which the party supposed to be in evidence, though not formally offered and admitted. *Haskins v. Smith*, 17 Vt. 268.

54. It must be a strong case which would induce the court to grant a new trial on the ground of surprise on the trial below, where the party neglected, at the proper time, to move for a continuance. *Bennett, J., in Briggs v. Gleason*. 27 Vt. 114.

#### 5. Newly discovered evidence.

55. General rules. Courts will not in all cases refuse a new trial, where the cause stated is the discovery of new and important evidence, although it is to a point litigated at the trial. The case, however, must be a strong one to induce the court to interfere. *Hurd v. Barber*, Brayt. 170. *State v. Cox*. *Id.* 171.

56. Contradictory evidence by the same witness at different trials, to a point material, is cause for a new trial, provided that fact could not be shown at the trial. *Durkee v. Fessenden*, Brayt. 167.

57. To entitle a party to a new trial on the ground of newly discovered evidence, it must appear that the evidence has been discovered since the trial; that no laches are imputable to him; and that it is material. *Myers v. Brownell*, 2 Aik. 407.

58. A petition for a new trial will not be sustained, which is founded upon facts which should have been presented to the county court as a reason for rejecting a report of referees. *Fuller v. Wright*, 10 Vt. 512.

59. After judgment by default in an action upon a note given for a patent right, a new trial was granted, upon terms, on the ground that further use of the machine had proved the invention to be of no value, or of much less value than represented, where this ground of defense was too little known when the action was defaulted to afford any prospect of defense. *Burnham v. Brewster*, 1 Vt. 87. *Burnham v. Hubbard*, 1 Vt. 91.

60. A petition for a new trial was refused, where a judgment in the county court had been rendered for the defendant on demurrer to a replication to a plea of the statute of limi-

tations,—the grounds of the petition being newly discovered evidence, and a new promise to pay a part after the judgment. *Ferris v. Barlow*, 10 Vt. 138.

**61. Cumulative evidence.** A new trial will not be granted for newly discovered evidence, where it is merely cumulative, and leaves the question still doubtful, not making a clear case. *Dodge v. Kendall*, 4 Vt. 81. *Bullock v. Beach*, 8 Vt. 78.

**62. Cumulative testimony**, under the rule relating to new trials, is to the same fact litigated at a former trial and upon which testimony was then given. *Kirby v. Waterford*, 14 Vt. 414.

**63. "Cumulative evidence"** is additional evidence of the same kind, to the same point. *Bradish v. State*, 35 Vt. 452.

**64.** On a petition for a new trial, on the ground of newly discovered evidence, the court should regard the state of the case as it stood upon the evidence on the trial. If the evidence produced fairly and reasonably entitled the party to a verdict, it could hardly be said that he was lacking in reasonable diligence in not inquiring for more, though such inquiry would have resulted in his finding it, and even the very evidence newly discovered, and perhaps decisive. *Gilman v. Nichols*, 42 Vt. 318.

**65.** The rule as to cumulative evidence does not exclude evidence of the same facts testified to on the trial, if these facts are material, and would, with reasonable certainty, be controlling, if established. *Id.* *Myers v. Brownell*, 2 Aik. 407. *Barker v. French*, 18 Vt. 480.

**66.** If cumulative, it must, at least, be of such a character as, *prima facie*, to raise a strong probability that it will be decisive of the case. *Redfield, J.*, in *Burr v. Palmer*, 23 Vt. 246.

**67. Newly discovered.** In trover for the conversion of certain tallow of the plaintiff sold to the defendant by one S, the main question litigated was whether S was authorized to make the sale. Verdict for the plaintiff. S was then in the State prison upon a conviction, procured by the plaintiff's testimony, for having stolen the same tallow from the plaintiff. S having served out his term and been pardoned, the defendant brought his petition for a new trial, assigning as newly discovered the testimony of S, that he had authority from the plaintiff to sell the tallow. *Held*, that the case was not within the recognized rules in granting new trials; that such testimony was rather new created than new discovered; that to admit it would be of bad precedent. Petition denied. *Waters v. Langdon*, 16 Vt. 570.

**68.** Where testimony, claimed to be newly discovered, was all of record in the court and might have been found on reasonable search;—*Held*, that to grant a new trial on the ground of

newly discovered evidence would be to relieve the party from the consequences of his own neglect; and the petition was denied. *Morgan v. Houston*, 25 Vt. 570.

**69. Conclusiveness.** A petition for a new trial on the ground of newly discovered evidence, was refused, because of want of due diligence, and because not conclusive, or decisive in character. *Stearns v. Allen*, 18 Vt. 119. *Lindsey v. Danville*, 45 Vt. 72.

**70.** A new trial will not be granted on the grounds of newly discovered evidence, where the verdict was general, so that it does not appear how the jury found the fact to which the new evidence applies. *Briggs v. Gleason*, 27 Vt. 114.

#### 6. Statute provisions.

**71. Chancery cause.** Under the authority given to the supreme court, by statute, to grant new trials, (G. S. c. 88);—*Held*, that that court could not grant a new trial or rehearing of a case determined in the court of chancery. *Slason v. Cannon*, 19 Vt. 219.

**72. Case "tried"—"determined."** The statute authorizing the supreme court to grant new trials in cases "*tried before any county court*," (Stat. 1825 s. 17,) or "*determined by such court*," (G. S. c. 88, s. 2,) applies only to those cases where a trial has been had, and does not reach the case of a default. *Adams v. Howard*, 14 Vt. 158. *S. C.*, 14 Vt. 560; and see *Scott v. Stewart*, 5 Vt. 57. *Hyde v. Haskill*, 10 Vt. 427. *Foster v. Austin*, 38 Vt. 615. *Goddard v. Fullam*, 38 Vt. 75; nor the case of a non-suit. *Montgomery v. Vinton*, 37 Vt. 514;—nor the case where the party failed by accident to enter bail for a review. *Beckwith v. Middlesex*, 20 Vt. 598.

**73. "Fraud, accident or mistake."** Where a party suffers a judgment by default before a justice through his own, or his attorney's, or any agent's forgetfulness of the day of trial, this is not such a case of being "unjustly deprived of his day in court by fraud, accident or mistake," under G. S. c. 88, s. 7, as to warrant the setting aside of the judgment on petition. *Babcock v. Brown*, 25 Vt. 550. *Davison v. Heffron*, 31 Vt. 687. *Denison v. True*, 22 Vt. 42.

**74. Appeal refused.** In a justice writ the *ad damnum* was laid at \$10, but the copy served set it at \$40. The defendant appeared and judgment passed against him, he supposing the case to be appealable. The justice refused an appeal. On the defendant's petition to the county court to set aside the judgment (G. S. c. 88, s. 7,) the court dismissed the petition. *Held*, (1) that the case was not appealable; (2), that the case was not one for a petition within the statute, and the court had no power

independent of the statute; (8), that if decided as matter of "discretion," no exception lay; (4), and, if so decided, it was rightly decided. *Downs v. Reed*, 32 Vt. 785.

## II. PROCEEDINGS AND PRACTICE.

**75. Petition.** Where a case passes to the supreme court on exceptions, a *motion* for a new trial will not be entertained. The cause for a new trial can be presented only by a *petition*, according to the statute. *Minkler v. Minkler*, 14 Vt. 558. *Blodgett v. Roylton*, 16 Vt. 497.

**76.** Consecutive motions and petitions for a new trial, pending at the same time, seem not to be warranted by precedent, or practice. *Shepherd v. Hayes*, 16 Vt. 486. So held in *Mann v. Fairlee*, 44 Vt. 672.

**77.** The supreme court has no jurisdiction to grant a new trial in the county court for matters not appearing upon the record, except upon petition under the statute, although the case in the supreme court is pending upon exceptions. So *Royalton Bank v. Colt*, 37 Vt. 415.

**78. Its form and verification—Affidavits.** In petitions for a new trial for newly discovered evidence, the petition must set forth the history of the former trial fully enough to show the applicability and effect of the newly discovered evidence, and a statement of such newly discovered evidence. To this must be attached the affidavit of the party that the evidence is newly discovered, and also the affidavits of the witnesses from whom the new evidence is expected, of what they will testify. (Rule of 1851, 22 Vt. 670.) *Bradish v. State*, 35 Vt. 452. *Cardell v. Lawton*, 16 Vt. 606.

**79.** The verification of a petition for a new trial by the oath of the party really in interest was held sufficient, where the party of record, in whose name the petition was necessarily brought, was out of the State. *Bradish v. State*.

**80.** A new trial will not be granted for newly discovered evidence, simply on the oath of the party interested; the motion must be accompanied with the affidavits of the newly discovered witnesses. *Webber v. Ives*, 1 Tyl. 441.

**81. Judge's Minutes.** On the hearing of a petition for a new trial, the minutes of the judge who tried the case in the county court, or a copy of them, must be produced. Only in case they cannot be obtained will the affidavits of the attorneys as to what passed at the trial be received, instead. *Durkee v. Marshall*, 14 Vt. 559.

**82.** The judge's minutes need not be made a part of the petition. (See Rule 9, 1 Aik. 399.) *Cardell v. Lawton*, 16 Vt. 606. *Bradish v. State*, 35 Vt. 452.

**83. Affidavits in defense.** In petitions for new trials, and like proceedings, affidavits in defense should, in strictness, be taken upon notice; if not so done, the testimony should at least be filed a sufficient length of time to enable the opposite party to prepare to meet it before the trial. *Wing v. Bates*, 16 Vt. 148.

**84. Citation—Recognizance.** A petition to the supreme court for a new trial in the county court, with a citation annexed, is not "a writ of summons," requiring a recognizance for costs. *Durkee v. Marshall*, 14 Vt. 559. 27 Vt. 560.

**85.** Where the recognizance was defective, which was taken on a petition for a new trial, under the statute, where judgment had been rendered by a justice on default;—*Held*, that the petition should not for this cause be dismissed, but be retained and further security ordered,—the court distinguishing between such case and the case of original writs, where the statute prescribes the effect of an omission of a recognizance, to wit, that the writ shall abate. *Houghton v. Slack*, 10 Vt. 520.

**86. Service.** Under the statute requiring notice of the petition for a new trial to be served upon the adverse party;—*Held*, that service upon the party's attorney of record was sufficient, where such party resided out of the State. *Wellington v. Aiken*; cited in *Bradish v. State*, 35 Vt. 453. *Mann v. Fairlee*, 44 Vt. 672.

**87.** The proper service of a petition for a new trial in a State case, is upon the State's attorney; but service upon the attorney of record would seem to be sufficient. *Bradish v. State*.

**88. Evidence.** On petition for a new trial, the court refused to receive the affidavit of an auditor, to show what he intended by certain terms and expressions in his report made to the county court, upon which judgment had been rendered. *McConnell v. Strong*, 11 Vt. 280.

## NOTICE.

**1. What is notice, and its effect.** If one has knowledge of distinct facts affecting the title of property which he is about to purchase, he is not at liberty to close his eyes and then screen himself under a plea of ignorance of other facts connected with those facts already known to him; but he is bound, in good faith, to make reasonable inquiry, and will be presumed to have done so, and will be affected with notice of all such facts as he might have learned by such inquiry. *Redfield, J.*, in *Blaisdell v. Stearns*, 16 Vt. 179.

**2.** Whatever is sufficient to put a party upon inquiry, is sufficient to affect him with

notice of all those facts which he might be presumed to have learned upon reasonable inquiry. *Stafford v. Ballou*, 17 Vt. 329.

3. Where one is put upon inquiry, and has the means of obtaining knowledge of all the facts, this is equivalent to notice, and he will be charged with the consequences of actual knowledge. *McDaniels v. Flower Brook Mfg. Co.*, 23 Vt. 274. 26 Vt. 684. 23 Vt. 373.

4. Notice of an outstanding claim or defense given to a purchaser, such as to put upon him the risk of payment to the vendor, must be not only such as to alarm him and put him upon inquiry, but must be sufficient to enable him to conduct that inquiry, in the usual course of such business, to a successful termination. *Adams v. Soule*, 33 Vt. 538.

5. A purchaser from one having no notice affecting his title, may stand upon the title of the vendor, and such title is not affected by any notice which the purchaser may himself have. *Powers v. Dennison*, 30 Vt. 753.

As to *Notice* in particular matters, see *BILLS AND NOTES*; *DEED*; *GUARANTY*; *MORTGAGE*; *NUISANCE*, &c.

### NUISANCE.

1. **Action for, at law.** An action on the case lies against one who maintains a nuisance, in favor of one who sustains special damage therefrom, though it be a public nuisance. *Abbott v. Mills*, 3 Vt. 521.

2. But only in case of such special damage. *Hatch v. Vt. Central R. Co.*, 28 Vt. 142.

3. An action cannot be maintained for continuing an obstruction—as, an obstruction to a way—which was erected by the defendant's grantor, without previous notice to the defendant to remove it. *Dodge v. Stacy*, 39 Vt. 558. Same law as to the use of a mill-dam, or of the water thereof. *Hove Scale Co. v. Terry*, 47 Vt. 109. *Pettibone v. Burton*, 20 Vt. 302.

4. **In chancery.** The court of chancery has authority to grant injunctions to restrain parties from the use of their own lands and buildings for trades and purposes in themselves lawful, but necessarily so noxious, unhealthy, dangerous, or unwholesome to the occupants of neighboring buildings, as to destroy, or seriously and substantially to impair, their value for the purposes for which they were designed. *Curtis v. Winslow*, 38 Vt. 690.

5. An injunction against the completing and using of a horse-barn, claimed to be a nuisance to the orator's premises, was refused, although inconvenient, yet not so manifestly and seriously injurious as to come within the class of cases in which such relief is granted. *Id.*

6. Where the orator bought land of the defendant with notice that the defendant intended to build a horse-barn near by on his land adjoining, and the defendant afterwards erected the barn at the place designated;—*Held*, on a bill brought to enjoin the completion and occupation of the barn, that after the purchase, under such circumstances, the orator could not at equity abridge the exercise of the defendant's lawful right in the use of his own land. *Id.*

7. **Indictment.** In an indictment for a nuisance, it is not indispensable that it should be alleged that it was "unlawfully" maintained; the words "injuriously and wrongfully," are sufficient. *State v. Vt. Central R. Co.*, 27 Vt. 108.

8. Upon trial of an indictment for a nuisance, the act complained of was the taking and appropriating to private use of property dedicated to the use of the public, so as wholly to exclude the public from the enjoyment of it. *Held*, that this was in law a nuisance, and that the law did not require this question to be submitted to the jury. *State v. Woodward*, 23 Vt. 92. (But see *State v. Croteau*, 23 Vt. 14.)

## 0.

### OFFICER.

- I. APPOINTMENT; TITLE; LIABILITY.
- II. OFFICERS CONNECTED WITH SERVICE OF PROCESS.

1. *Powers, duties and liabilities.*
2. *Fees.*

- I. APPOINTMENT; TITLE; LIABILITY.

1. **As to third persons.** Where third

persons are interested in the acts of public officers, proof that they are reputed to be such, or that they have acted as such, is sufficient without the production of evidence of their appointments; and officers duly appointed and commissioned are presumed to have taken the regular oaths. *Adams v. Jackson*, 2 Aik. 145. 34 Vt. 521. 36 Vt. 331, 396.

2. The doings of a militia sergeant under a writ of execution for a fine, being regular in

form, were *held* to be sustained by proof that he was sergeant *de facto*, he having been duly elected and sworn, though his warrant of appointment was imperfect. *Warner v. Stockwell*, 9 Vt. 9.

3. All officers having general duties assigned them by statute, if shown to have acted and to have been recognized as such, are presumed to have been regularly appointed, commissioned and sworn. *Panton Turnpike Co. v. Bishop*, 11 Vt. 198.

4. We are not aware that any different proof of the appointment of an officer in a foreign country is required, from that at home. Proof of one exercising the office *de facto* is usually sufficient, in either case. *Redfield, J.*, in *Spaulding v. Vincent*, 24 Vt. 501, *note*.

5. Where one holds office by color of title, his acts as an officer *de facto* are valid so far as they may affect the rights of third persons, or the public, to the same extent that they would be if he were an officer *de jure*. *Lyndon v. Miller*, 86 Vt. 329. *State v. Bates*, *Id.* 396. *Adams v. Jackson*, 2 Aik. 145. *Taylor v. Nichols*, 29 Vt. 104. *McGregor v. Balch*, 14 Vt. 428. *Ferris v. Smith*, 24 Vt. 27. *Courser v. Powers*, 84 Vt. 520.

6. An action upon an officer's receipt for property attached is, *prima facie*, brought for the ultimate benefit of the creditor; and where the plaintiff was an officer *de facto*, such suit cannot be defended on the ground that he was not duly qualified, without at least showing that the suit is now prosecuted solely for his own benefit. *Taylor v. Nichols*.

7. **Incompatible offices.** Although a postmaster is disqualified by the constitution from *holding* the office of justice of the peace, yet, having been elected a justice, he is such officer *de facto*, and his acts as justice are, as respects third persons, valid; and, in a suit brought before him as justice, objection to his jurisdiction for such cause cannot be sustained. *McGregor v. Balch*, 14 Vt. 428. 24 Vt. 32. 36 Vt. 329.

8. Under the constitution of this State, declaring that "no person holding any office of profit or trust under the authority of Congress shall be eligible to any appointment in the Legislature, or of holding any executive or judiciary office under this State," a postmaster is *eligible* to the office of justice of the peace, but he cannot *hold* and exercise both offices at the same time. If he accept the last he must abandon the first; otherwise, he may be removed from the State office by *quo warranto*, and, in a suit brought against him, could not justify his acts as justice, while he held the office of postmaster. *Id.*

9. The official act of a constable *de facto* in serving process is valid, as to the public and third persons, although he may hold another

office incompatible with the first. *State v. Clark*, 44 Vt. 636.

10. **Justifying an officer.** Where an officer himself, or those under whose authority he was appointed and put in motion, are called to justify his proceedings, it is not enough that he was an officer *de facto*, but they must show his right to exercise the functions of the office. *Cummings v. Clark*, 15 Vt. 663.

11. Where a public officer is a party, and he claims or justifies by virtue of his office, he can protect himself only by showing that he is an officer *de jure*. *Kellogg, J.*, in *Lyndon v. Miller*, 86 Vt. 331. *Id.* 338. *Adams v. Jackson*, 2 Aik. 145. *McGregor v. Balch*, 14 Vt. 428. *Courser v. Powers*, 84 Vt. 517.

12. **Official bond.** The official bond of a public officer *de facto*, elected and acting as such—as a first constable and collector of taxes, or a State treasurer,—is an obligatory instrument upon his sureties, although such officer neglected to take the oath of office as required by the laws and the constitution. *Lyndon v. Miller*, 86 Vt. 329. *State v. Bates*, *Id.* 387.

13. An official bond is commensurate with the appointment and covers that official term, and no more. *State Treasurer v. Mann*, 84 Vt. 871.

14. **Oath.** The same law as to an oath of office. *Courser v. Powers*, 84 Vt. 517.

15. **Vacancy.** The refusal in good faith, of a public officer to do a particular official act, although required by his duty, does not create a vacancy in his office; as, where a highway surveyor refused to give a receipt for a tax bill committed to him. *Cummings v. Clark*, 15 Vt. 653. So, where the prudential committee of a school district refused to assess a tax voted by the district. *Stevens v. Kent*, 26 Vt. 503.

16. **Liability for error within jurisdiction.** Where a mere ministerial officer acts under the authority of a court or other board or tribunal of a limited jurisdiction, if the act be beyond their jurisdiction, he is, or may be, liable in trespass. But where there is jurisdiction over the person and the subject matter, he is not liable for any irregularity or mistake in the exercise of that jurisdiction. *Brown v. Mason*, 40 Vt. 157.

17. No action lies for misconduct or delinquency in the performance of judicial duties. Although the officer may not in strictness be a judge, still, if his powers are discretionary and in their nature judicial, and he acts within the scope of his legitimate authority, he is not responsible for any error of judgment, while acting in good faith with reasonable diligence. *Fuller v. Gould*, 20 Vt. 648. *Stearns v. Miller*, 25 Vt. 20. *Davis v. Strong*, 31 Vt. 333. *Universalist Society v. Leach*, 35 Vt. 108. *Mower v. Allen*, 1 D. Chip. 381. *Warner v. Stockwell*, 9 Vt. 9.

## II. OFFICERS CONNECTED WITH SERVICE OF PROCESS.

## 1. Powers, Duties and Liabilities.

18. **Agent of creditor.** *Dictum*—An officer in making an attachment is the agent and servant of the creditor. *Felker v. Kimerson*, 17 Vt. 101; but, *held*, that he is not, by receipt of the writ for service, made agent to receive payment of the demand. If paid, he holds the money as agent of the debtor until paid over. *Wainwright v. Webster*, 11 Vt. 578.

19. **Set-off of executions.** An officer is empowered to set off one execution against another between the same parties, where both are in his hands at the same time. *Culver v. Pearl*, 1 Tyl. 12. But he is not compelled to do so, though so requested by one of the parties. *Anon*, Brayt. 118. See *infra*.

20. An officer cannot apply the money collected by him upon an execution, in satisfaction of an execution against the creditor in the first. *Prentiss v. Bliss*, 4 Vt. 513.

21. **Regarding equities.** Officers are not bound to regard the equities subsisting between the debtors in an execution, or between the debtors and their other creditors; nor is he liable to a co-obligor or surety for any default in enforcing an execution against the principal debtor. *Rutland v. Paige*, 24 Vt. 181. *Warren v. Edgerton*, 23 Vt. 199.

22. **Money collected on execution.** The cause of action against an officer for not paying over money collected on execution does not accrue until demand made. *Hutchinson v. Parkhurst*, 1 Aik. 258.

23. An officer sued for not paying over to the creditor the avails of a sale on execution, may defend on the ground that the property sold was not the debtor's. *Wahworth v. Readboro*, 24 Vt. 252.

24. Where a judgment was rendered in the county court against a sheriff for money collected on an execution, with 15 per cent. interest from the time of demand, according to the statute, the supreme court, on affirming that judgment, directed the clerk to cast 15 per cent. interest on so much of it from its date, as was for money detained, and 6 per cent. upon the residue; although the court below, on allowing the exceptions, ordered a stay of execution. (*Redfield, J.*, dissenting). *Barron v. Pettes*, 18 Vt. 385.

25. For the neglect of a sheriff to pay over money collected on an execution, the plaintiff, under G. S. c. 12, s. 23, recovered the sum with 15 per cent interest thereon as damages. On affirmance of that judgment in the supreme court;—*Held*, that only six per cent interest on that judgment should be computed. (G. S. c. 30, s. 59.) *Smith v. Pike*, 44 Vt. 61.

26. **Subrogation.** An officer who becomes chargeable for default upon an execution and pays the creditor therefor, may, with consent of the creditor and in his name, use the creditor's remedies to enforce payment of the debtor. *State Treasurer v. Holmes*, 4 Vt. 110; and see *Oliver v. Chamberlin*, 1 D. Chip. 41. 9 Vt. 294.

27. The liability of an officer for having neglected to levy an execution is altogether collateral to the debt, and confers no legal interest in it, nor right to control or discharge it. *Fletcher v. Crooker*, 8 Vt. 814.

28. In what cases a sheriff may be subrogated to the rights of the creditor in an execution, where the sheriff has become charged thereon; and in what cases sureties may be subrogated to the rights of the execution creditor against the sheriff,—considered. *Belows v. Allen*, 23 Vt. 169.

29. Where the maker of a promissory note was sued upon it and his property attached, and the attaching officer was obliged to pay the debt through the failure of the receptors of the attached property;—*Held*, that the suit and attachment were for the benefit of a collateral guarantor of the note, as well as for the creditor, and that the officer was not entitled to be subrogated to the rights of the creditor against the guarantor, a surety. *Hammond v. Chamberlin*, 26 Vt. 406.

30. **Duty to execute all process not void.** A sheriff or constable cannot excuse himself from the service of process because it is erroneous, but is bound to execute it unless absolutely void. *Stoddard v. Tarbell*, 20 Vt. 321. *Fletcher v. Mott*, 1 Aik. 389. *Lewis v. Avery*, 8 Vt. 287. *Avery v. Lewis*, 10 Vt. 332. *Bank of Whitehall v. Pettes*, 18 Vt. 395. *Chase v. Plymouth*, 20 Vt. 469. Thus, he is bound to serve an execution issued more than a year and a day after the judgment. *Fletcher v. Mott*;—or an execution having a false date, as, June 13, 1809, but reciting the judgment truly as rendered at June term, 1839. *Bank of Whitehall v. Pettes*.

31. A writ, legally served, was afterwards altered by the plaintiff, without consent of the defendant therein, by changing the date and return day, and was again committed to the same officer for service, with notice to the defendant of a discharge of the first suit. *Held*, that the writ, as so altered, was not void, and that the officer was liable for his neglect to serve it. *Stoddard v. Tarbell*, 20 Vt. 321.

32. It is not a defense to an officer sued for his neglect to serve an attachment, that it might have proved of no benefit to the plaintiff by reason of anticipated proceedings under the bankrupt act. *Carlisle v. Soule*, 44 Vt. 265.

33. **As to void or irregular process.** Though an officer may be justified in serving

a writ legal upon its face, yet he is not bound to execute it if it be in fact void, or irregular, so that the creditor would become a trespasser by the service. *Hill v. Wait*, 5 Vt. 124. *Barber v. Benson*, 9 Vt. 171.

34. In an action against a sheriff for default of his deputy in not paying over money collected upon an execution;—*Held*, that it was no defense that the execution was for a less sum than the judgment and was therefore void as to the creditor, although the officer might for this reason have refused to collect it. It being valid on its face, it was a good justification for collecting and paying over the money. *Coburn v. Chamberlin*, 81 Vt. 326.

35. Where an officer was sued for neglect to return a writ issued in an action upon a note;—*Held*, that he might in defense impeach the note as having been fraudulently obtained, and void. *Woolcott v. Gray*, Brayt. 91.

36. Officer interested. Under a statute (G. S. c. 12, s. 27) prohibiting a sheriff, or other officer, from serving "any writ when he is a party or interested in the suit, or in which a private corporation of which he is a member is a party, or interested;"—*Held*, that a sheriff was not liable for neglect to levy and return an execution, committed to him, in favor of a bank of which he was a stockholder, although he served the original writ, attached property thereon, took a receipt, and had obtained judgment against the receiptor, who proved insolvent. *Bank of Rutland v. Parsons*, 21 Vt. 199.

37. Special cases. It is not the legal duty of an officer having an execution in his hands for collection, to levy it upon the lands of the debtor unless so directed by the creditor, although, by direction of the creditor, he served the original writ by the attachment of real estate. *Bank of Newbury v. Baldwin*, 81 Vt. 811.

38. Where an officer, having an execution in his hands for collection, delivered it over to another for service, and informed the debtor thereof, who in consequence of such information avoided the execution, which was returned *non est*;—*Held*, that the first officer was liable in an action for not executing the writ. *Isham v. Eggleston*, 2 Vt. 270.

39. If an officer would excuse himself by a return of *languidus* upon process, and by that only, the return must show that the sickness was such as would endanger life to execute the process, and that this continued up to the return of the process. But if he finds the party sick, his duty is not to remain with him, but only to use reasonable diligence in holding watch for his recovery, so as to make service of the process, and is liable only for negligence herein. *Bramble v. Poutney*, 12 Vt. 842.

40. Where the return, in such case, showed

that when the officer first called on the debtor with the execution he found the debtor thus sick, and that for six days thereafter on diligent search he could find neither the body nor property of the debtor, and the execution was seasonably returned;—*Held*, that upon the return, *prima facie*, the officer was not liable for neglect to levy the execution. *Ib.*

41. Where the original act of an officer in the service of civil process is unlawful—as where he breaks open the outer door of a dwelling house for that purpose—those who aid him in the performance of it are trespassers, though they act by his command. *Hooker v. Smith*, 19 Vt. 151.

42. An execution does not, of itself, empower the officer holding it to make a sale of property thereon to himself; and without authority from the parties to it, or of the debtor, at least, he acquires no title to the property so bid off by himself, though he pay the amount of the execution to the creditor. *Woodbury v. Parker*, 19 Vt. 358.

43. But with the assent of the parties to the execution, there being no fraud in the transaction as to other creditors, he may become such purchaser; it being virtually a purchase of the debtor. *Ib.* *Farnum v. Perry*, 48 Vt. 478.

44. Interference of creditor, as an excuse. The taking back of an execution from an officer, at such a time as to prevent him from completing his duty, would release him; but otherwise, where his liability has already become fixed. *Wetherby v. Foster*, 5 Vt. 136.

45. In an action against an officer for a false return of a *capias*, by stating that he had taken "sufficient bail," whereas he did not take bail;—*Held*, that the officer was not concluded by his return from proving that the plaintiff directed him not to require bail; and that such direction was a bar to the action. *Ordway v. Bacon*, 14 Vt. 878.

46. So, in an action against an officer for neglect to keep property, returned as attached, so as to answer upon the execution;—*Held*, that he was not concluded by his return from proving that he was directed by the plaintiff to make such return and not take the property into his possession, but to leave it with the debtor; and that this was a defense. *Abbott v. Edgerton*, 30 Vt. 208.

47. Where a party or his attorney gives special instructions to an officer, in regard to the execution of process, different from his legal duty, and he is influenced thereby to omit the performance of his plain official duty (which will be presumed where the instructions have such a tendency, unless the contrary appears), or where the officer is authorized to act according to his discretion, he is exonerated



from legal liability as an officer. In such case, he ceases to be a public officer as to the business entrusted to him, and becomes a mere private agent. *Willard v. Goodrich*, 31 Vt. 597. *Strongs v. Bradley*, 14 Vt. 55. *S. C.*, 13 Vt. 9. *Fletcher v. Bradley*, 12 Vt. 22. *Kimball v. Perry*, 15 Vt. 414. *Bellows v. Allen*, 23 Vt. 169. *Austin v. Burlington*, 34 Vt. 514.

48. The attorney of an execution creditor sent the execution to a deputy sheriff for collection, with the following written instructions: "Should you find it necessary to take any other course than the straightforward one, you will please advise me." In an action against the sheriff for neglect to collect or make return of the execution;—*Held*, that this writing gave the deputy an unlimited discretion in the management of the collection of the execution, and that whatever he did, or omitted, should be referred to that discretion, in the absence of evidence that his conduct was in no degree influenced by such instructions; and *held*, that the sheriff was not liable. *Strongs v. Bradley*.

49. The plaintiff had obtained judgment against a sheriff (Church) for neglect to collect an execution, and Church had obtained judgment against the receiptor of the property attached in the original suit. Both judgments were obtained by the same attorney, who handed an execution in each case, and both at the same time, to the defendant, a constable, for collection, saying, "You may go to Church for directions." The defendant did apply to Church, who directed him not to return the execution against himself (Church). Relying upon this, the defendant suffered the execution to expire in his hands. In an action therefor, —*Held*, that the defendant was justified in following the instructions given. *Willard v. Goodrich*, 31 Vt. 597.

50. Instructions given by the creditor to the officer as to the manner of serving process, which do not, in fact, mislead him in the performance of his official duty, do not release him from the consequences of his official neglect. *Hovey v. Spicer*, 28 Vt. 508.

51. A certain interference by the creditor assenting to delay of payment of a bid on execution sale [see facts stated and verdict] construed not to be such a control as to release the officer for not collecting the execution. *Walworth v. Readsboro*, 24 Vt. 252.

52. A deputy sheriff holding an execution for collection, sent a message to the creditor, by the debtor's request, inquiring if he would take the note of one D for the amount of the execution. The creditor returned word to the deputy, that he might take the negotiable note of D, or of any good man, for the amount of the damages, but that the costs must be paid. The deputy thereupon took the non-negotiable note of D for the amount of both damages and

costs and sent it to the creditor, who refused to receive it, claiming that it was not such a note as he had authorized the deputy to take. The deputy did nothing more to collect the execution, but suffered it to expire in his hands. *Held*, that the creditor had done nothing to release the deputy from doing his legal duty, but only authorized him to suspend action upon the performance of a specific act by the debtor; that he had violated his official duty, and that the sheriff was liable to the creditor therefor. *Mason v. Ide*, 30 Vt. 697.

53. Instructions to an officer by the creditor's attorney, which were construed as equivalent to a direction not to attach real estate, and that for the personal property to be attached he might take receiptors, and before removing it he might go to the debtor and see if he would furnish receiptors, were *held* not to release the officer from liability for the property attached, where the receiptors taken, although then responsible, afterwards failed and became irresponsible. *Austin v. Burlington*, 34 Vt. 506.

54. Measure of liability for neglect. Where an officer neglected to return an execution in due season to charge the bail, he was *held* liable for the whole amount of the execution. *Turner v. Lowry*, 2 Aik. 72.

55. So, where the officer refused, or *wholly* neglected to serve and return the execution, he was *held* liable for the whole debt, and was not allowed to prove the poverty of the debtor in mitigation of damages. *Hall v. Brooks*, 8 Vt. 485. See *Watkinson v. Bennington*, 12 Vt. 404.

56. An officer holding final process against the body of a debtor which he might have served but neglected to do so and "let it run out on his hands," or, having once had an opportunity to arrest the debtor, neglected to do so, and the debtor afterwards absconded, is *fixed with the debt*, and in an action against him, cannot show the insolvency of the debtor in mitigation. *Goodrich v. Starr*, 18 Vt. 227.

57. The leaning of courts in this State, as well as in others, has been not to hold sheriffs, or other officers of that class, liable for damages for any neglect of duty, unless the same was gross and willful, beyond a fair compensation to the party for his actual loss. *Poland, J.*, in *Blodgett v. Brattleboro*, 30 Vt. 588-4.

58. For the mere neglect of an officer to return, within its life, an execution not fully executed, he is liable, but only for nominal damages, unless it appears that actual damages have been sustained. *Kidder v. Barker*, 18 Vt. 454. *Ives v. Strong*, 19 Vt. 546. *Bank of Newbury v. Baldwin*, 31 Vt. 811. *Watkinson v. Bennington*, 12 Vt. 404. *Turner v. Lowry*, 2 Aik. 72.

59. Where an officer, through mere casualty, neglects to return a writ, the actual injury to

the plaintiff by the non-return of the writ is the measure of damages. *Hamilton v. Marsh*, 2 Tyl. 408.

60. In an action against an officer for not taking bail upon a writ, the rule of damages is the amount of the judgment, where the debtor has absconded so that he cannot be reached by execution, unless there be evidence tending to prove the insolvency of the debtor. *Crane v. Warner*, 14 Vt. 40.

61. In an action against an officer for not levying upon particular property, the rule of damages is the cash value of the property, not exceeding the amount due on the execution, and not an estimated auction value. *Witherby v. Foster*, 5 Vt. 186.

62. It is not a full defense to an action against an officer for making a defective levy of execution upon land, that the levy had become perfected by lapse of time after the commencement of the suit. *Bell v. Roberts*, 18 Vt. 582;—nor is it a defense that the debtor had no title to the land. *S. C.*, 15 Vt. 741.

## 2. Fees.

63. Where an officer receives a writ for service without objection for non-prepayment of his fees, he is bound to serve the writ notwithstanding. Such acceptance is a waiver of prepayment. *Carlisle v. Soule*, 44 Vt. 265.

64. An officer cannot charge fees for return of an execution stayed by a *supersedeas* in a writ of error. *Fitch v. Stanton*, 1 Tyl. 28.

65. An officer, who proceeded to levy an execution for his fees, after payment of the execution by the debtor to the creditor, while in the officer's hands and before levy, which payment was indorsed upon the execution, was held liable in trespass;—that without a levy, or payment of the money upon the execution to the officer, he was not entitled to fees. *Barnard v. Stevens*, 2 Aik. 429. 19 Vt. 572.

66. An officer had levied an execution and advertised the property for sale, when it was taken from him by writ of replevin, of all which he made return upon the execution. Held, that he was entitled to recover of the execution creditor his full fees as for a levy of the execution, including travel and poundage. *Baldwin v. Shaw*, 85 Vt. 272.

67. A charge, in addition to the travel fee, for the "conveyance" of a prisoner to jail upon a commitment on a tax warrant, or for

debt, is not, under ordinary circumstances, allowable. *Henry v. Tilson*, 17 Vt. 479.

68. A constable who commits one to jail upon a tax warrant is entitled to travel fees only one way—no return being necessary. *Ib.*

69. In trespass by an officer, against a person other than the debtor in an execution, for taking from his possession property held on the execution, it was held no objection to including in the damages his fees on the execution, that they were stated on the execution in gross, and not by items. (G. S. c. 12, s. 29.) *Houston v. Howard*, 89 Vt. 54.

70. The defendant, a constable of the plaintiff town, had an execution in favor of one S against the town in his hands for collection. After demanding, but before receiving, payment thereof, he advanced to S, at his request, the amount thereof, with the understanding that the money when collected on the execution should be his own. He retained the execution and afterwards the plaintiff, knowing the facts, paid the defendant the amount of the execution, together with his fees for collection, without objection. Held, that the defendant had no such legal interest in the execution as disqualified him from charging his fees for collecting it, and that the plaintiff could not recover back from him the fees so paid. *Stratford v. Blaisdell*, 45 Vt. 549.

71. Illegal fees. Where an officer charged the plaintiff in a suit, and was paid by him while that suit was pending, larger fees than allowed by law for serving the writ;—Held, that the officer was liable to him for the statute penalty, notwithstanding the fees, as charged, were afterwards taxed for such plaintiff in his bill of costs, and were paid by the defendant in that suit to such plaintiff's attorney. *Johnson v. Burnham*, 22 Vt. 639.

72. The penalty for receiving illegal fees (G. S. c. 125, s. 17), applies as well to charges for official services for which no fixed, but only proportionate, compensation is authorized (G. S. c. 126, s. 52), as to such as are specified in the fee bill. *Henry v. Tilson*, 17 Vt. 479.

73. An officer who receives illegal fees, is not liable to the penalty imposed by the statute, unless received with a knowledge of their illegality. *Ib.* *Haynes v. Hall*, 87 Vt. 20.

Where an officer is held to become a trespasser *ab initio*, see TRESPASS, I., 2.

## P.

## PARENT AND CHILD.

- I. PARENT'S RIGHTS.
- II. PARENT'S LIABILITIES.
- III. SERVICES AND SUPPORT IN THE FAMILY.

## I. PARENT'S RIGHTS.

## 1. Minor child's services and earnings.

The plaintiff having the care of the minor children of his wife by a former husband, although not their guardian, was allowed to recover for their services. *Stone v. Pulsipher*, 16 Vt. 428.

2. Where the plaintiff's claim is for services of his minor son, under a contract made by the son, the right to compensation depends upon a proper performance of the contract; and the plaintiff is not entitled to recover, in violation of the contract so made. *Dictum in Rogers v. State*, 24 Vt. 513,—the case stating that the contract was made "without the knowledge of the plaintiff." But see *Chilson v. Philips*, 1 Vt. 41.

3. The plaintiff's agent hired out the plaintiff's minor son to the defendant, for a specified term and at a stipulated price, the defendant reserving the right to discharge the boy, if he did not like him. After a few weeks' service, the defendant told the boy he could not keep him under that contract, and agreed with him to continue at a less price; but neither the plaintiff nor such agent was informed of this. The boy remained in service. In an action to recover for the services;—*Held*, that the boy had no authority to make a new contract, or to dispense with the original one; that the defendant, not having actually discharged the boy, was answerable for his services according to the original contract. *McDonald v. Montague*, 80 Vt. 857.

4. Giving minor his time. A father may, at his discretion, by gift or otherwise, relinquish to his minor child his right to the time and earnings of the child during the whole or part of the child's minority, and to the property acquired thereby, against any claim of the father's creditors. *Chase v. Elkins*, 2 Vt. 290. *Tillotson v. McCrillis*, 11 Vt. 477. *Bray v. Wheeler*, 29 Vt. 514.

5. He may do this verbally. *Chase v. Smith*, 5 Vt. 558.

6. A father may, by agreement with his minor child, relinquish to the child the right he would otherwise have to the child's services,

and authorize those who employ him to pay him his wages. In such case, the child's contract with a third person is conclusive upon the father. *Varney v. Young*, 11 Vt. 258. *Chilson v. Philips*, 1 Vt. 41.

7. Father's assent to his minor son's contracts and to payment of wages to him, shown by giving the son his time, course of dealing with him, &c. *Perlinau v. Phelps*, 25 Vt. 478. *Chilson v. Philips*.

8. A certain deed, &c. [recited in the case], from a father to his minor son, held not to operate as an emancipation. *Mason v. Hutchins*, 82 Vt. 780.

9. Minor's property. The father of an infant derives no right from that relation to make a sale or transfer of the infant's property, much less to dispose of it in satisfaction or security of his own debts. *Keeler v. Fassett*, 21 Vt. 539.

## II. PARENT'S LIABILITIES.

10. For necessities for child. A father is not bound to pay for necessities furnished to his minor child, unless an actual authority be proved, or the circumstances be sufficient to imply one. There must be proof of a contract, express or implied, a prior authority, or a subsequent recognition of the claim. *Varney v. Young*, 11 Vt. 258.

11. The moral obligation the parent is under to support his children, infers no such liability to third persons; affords no inference of a promise to do so. *Gordon v. Potter*, 17 Vt. 348.

12. If one trades with an infant and gives credit to him alone, knowing all the facts in the case, he can never, after that, sustain an action against the father for articles thus delivered. It is the same doctrine as applies to agents generally. *Id.*

13. The defendant permitted his minor son to go out to work by the month, and, while so out at work, the plaintiff, knowing the circumstances, let the son have some cloth and trimmings for articles of necessary clothing, but without any authority given by the father. *Held*, that the father was not liable therefor, although he knew of the purchase by the son, and gave him some money to pay for making up the cloth, and permitted him to wear out the clothes, when made. *Id.* 20 Vt. 879.

14. While one's minor children remain a part of his family and household, and receive necessities with the knowledge of the father

and without objection on his part, it is the same thing as if he himself, or his wife, had received them; and if furnished upon his credit and charged to him in good faith, he is liable therefor. So *held*, where the claim was for medical attendance upon the defendant's minor son, sick at the defendant's house, although the defendant had given him leave to act for himself, and had published the fact, and that he would not thereafter pay any debts of the son. *Swain v. Tyler*, 26 Vt. 9.

15. **Articles not necessary.** The plaintiff's son of eleven years purchased of the defendant, a shop-keeper, cigar-holders and pipes in cases, and paid therefor in money \$4.75. The next day the plaintiff's wife, and boy's mother, went with the boy to the defendant's shop, tendered back the articles, and demanded the money paid therefor. The defendant did not question the mother's authority, offered to return part of the money, but refused to return the whole amount, and the mother left the articles. *Held*, that the money so paid was presumably the money of the plaintiff, and that he could recover it in assumpsit for money had and received. *Sequin v. Peterson*, 45 Vt. 255.

### III. SERVICES AND SUPPORT IN THE FAMILY.

16. **After becoming of age.** The fact that a child continues to live with a parent after becoming of age, or returns to live with him and becomes one of the family, does not ordinarily constitute the relation of creditor and debtor between them, so as to warrant a charge for board on the one side, or for services in the family on the other. A claim for compensation, in such case, must rest upon an express promise, or such facts as show a mutual understanding, or expectation, of compensation. *Fitch v. Peckham*, 16 Vt. 150.

17. The law is the same as to adopted children, and the like. *Andrus v. Foster*, 17 Vt. 556. *Lunay v. Vantyne* 40 Vt. 501.

18. In order to maintain an action for services rendered by a child or other relative living in the family of a parent or other person standing in that relation, it must appear unequivocally that the parties, at the time of the service, supposed they were dealing as debtor and creditor, that the service was for wages and not for support, or in expectation of a gratuity or legacy. *Davis v. Goodenow*, 27 Vt. 715. (*Cobb v. Bishop*, 27 Vt. 624.)

19. But this does not alter the rule of the common law, that a fair balance of proof will rebut the legal presumption against the claim, in such case, and establish it by proof of an express promise, or a mutual understanding, that the services should be paid for. *Ib.*

*Putnam v. Tower*, 84. Vt. 429. (*Way v. Way*, 27 Vt. 625.)

20. It is well settled by repeated decisions in this State that when a child, after becoming of age, remains at home, continuing a member of the family, receiving support and performing services, the law implies no contract by which the relation of debtor and creditor arises between the parent and the child; and, in order to create any right of recovery either way, for support, or for services, an express contract must be shown. *Poland C. J.*, in *Sprague v. Waldo*, 88 Vt. 141.

21. **Persons standing in like relations.** This rule was applied to the case of a son-in-law, who came into the family on his marriage to the daughter, then a member of the family, and they continued so to live and serve as members of the family, until her death. *Ib.* 189.

22. The defendant, being childless, took the plaintiff, a niece of his wife, when eight or nine years of age, to live with him until she should become of age, and she so lived in his family until she became of age, when he told her she was free to go, but that "if she remained with him and did well, he would do well by her." She consented to stay, and continued on working, as before, for some six years, living in the family as a member of it, attended school some, and was uniformly treated as she was before she became of age, neither party keeping any accounts. She then left and went to New Hampshire, not expecting to return. Nothing was then said about any settlement, or pay, or claim. After about five years, at the request of the defendant, she returned and worked for him in his family for about a year, and until near her marriage. The defendant made her a payment on this last service. In an action on book;—*Held*, that the plaintiff was not entitled to recover for her services before she went to New Hampshire, but was entitled to recover for such services after her return thence. *Andrus v. Foster*, 17 Vt. 556.

23. The plaintiff was taken into the defendant's family as an adopted daughter, to live there until she should become of age, without any agreement or expectation of pay for services. By a mutual mistake as to the plaintiff's age, she continued her services in the family for a full year after she became of age. After that year the defendant employed her at wages. The mistake was afterwards discovered. In an action to recover for such year's services;—*Held*, that from the fact that the defendant paid her after he understood she had become of age, a promise could not be implied to pay for previous services, against the mutual understanding that the services when rendered were not to be paid for; and that the plaintiff could

not recover. *Lunay v. Vantyne*, 40 Vt. 501.

24. Where a father, with his family, lived with his son and performed for him valuable services, more than the support of the father and family was worth;—*Held*, that, by reason of the relationship, no implied obligation to pay wages arose; and that a loan of money by the son to the father, made without reasonable expectation of repayment, should not, for the same reason, be treated as a payment on account of such services. *Harris v. Currier*, 44 Vt. 468.

25. Where a child supported his parent without express contract for compensation, the situation and circumstances of the parties, as set forth, were *held* to rebut the presumption that the support was to be rendered without compensation. *Doane v. Doane*, 46 Vt. 485.

26. The plaintiff was the maiden sister of the intestate, and never made his house her home before August, 1865. She then went there, without invitation, to see the defendant's sick daughter, who died soon after. At this time, the intestate was single, and so continued till his death in April, 1870, having no relative in his house but the plaintiff. Soon after the daughter's death, the plaintiff commenced taking charge of the domestic affairs of the intestate, with his knowledge and approval, but there was no evidence of his request or invitation so to do, and she so continued until his death, rendering valuable services. *Held*, that, without evidence of an expectation to the contrary, the law implied a promise to pay for such services. (See case for special circumstances.) *Briggs v. Briggs*, 46 Vt. 571.

See INFANT.

## PARTITION.

- I. AT LAW, ON PETITION.
- II. THE PETITION AND PROCEEDINGS.
- III. PARTITION BY AGREEMENT, OR DEED.

### I. AT LAW, ON PETITION.

1. **Subject of partition.** The court refused, on petition, to make partition of an ore bed, or to direct a sale of the defendant's share, on account of the situation and quality of the property,—referring the petitioner to the court of chancery, as the proper tribunal. *Conant v. Smith*, 1 Aik. 87.

2. *Dictum* that proceedings cannot be sustained for partition of a saw-mill and its appurtenances, or for a sale or assignment thereof, where the petitioner has not been deprived of his turn in the occupancy of the premises.

*Brown v. Turner*, 1 Aik. 350. *Overruled in Baldwin v. Aldrich*, 84 Vt. 526.

3. **Petitioner's title.** One of several mortgagees of undivided interests in the same land, though never in possession, and before foreclosure, may maintain a petition for partition against the others, and the mortgagor in possession cannot defend against it. *Munroe v. Walbridge*, 2 Aik. 410, *Prentiss*, J., dissenting. 18 Vt. 323.

4. In order to sustain a petition for partition, actual possession by the petitioner is not essential, provided he is not legally disseized; and, for this purpose, a distinction is recognized between a mere possession of the plaintiff's share by a third person, or by the defendant, and a legal disseisin. *Hawley v. Soper*, 18 Vt. 320. 28 Vt. 660.

5. In order to sustain a petition for partition of lands, the plaintiff must have possession, or the right of immediate possession. It cannot be had of reversionary interests. *Baldwin v. Aldrich*, 84 Vt. 526. *Nichols v. Nichols*, 28 Vt. 228.

6. The petitioner for partition had set off, on execution against the defendant, an undivided part of the defendant's land; but the defendant remained in possession of the whole, claiming adverse to the levy. *Held*, that the plaintiff had only a right of entry, and there was no such privity between the parties, or seisin in the plaintiff, as entitled him to partition. *Brock v. Eastman*, 28 Vt. 658.

7. It is no objection to a partition, assignment or sale under G. S. c. 45, upon proper petition, that the plaintiff is not hindered in the enjoyment of his share of the premises. *Dictum contra*, in *Brown v. Turner*, 1 Aik. 350, denied in *Baldwin v. Aldrich*, 84 Vt. 526.

8. **Defendant's title.** Where a petition for partition is brought against several defendants for the partition of several parcels of land, each of the defendants must be interested in each of the parcels. For a misjoinder, in this respect, the petition was dismissed. *Brownell v. Bradley*, 16 Vt. 105.

9. Where the plaintiff in partition claimed by virtue of a levy of execution, and the defendant, to defeat the plaintiff's right, put in evidence a deed to a third person of the share claimed, made before the levy, but without showing such third person in possession;—*Held*, (1), that such possession would not be presumed; (2), that the plaintiff might show that the deed was fraudulent and void; (3) that such third person was not a necessary, or proper defendant. *Hawley v. Soper*, 18 Vt. 320.

10. In partition, a plea that the defendant's title, by decree in bankruptcy, passed to his assignee, is a good bar; but (by *Bennett*, J.) doubtless the petition might be so amended as

to bring the assignee before the court. *Onion v. Clark*, 18 Vt. 863.

11. **Partition between heirs.** The county court has jurisdiction to make partition of land which descended to heirs, among whom it was never divided, where the petitioner has bought out the shares of some of the heirs, and holds the estate in common with the others; and, *dubitat*, whether the probate court has jurisdiction in such case. *Collamer v. Hutchins*, 27 Vt. 738. (G. S. c. 45, s. 1.)

12. **Injunction.** The orator paid the entire purchase money for a parcel of land, but took the conveyance to himself and the defendant jointly, upon the defendant's agreement to pay one-half. The orator paid all rents and taxes, and permanently improved the premises by erecting buildings and clearing the land. The court enjoined the defendant's suit for partition until compensation should be made to the orator, and ordered an account to be taken. *Maloy v. Sloan*, 44 Vt. 311.

## II. THE PETITION AND PROCEEDINGS.

13. A petition for partition with citation annexed, is not "a writ of summons" requiring a recognizance for costs. *Brock v. Eastman*, 27 Vt. 559.

14. A petition under the partition act of 1797 was held ill on demurrer, because not according to the statute. *Jewett v. Nash*, 4 Vt. 517.

15. Where a petition for partition contained no prayer for a sale or assignment, a plea in bar that the premises were not partible, was held good. *Brown v. Turner*, 1 Aik. 350. See *Baldwin v. Aldrich*, 34 Vt. 528.

16. On a petition for partition, if it appear that the plaintiff is entitled to partition of only part of the premises embraced in the petition, the court may order partition, assignment, or sale of that part. (G. S. c. 45, s. 7.) *Baldwin v. Aldrich*. *Hove v. Blanden*, 21 Vt. 815.

17. In proceedings for partition at law between tenants in common by deed, the legal operation of the deed cannot be changed by any form of issue under the petition, or by the result of the proceeding, short of impeaching the deed for fraud. Thus, a deed of an undivided half cannot be treated, in partition, as a deed of a particular half in severalty. *Piper v. Farr*, 47 Vt. 721.

18. **Commissioners.** Commissioners to make partition of lands should set forth in their return what lands they divide, and, specifically, what is set to each one of the parties, and not by way of reference to the petition. For such last defect the report was set aside. *Harrington v. Barton*, 11 Vt. 31.

19. Commissioners to make partition, under G. S. c. 45, are not empowered to determine

any question of right, title or interest, as between the parties to the partition. That is to be done in the county court, preliminary to the judgment for partition. *Gourley v. Woodbury*, 43 Vt. 89.

20. **Costs.** Upon judgments in partition cases, costs may be taxed after the court adjourns, as well as in any other cases. *Strong v. Hobbs*, 20 Vt. 192.

21. All costs which accrued in consequence of the trial of any of the facts alleged in the original petition, to which the petitionee interposed a plea of denial and upon which the petitioner prevailed, are properly taxable, in the discretion of the court, for the petitioner. But, in practice, costs in regard to the trial have only been taxed where the title to the land, in some way, came in dispute between the parties. *Id.*

22. In partition cases, the supreme court, in a case before it, may order a sale of the land for the payment of the costs. *Id.*

23. Regularly, an order of sale cannot be made at the same term of final judgment, but the order of payment of costs should then be made, and the cause be entered continued; and, if such order should not be complied with, then at the next term an order of sale should be moved for. When not so continued, the case may be brought forward on formal petition served on the opposite party, and the proper orders be made. *Id.*

## III. PARTITION BY AGREEMENT, OR DEED.

24. Tenants in common, though their title has not become perfected by 15 years' possession, may make partition by parol, provided such severance is accompanied by possession in severalty. *Pomeroy v. Taylor*, Brayt. 174. 27 Vt. 291.

25. A partition in fact among tenants in common, acquiesced in for more than fifteen years, becomes absolutely perfect in law. *Pope v. Henry*, 24 Vt. 560.

26. If two own a lot in equal portions in severalty, but in fact not divided, and enter on extreme parts of the lot, each upon his own portion, it will be considered that they intend a division by a line drawn through the center, leaving the two parts as nearly similar as they can be, and be equal. *Beecher v. Parmole*, 9 Vt. 352. 10 Vt. 211. 27 Vt. 743.

27. In a division, by deeds of quit-claim, between tenants in common of land, if the title to a part fails, the loss, in the absence of all fraud, falls upon him who took that share in the division. *Beardsley v. Knight*, 10 Vt. 185.

28. Partition deeds between tenants in common of a water privilege, executed at the same time, are to be taken as one instrument;

and any grant or limitation of the use of water, contained in either, is binding on both parties, and those claiming under them. *Rogers v. Baneroff*, 20 Vt. 250. (20 Vt. 546.)

## PARTNERSHIP.

### I. WHAT CONSTITUTES A PARTNERSHIP.

1. *As between the parties.*
2. *As to third persons.*

### II. PROOF OF PARTNERSHIP.

### III. RIGHTS AND LIABILITIES.

1. *In general.*
2. *In respect to partnership property and partnership debts.*
3. *Act of one partner as binding the others.*

### IV. DISSOLUTION AND CHANGE OF MEMBERSHIP.

1. *Partner's authority after dissolution.*
2. *Continuing liability.*

### V. RIGHTS AND REMEDIES.

1. *Between the partners.*
2. *As to third persons.*

### I. WHAT CONSTITUTES A PARTNERSHIP.

1. *As between the parties.*

1. To constitute a partnership, there must be an agreement to share in the ultimate profit and loss of the business. *Bowman v. Bailey*, 10 Vt. 170.

2. Where one party furnished a boat and the other sailed it, under an agreement for a division of the gross earnings of the boat;—*Held*, that this did not constitute a partnership. *Id.*

3. Division of earnings merely does not constitute a partnership. *Id.* *Ambler v. Bradley*, 6 Vt. 119;—though the division is to be made only after deducting such expense of repairs by the one or the other party. *Boardman v. Keeler*, 2 Vt. 65. *Tobias v. Blin*, 21 Vt. 544. 26 Vt. 725.

4. Persons jointly interested in the net profits of an adventure or business, or in the profits as affected by the losses, are partners. *Chapman v. Devereux*, 32 Vt. 616. *Kellogg v. Grinstead*, 12 Vt. 291. *Brigham v. Dana*, 29 Vt. 1.

5. It is not requisite to the constitution of a strict partnership, that each partner, as between themselves, should be liable to share indefinitely in the losses. An agreement to share in the profits, and consequently in the losses as they affect the adventure, will ordinarily be held sufficient to constitute a strict partnership. Nor is it essential to the constitu-

tion of a general partnership, that the partners should be proportionate joint owners of the property of the concern; but the whole capital may, by stipulation, remain in one or more of the parties who furnished it. All that is indispensable is, that the parties shall be jointly interested in the profits as affected by the losses, or net profits of the concern. *Brigham v. Dana*.

6. An agreement between parties for the transaction of a certain business, wherein all furnish specified portions of the capital and jointly own the property purchased, which is to be sold for their joint and mutual benefit, and where each is to contribute his skill and aid to the business and share in the final profit or loss at the close of the business, contains every ingredient of a partnership between themselves, and makes such partnership, although the parties were not aware, and did not suppose, that the legal effect of the agreement was to create a partnership. *Duryea v. Whitcomb*, 31 Vt. 395.

7. Where two or more persons agree to become partners, and actually proceed to carry into execution the joint undertaking or business, the relation of partners exists between them, although the conditions of the partnership were not understood alike by the partners. *Cook v. Carpenter*, 34 Vt. 121.

8. A and B agreed to work together in the business of manufacturing marble. B was to furnish the marble and to board A. A was to pay B one-half the cost of the marble. Both were to contribute their labor and skill in the business, and the products and avails were to be equally divided. *Held*, that they became strictly partners, as between themselves. *Griffith v. Buffum*, 22 Vt. 181. 26 Vt. 725. 31 Vt. 395.

9. The plaintiff and defendant entered into a contract for the manufacture and sale of hat bodies; the defendant to furnish the wool for the hat bodies, to peddle or sell the same after manufactured, and to charge nothing for his time while engaged in the sale; the plaintiff to manufacture the wool into hat bodies, and to charge nothing for his time while so engaged; each party to pay one-half the expense of extra labor, wool, and use and wear of the machinery; the defendant out of the sale of the hat bodies to retain the cost of the wool, and the profits, after paying for the wool, to be equally divided. *Held*, that the parties were not, as between themselves, partners,—the one-half of such profits, payable to the plaintiff, being a virtual compensation to him for his labor expended upon the wool; and that an action of book account lay therefor. *Mason v. Potter*, 26 Vt. 723; and see *Kellogg v. Grinstead*, 12 Vt. 291.

10. The defendant took the job of finishing off a church at a certain price. Afterwards,

the defendant agreed with the plaintiff that they would go on together and do the job, each working, and the work of each to offset that of the other; the expense of materials and other work to be deducted from the price of the job, and the balance to be equally divided between them. They did the job accordingly, the plaintiff having worked thereon thirty days more than the defendant. *Held*, that the parties were not partners as between themselves, and that the plaintiff could recover in *assumpsit* what the defendant had received on the job more than his share; and that, in determining how much the plaintiff was entitled to receive, such extra work should be reckoned for which, by the contract, he was to be allowed. *Hawkins v. McIntyre*, 45 Vt. 496.

11. The plaintiff owned a tin-shop and carried on the business in his own name. D was a practical plumber, and engaged his services under an agreement between them by which the plaintiff was to be allowed out of the profits of the business ten per cent on his stock invested, and the remainder of the profits was to be equally divided between them. They went on under this agreement, each devoting his whole time and attention to the business, which was carried on in the plaintiff's name as before, and D's share of the profits remained in the concern. *Held* a partnership. *Tyler v. Scott*, 45 Vt. 261.

## 2. As to third persons.

12. Persons are to be treated as partners, in their dealings with others, if they conduct and hold themselves out as such, though there may be no partnership in fact. *Stearns v. Haven*, 14 Vt. 540. *Cottrill v. Vandusen*, 22 Vt. 511.

13. In *assumpsit* against A and B, as partners, for goods sold, the defense was that B was not the partner of A, but that C, not joined, was. *Held*, that if this were so, and yet B represented himself as a partner in making the purchase, a recovery could be had against A and B, the non-joinder of C being, at most, cause for abatement. *Hicks v. Crane*, 17 Vt. 449.

14. The defendants bought a grist-mill and privilege, under an agreement between themselves to rebuild the works and run them, and to share the profits and loss of the business. The plaintiff, under the engagement of one of the defendants, but expecting that all were liable, performed services in rebuilding the mill. *Held*, that the defendants were partners and liable as such, although there was an agreement between the defendants, unknown to the plaintiff, that each should pay the men engaged by him, and charge therefor to the company. *Noyes v. Cushman*, 25 Vt. 390. 31 Vt. 398.

15. In an action against partners to recover

for publishing a newspaper advertisement, which was in the name of one partner, but which, as claimed, enured to the benefit of the firm;—*Held*, that evidence in defense was admissible, that the advertising partner had a special interest to be promoted by the advertising outside the partnership interest; also, that it was agreed between the partners, on the formation of the partnership, that they should not advertise in the newspapers, and that they never had. *Harris v. Holmes*, 30 Vt. 352.

16. L. D. Hill and Harrington were never partners, and no such firm as L. D. Hill & Co. ever existed; but Harrington gave the plaintiff a note for property purchased by him, signed "L. D. Hill & Co. by Harrington," without the knowledge of Hill. Two or three years before this, Hill was informed that Harrington was using the name of L. D. Hill & Co. in his business, and thereupon he told Harrington he must not use that name to injure him, and Harrington said he would not. The plaintiff, at the time he took said note, did not know of such previous use of the name of Hill, and it did not appear whether Harrington made any representations to him at the time beyond what appeared on the face of the note. *Held*, that the legal intentment was that the plaintiff took the note on the faith of Hill's name, and that Hill was liable upon it. *Smith v. Hill*, 45 Vt. 90.

## II. PROOF OF PARTNERSHIP.

17. A partnership may be proved against the partners by oral evidence of the actions and declarations of the parties, although there are written articles; but to prove the partnership in their own behalf, they must produce the written articles. *Cutler v. Thomas*, 25 Vt. 73. *Hastings v. Hopkinson*, 28 Vt. 108.

18. The admission of a partnership, or a joint liability, by one of two or more defendants, is evidence against himself, but not against the others. *Cottrill v. Vandusen*, 22 Vt. 511. *Noyes v. Cushman*, 25 Vt. 390.

19. Partnership proved by admissions of the several defendants sued as partners. *Mathews v. Felch*, 25 Vt. 536.

20. Common reputation is not competent evidence to prove the fact of a partnership. *Hicks v. Crane*, 17 Vt. 449. *Carlton v. Ludlow Woolen Mill*, 37 Vt. 496.

21. To prove that a person was a member of a firm, testimony is admissible that he held a deed of an undivided portion of the common factory property, and that, with his knowledge, suits respecting said property had been brought in his name with others as joint owners of the factory, and that he took an active part in making repairs and advising about the same, and in the manufacturing at the mill, although



he had before that erased his name from the articles of copartnership. *Carlton v. Ludlow W. Mill*, 28 Vt. 504.

22. Where the plaintiff attempted to prove a partnership as existing between two defendants as inn-keepers, &c., by the admission of one of them, and by the course and circumstances of their business and their joint use of the tavern property;—*Held*, that, as tending to rebut such evidence and to prove that the defendants had not been in the joint receipt of the income of the tavern, it was admissible for one of the defendants to prove that the other had assigned tavern furniture and tavern accounts to a third person for the payment of his individual debts. *Callender v. Sweat*, 14 Vt. 160.

### III. RIGHTS AND LIABILITIES.

#### 1. In general.

23. A note signed by each member of a firm individually, instead of by the partnership name, because the payee so insisted, the consideration of which went into the partnership business, was *held* to be a partnership debt. *Kenrick v. Tarbell*, 27 Vt. 512.

24. One of three partners in a country store, the partnership being notorious, purchased a horse for which he gave his individual note, and afterwards sold the horse and put the avails with other money of the concern, but upon what conditions did not appear. *Held*, that the partnership was not liable, either in an action upon the note, or for goods sold. *Holmes v. Burton*, 9 Vt. 252. 36 Vt. 157.

25. The extent of the powers of a copartnership, or of one of its members, to bind the firm, and the liability of the members, must be determined by the law of the place where the partnership was formed and had its place of business, although the transaction in question was had in another State. *Cutler v. Thomas*, 25 Vt. 73. *Hustings v. Hopkinson*, 28 Vt. 108.

26. Where a note is signed by one of two partners for partnership purposes, and under circumstances to constitute it a partnership debt, the other partner is under equal obligation to pay it; and though he pays it out of his private funds, it is thereby extinguished and he cannot keep it on foot so as to maintain an action upon it, but his payment becomes a matter of partnership accounting; and a subsequent naked promise by the signer to pay the note to the other, does not revive it as an obligation. *Sprague v. Ainsworth*, 40 Vt. 47.

#### 2. In respect to partnership property, and partnership debts.

27. **Real estate.** Land paid for with partnership funds and occupied and used for the partnership benefit and conveyed to the partners jointly, though not described as partners, is partnership property, and should be so regarded even in a controversy for priority between partnership and private creditors. *Willis v. Freeman*, 35 Vt. 44. *Rice v. Barnard*, 20 Vt. 479.

28. A and B being partners, B, for their joint benefit, but in his own name, bought certain standing timber, which was to be taken from the land by a day named. The timber was wholly paid for and with joint funds. It was not all got from the land by the day set, and afterwards the owner of the land, not insisting on a forfeiture, conveyed the land for the price of the mere land to B, and B afterwards cut and got off the timber. In a bill by A against B, to account;—*Held*, that they remained joint owners of the timber, and B was liable to account. *Washburn v. Washburn*, 23 Vt. 576.

29. While the orator and the defendant were partners, land was purchased for the partnership use, with the expectation that it would be paid for by the firm. The defendant, without the orator's knowledge, took the conveyance to himself alone and gave his own note for the price, which he afterwards paid from partnership funds, and the land was regarded and used as partnership property during the existence of the firm, being 26 years. *Held*, that the defendant held the title only as trustee for the firm, and he was decreed to convey an undivided half to the orator. *Dewey v. Dewey*, 35 Vt. 555.

30. **Primary liability of partnership property for partnership debts.** At law, both separate and joint creditors of a partnership may attach either separate or joint property, and may sell the personal property upon execution in satisfaction of their judgments, without regard to the equities of the debtors. *Bardwell v. Perry*, 19 Vt. 292. 29 Vt. 887. *Reed v. Shepardson*, 2 Vt. 120;—or may, in like manner, set off the lands upon execution. *Clark v. Lyman*, 8 Vt. 290.

31. A partnership contract imposes precisely the same obligation upon each separate partner that a sole and separate contract does, and there is no express or implied contract resulting from the law of partnership, that the separate estate shall go to pay separate debts exclusively. All that the separate creditors can require, in equity, is, that the partnership creditors shall exhaust their remedy against the partnership funds before resorting to the separate estate. Beyond this, or when there is no

partnership estate, both sets of creditors stand precisely equal, both at law and in equity. *Bardwell v. Perry*.

32. In equity, the creditors of an insolvent partnership are entitled to have the partnership assets applied in satisfaction of their debts, in preference to the creditors of the individual partners, although the separate creditors may have first attached those assets. This is by virtue of a lien which each partner has, by implied contract, upon all the partnership effects until all the partnership debts are paid—the interest of each partner being only his share in the surplus after the partnership accounts are settled, and all just claims satisfied. *Washburn v. Bank of Bellows Falls*, 19 Vt. 278. *Bardwell v. Perry*, *Id.* 292. *Shedd v. Wilson*, 27 Vt. 478. *Russ v. Fay*, 29 Vt. 381. *Willis v. Freeman*, 35 Vt. 44. *Miner v. Pierce*, 38 Vt. 610.

33. A separate creditor of one member of a copartnership acquires no greater right by attachment of the partnership effects, than that member of the firm has, after payment of all the debts of the firm, and a final settlement between the copartners. *Miner v. Pierce*. *Washburn v. Bank of Bellows Falls*. *Rice v. Barnard*, 20 Vt. 479. *Shedd v. Wilson*.

34. The creditors of an insolvent partnership have, in equity, a claim to the partnership property, which is paramount to any lien acquired by the attachment of it by either the creditors of the individuals composing the partnership, or the creditors of another firm composed of the same members together with others. *Shedd v. Wilson*.

35. Where a creditor of an individual partner attached that partner's interest in partnership property, being one-half, and the partnership was not shown to be then insolvent;—*Held*, in equity, that the lien thereby created was superior to that of a partnership creditor, subsequently acquired, although the partnership became insolvent before the recovery of judgment in the first case. *Willis v. Freeman*, 35 Vt. 44.

36. A and B were copartners in trade, and the partnership was insolvent, and B was indebted to the partnership, and was insolvent. C, a creditor of B, attached the partnership goods and sold on execution B's interest therein, and they were dispersed. In a bill by A against B and C;—*Held*, that C should account to A for the value of the goods, within the limits of B's indebtedness to A as partner. *Miner v. Pierce*, 38 Vt. 610.

37. Where several creditors of a partnership had made separate successive attachments of the partnership property, and brought their bill in chancery for relief against the previous attachments of separate creditors, the court granted the relief, but *held* that the partnership creditors should share the assets *pro rata* (the

partnership being insolvent), and not in full, in the order of their attachments. *Washburn v. Bank of Bellows Falls*, 19 Vt. 278.

38. If the contract of copartnership, or association, be of such a nature that the individual associates have no lien upon the partnership funds for the payment of partnership liabilities before individual debts, the partnership creditors cannot claim such preference;—as, where the case was one of a universal hotchpot of all the property and liabilities, present and prospective, of the associates, constituting a community of goods and all other interests, without accounts kept, or settlement made, or possibility of making any. *Rice v. Barnard*, 20 Vt. 479.

### 3. Act of one partner as binding the others.

39. One member of a partnership has no implied authority, as partner, to assign all the partnership property to a trustee for the benefit of the creditors of the firm, and thus put an end to the partnership. *Redfield and Bennett, J. J.*, in *Dana v. Lull*, 17 Vt. 390.

40. The assignment of a partnership demand by one partner, to secure a loan by a third person to an employee of the firm, was *held*, under the circumstances stated, not so invalid as to leave the demand subject to trustee process against the firm. *Crosier v. Shants*, 48 Vt. 478.

41. A mere partnership relation does not authorize one partner to execute an instrument under seal, whereby a new and original obligation is created, which will be binding on the company as a specialty debt, or which can be enforced by an action of covenant; but an instrument, so executed, may become obligatory as the deed of the company, by a previous parol authority, or by a subsequent parol ratification by the other partners, and so as to sustain an action of covenant thereon. *McDonald v. Eggleston*, 26 Vt. 154.

42. One joint debtor cannot confess judgment for his co-debtors; as, one partner for his firm. *Shedd v. Bank of Brattleboro*, 32 Vt. 709.

43. One partner cannot, by virtue of his relation as partner, bind his copartner by the submission of a partnership matter to arbitration. *St. Martin v. Thrasher*, 40 Vt. 460.

44. The active partner of a firm accepted, for the firm, service of a writ against all the partners, and employed an attorney to review the cause, who entered a general appearance for the defendants, and reviewed from a judgment against them. *Held*, that all the partners were concluded thereby. *Bennett v. Stickney*, 17 Vt. 531.

45. Where a partnership was interested in the event of a suit, a release, by one of the

firm, of all his claims as an individual and as a member of the firm, was *held* sufficient to render him competent as a witness. *Linsley v. Lovely*, 26 Vt. 133.

46. Where negotiable paper is rightly taken payable to a partnership, either partner may bind the firm by an indorsement, in the name of the firm, to a *bona fide* purchaser for value, although, as between the partners, the paper was the sole property of the one who indorsed it, and although the partners had agreed that no member should indorse paper to make the others liable. *Barrett v. Russell*, 45 Vt. 43.

47. **Dealings with one partner.** Where a party seeking to charge a partnership is apprised that the transaction is not for or on account of the firm, and that the credit is not for their benefit, and the act is not in the usual course of business, *prima facie* the firm is not bound, and he must show the authority or approbation of the partner attempted to be charged. It is not necessary that he should have known or believed that each member of the firm would approve the transaction; but it is necessary, in the absence of all proof of such assent or approbation, that he should *not* have known that the transaction was not for the benefit of the firm. *Huntington v. Lyman*, 1 D. Chip. 438.

48. Where a contract is made by one partner, in the name of the firm, which is beyond the scope of the partnership, a subsequent assent thereto may be inferred from the declarations or conduct of the other partners, so as to bind them. *Waller v. Keyes*, 6 Vt. 257.

49. One member of a firm of three made a negotiable promissory note, in the name of the firm, to a second member, who indorsed it to the plaintiff. In an action thereon against the firm;—*Held*, that the note and indorsement, *prima facie*, showed a good cause of action against the firm. *Norton v. Downer*, 15 Vt. 500.

50. If one partner purchases property upon his single credit, for the use of the partnership, and the seller is not aware of the existence of the partnership, he may, when he discovers it, have the benefit of the partnership liability. *Griffith v. Buffum*, 22 Vt. 181.

51. Where a contract is made with one partner and in his name alone, the other party knowing of the partnership, if it turns out that such partner was not justified in making the contract on behalf of the firm, the other partners are not liable. *Chapman v. Devereux*, 32 Vt. 616.

52. Where by the terms of a partnership one partner has no authority to purchase upon the credit of the partnership, or of some of the partners, and this is known to the vendor, a sale to one of the partners upon such credit will not bind the non-consenting partners.

*Hastings v. Hopkinson*, 28 Vt. 108. *Chapman v. Devereux*.

53. The private debts and transactions of one partner become matters of charge against the partnership, where the other partners assent. *Miller v. Dow*, 17 Vt. 235. *Willard v. Collamer*, 34 Vt. 594.

54. The acceptance of a claim against one partner as payment of a partnership claim, is payment. *Churchill v. Bowman*, 39 Vt. 518.

55. It is incident to ordinary partnerships, that either partner should have the right to interfere to prevent the diversion of the partnership property from the legitimate business of the partnership, as for the payment of the debts of one of the partners; but as to parties dealing with either of the partners, the intention thus to interfere should be so expressed, and be evidenced by such acts, as to leave no reasonable doubt upon the subject. *Tyler v. Scott*, 45 Vt. 261.

56. **Defense and set-off.** Where one in good faith and by agreement with one of the partners, receives the goods or services of a partnership in payment of, or to apply upon, his claim against such partner, although without the knowledge of the other partners, he may to that extent defend against an action by the firm. *Strong v. Fish*, 13 Vt. 277. *Fay v. Green*, 1 Aik. 71. 2 Aik. 886. 17 Vt. 287. 27 Vt. 868. 34 Vt. 597. *Eaton v. Whitcomb*, 17 Vt. 641. (*Williams, C. J., dissenting.*) *Tyler v. Scott*.

57. In an action by a partnership, the defendant may use, by way of defense or set-off, any claim which he has against that partner with whom he contracted or dealt without knowledge of the partnership, although such claim existed when the contract was entered into. *Bryant v. Clifford*, 27 Vt. 664. *Hilliker v. Loop*, 5 Vt. 116.

58. In book account by two, as partners, for goods sold, if in fact the goods and business belonged to only one of them, the defendant's account against that one may be set off and adjusted. *Lewis v. Parks*, 47 Vt. 336.

59. **Notice to one.** Notice to one of two partners is notice to both. *Barney v. Currier*, 1 D. Chip. 315. *Stevens v. Goodenough*, 26 Vt. 676.

60. So, as to others having a joint interest. *Stevens v. Goodenough*.

61. The plaintiffs, R, H and E, were partners owning some hay. The defendant asked R if he had any hay to sell, and said he was buying hay for one H, as his agent, as the fact was. R said he was not prepared to contract. The hay was not then all cut. The defendant said he would call again. Four weeks after, the defendant called and bought the hay of H, in the absence of the other partners and without the knowledge of R, the defendant not dis-

closing his agency and H having no knowledge thereof. *Held*—the conversation with R being no part of a negotiation for the hay—that the knowledge of the defendant's agency derived therefrom must be treated as if incidentally derived from a stranger, and did not become, constructively, knowledge by the firm; and that the defendant was personally liable. *Baldwin v. Leonard*, 39 Vt. 260.

62. **Payment.** Where part payment was made upon the promissory note of a firm, by one of the partners who was agent of the firm for making disbursements, &c.;—*Held*, that the fair intendment was, that it was made out of the joint funds of the partnership; and that such payment was not to be treated as a payment by the individual member, but by the entire firm on their joint account, and therefore took the case out of the statute of limitations as to all the partners. *Carlton v. Ludlow W. Mill*, 28 Vt. 504.

#### IV. DISSOLUTION AND CHANGE OF MEMBERSHIP.

##### 1. Partner's authority after dissolution.

63. After the dissolution of a partnership, one of the partners has no implied authority to impose new obligations upon the firm, or to vary the form, or character, of those already existing; as, by giving a partnership note for a pre-existing partnership debt, or by stating a partnership account, so as to bind the firm. *Woodworth v. Downer*, 13 Vt. 522. *Torrey v. Baxter*, *Id.* 452.

64. A note executed by one partner in the name of the partnership and for a partnership debt, but not delivered by him until after the dissolution, was *held* not to bind the partnership, for that a note takes effect only from its delivery. *Woodford v. Dorwin*, 3 Vt. 82. 30 Vt. 25. *Chamberlain v. Hopps*, 8 Vt. 94.

65. A promissory note was indorsed by a firm as collateral security for a partnership debt. One of the partners afterwards paid that debt with his own money, and took up the indorsed note and, before its maturity, but after the expiration of the partnership, transferred it, so indorsed, in payment of his individual debt. *Held*, that by his payment of the debt for which the note was pledged, the indorsement became legally extinct, and that he could not, after the dissolution, re-transfer the note so as to bind the firm by the old indorsement. *Dana v. Conant*, 30 Vt. 246.

66. A member of a dissolved partnership may pay, or release, a partnership debt, and much more receive back a note or bill, which the firm had fraudulently put in circulation as payment of their debt; and thus leave the original demand in force. *Torrey v. Baxter*, 18 Vt. 452.

67. A payment to one partner, though after a dissolution and against the prohibition of the other, operates as a payment of the debt, when made in good faith and when it does not appear that it operates as a fraud upon the other partner. *Thrall v. Seward*, 37 Vt. 578.

68. An admission by one partner, made after a dissolution of the firm, in regard to the business of the firm previously transacted, is admissible as evidence against all the partners, and binding on the firm. *Loomis v. Loomis*, 26 Vt. 198.

##### 2. Continuing liability.

69. **Notice of dissolution.** A retiring partner who was known to be a member of the firm, must publish notice of such retirement in some newspaper where advertisements are inserted and published in the place where the business is done, in order to shield himself from liability for the future debts of the firm, even to those with whom they have had no previous dealings; and as to those with whom the firm have had dealings, actual notice is requisite. *Simonds v. Strong*, 24 Vt. 642. *Prentiss v. Sinclair*, 5 Vt. 149.

70. Where a retiring partner suffers his name still to appear as one of the firm, he must be held liable as a partner to those who are misled by it into dealings as with the firm, although he may have given notice by newspaper publication that he has ceased to be a partner, and although such fact be generally known at the place where the contract is made, but not known to the persons so dealing. *Wait v. Brewster*, 31 Vt. 516. *Amidown v. Osgood*, 24 Vt. 278; and see *Southwick v. Allen*, 11 Vt. 75.

71. **Other party's knowledge.** A retiring partner cannot be held for a subsequent debt of the firm, if the creditor, at the time of the contract, was ignorant that such partner had belonged to the firm. *Benton v. Chamberlain*, 23 Vt. 711.

72. In order to hold an outgoing partner upon a contract as made with the firm, but after the dissolution, the plaintiff must show, (1), that he knew, when he made the contract, that the defendant had been a partner; (2), if he knew this, then that he did not know of the dissolution; and (3), that he contracted upon the faith and credit of the defendant as a partner. *Pratt v. Page*, 32 Vt. 13. *Spaulding v. Ludlow Woolen Mill*, 36 Vt. 150.

73. *Held*, that the defendant, who was a member of a division of the N. E. Protective Union when the dealings between the plaintiff and such division began, could not escape responsibility for the payment for goods sold to the division after he had withdrawn himself as a member, but before the plaintiff was notified

of such withdrawal, unless it appeared that when the plaintiff [first] gave credit to the division he did not know that the defendant was a member. *Tenny v. N. E. Protective Union, &c.*, 37 Vt. 64.

74. The plaintiff, an attorney, had been retained generally for the defendants, while partners, in all their business. C, one of the defendants, sold out all his interest to the others and retired from the firm. The plaintiff, on the application of the other defendants, brought a suit in the name of the firm upon a cause of action existing before the dissolution, and rendered services therein. He knew that C had retired from the firm, but it did not appear that he knew of the details, or that C had parted with his interest in the assets. In an action to recover for such services;—*Held*, that C was liable with the other defendants. *Cahoon v. Hobart*, 38 Vt. 244.

75. A and B, the plaintiffs, were partners in the ownership and running of a saw-mill. A sold his half of the mill and lumber on hand, but not his half of the partnership accounts. These he left with an attorney for collection, and absconded. B notified the defendant, a debtor of the partnership, to pay no one but himself, and demanded the accounts of the attorney, which the attorney refused to surrender. B then brought this suit in the name of A & B, after which the defendant paid his debt to said attorney, taking from him a release, of which A was informed and he approved it. *Held*, that such payment and release were not a bar to the suit. *Ayer v. Ayer*, 41 Vt. 346.

76. **Change of membership.** The death of a member of a partnership designed to be continuing and to have perpetuity, as a division of the N. E. Protective Union, does not work a dissolution of the partnership. *Tenney v. N. E. Protective Union, &c.*, 37 Vt. 64.

77. The formation of a new partnership, alone, is no evidence of a dissolution of a previous one existing between some members of the new firm; but the discontinuance of the business of an old firm and the formation of a new one, who succeed in business at the same store, does tend to prove a dissolution. *Southwick v. Allen*, 11 Vt. 75.

78. Where the defendant's dealings with a former firm are, by his consent, carried into the accounts of a succeeding firm and charged to him, they become proper matters for adjustment in the action of book account between the second firm and the defendant. *Eaton v. Whitcomb*, 17 Vt. 641.

79. Where the property and liabilities of a partnership had become merged in a succeeding corporation and the partnership extinguished, and the orators had for some two years dealt with the parties on this basis, transferring the partnership account to the corporation and

taking judgment against the corporation for their entire claim;—*Held*, that they could not, upon the insolvency of the corporation, go against the partnership for any part of their claim. *Whitwell v. Warner*, 20 Vt. 425.

80. Where a change takes place in the membership of a firm, and the account with a customer goes on as one continuous, open and current account, or the old balance is carried forward and blended in the general account with other transactions, and he makes payments generally on the account, for the purpose of reducing the general balance, such payments, the rights of third persons and sureties not being affected, will be first applied to the extinguishment of the earliest accounts. *Morgan v. Tarbell*, 28 Vt. 498.

81. A surviving partner is not bound by the agreement of his deceased partner, to apply upon a partnership demand his individual indebtedness,—the application not having been in fact made. *Stearns v. Houghton*, 38 Vt. 588.

82. Certain promissory notes belonging to a partnership, though made payable to one of the partners who afterwards deceased with the notes in his possession, passed into the hands of the defendant as his administrator. *Held*, that the defendant was liable to the surviving partner in trover, for refusal to deliver the notes on demand. *Id.*

## V. RIGHTS AND REMEDIES.

### 1. Between the partners.

83. **Action at law.** In a partnership of three, two cannot sue the third at law, for property of the firm received by him, although charged to him on the partnership books. *Judd v. Wilson*, 6 Vt. 185.

84. No action at law lies on a contract with a partnership of which the plaintiff is a member. *Estes v. Whipple*, 12 Vt. 378.

85. Assumpsit will not lie by one partner against another, to recover an unliquidated and unsettled balance of a partnership business. *Spear v. Newell*, 18 Vt. 288.

86. If partners, by an express agreement, separate a distinct matter from the partnership dealing, and one expressly agrees to pay the other a specific sum for that matter, assumpsit will lie on that contract, although the matter arose from their partnership dealing. *Collamer v. Foster*, 26 Vt. 754.

87. — **in chancery.** To settle and adjust a partnership, and to recover from a partner who has received none of the avails of the concern, a balance due to make up losses, a bill in chancery is the only remedy. *Spear v. Newell*, 18 Vt. 288.

88. Winding up of a "union store" in

chancery. *Stimson v. Lewis*, 36 Vt. 91. *Henry v. Jackson*, 37 Vt. 431.

89. **Account, and accounting.** In an action of account to settle the affairs of a partnership engaged in the business of buying and selling wool;—*Held*, that the several partners were entitled to interest on the money advanced in the business, from the time it was advanced. *Hodges v. Parker*, 17 Vt. 242.

90. In an action of account between partners, the plaintiff was *held* entitled to charge a reasonable compensation for his services in closing up the business of the firm after its dissolution, although there was no agreement to that effect, and although, by the terms of co-partnership, he was not to receive compensation for services during its continuance. *Bradley v. Chamberlin*, 16 Vt. 613.

91. Where, on the dissolution of a partnership, one partner agreed to collect the partnership demands, and divide after deducting "all expenses and costs of collecting," and he sent out his clerk for this purpose and paid the clerk only his customary wages during the time;—*Held*, that such partner was not entitled to claim any larger sum, on the ground that such clerk's services would have been worth more to him, if the clerk had remained in his individual employment. *Porter v. Wheeler*, 37 Vt. 281.

92. A partner is liable to make up, in his accounting with the partnership, for losses occasioned by his diversion of the funds, and for his fraud and unfaithfulness occasioning loss. *Pierce v. Daniels*, 25 Vt. 624.

93. A, B, C and D entered into an arrangement to purchase a patent right, to pay equally towards the purchase, and each to own one-quarter of the patent right, and to share equally in the profits and loss upon sales. The purchase was made by one of the associates, who falsely represented the price paid by him to be greater than the truth was, and the other associates contributed towards the purchase according to the report so falsely made. Upon a bill in chancery for settlement of the partnership and for an account;—*Held*, that, upon the adjustment of the accounts, such over-payments were a proper charge in favor of the parties making them, so as to make the parties equal in the purchase. *Penniman v. Munson*, 26 Vt. 164.

94. A and B were co-partners and equal owners in trade, having a shop at J and one at W. The business at J was managed by B alone. From that business A never received anything, and B showed no losses, but the effects there had been expended. All the effects at W had gone into the business and to pay partnership debts. On a bill to settle the partnership;—*Held*, that B could not object to being charged with the value of the goods taken

to the shop at J, and to paying A the one-half. *Minor v. Pierce*, 38 Vt. 610.

95. **Special cases.** The covenant of one partner to the other, to pay all the partnership debts with the avails of the partnership property after the expiration of the partnership, is discharged by a joint sale of all the partnership property before dissolution, where the covenantee alone receives the pay, and by an assignment to the covenantee, after dissolution, of all the covenantor's interest in the partnership. *Austin v. Cummings*, 10 Vt. 26.

96. Where one partner, not well acquainted with the affairs of the firm, purchased of the other a part of his interest, and gave a note therefor, on the false representations of the latter, afterwards discovered to be fraudulent, as to the value of such interest, the firm being in fact insolvent at the time, and so the interest purchased worthless;—*Held*, that such facts were a defense to the note, and this without an offer to rescind; for, there being no residuum after payment of debts, the purchase was of a thing which did not exist, and therefore could not be restored. *Smith v. Smith*, 30 Vt. 139.

97. P and K dissolved their partnership, K taking the partnership property and giving P a note for \$938, and agreeing to pay all partnership liabilities. K afterwards failed, leaving the partnership liabilities unpaid to the amount of \$1,500, and informed P that he could not pay them, and that P must. Finally, upon K's proposal, P agreed to pay K \$700 upon being indemnified by certain persons named against such partnership liabilities. K procured the indemnity proposed, and paid P the balance of the note after deducting the \$700, and P surrendered to him the note and discharged the mortgage given to secure it. *Held*, that the indemnity was a sufficient consideration for the compromise, and that, in the absence of fraud on the part of K, P could not recover the \$700, as due upon the note, or otherwise. *Parmenter v. Kingsley*, 45 Vt. 362.

98. K, the plaintiff, one of the partnership of B and K, engaged in the manufacture and sale of slate mantels, sold his interest in the business and property of the firm, including debts due, to the defendant, upon condition that the property sold should remain the property of the plaintiff until paid for, and until the liabilities of that firm, which the defendant assumed, should be paid. B retained his interest in the business and kept along in it as partner with the defendant. The defendant, with the consent and concurrence of B and in the usual course of business, sold a portion of said property, without having fully paid for his purchase and without having paid any of the liabilities of K & B, not intending at the time to appropriate the avails

thereof contrary to his agreement; but, subsequently, he did appropriate such avails to his private use, and abandoned the business. *Held*, that the defendant was not liable in trover for the property so sold. *Kellogg v. Fox*, 45 Vt. 348.

99. The defendants, T and D, gave their bond to E, the plaintiff, conditioned to indemnify him against all claims, &c., due from the firm of E, T and D, among which were certain notes of this firm to the firm of E and L. The notes having fallen due, E & L charged them to the private account of E, with his consent, and gave them up to him. *Held*, that this was a payment of the notes by the plaintiff, and that the defendants were liable to him upon the bond,—his being a member of both partnerships not affecting the question. *Emerson v. Torrey*, 10 Vt. 823.

## 2. As to third persons.

100. Joinder of parties. Where one member of a partnership contracts separately, and so declares, he cannot afterwards in a suit against him object that his co-partner is not joined, though such partner may have been interested in the contract. *Goddard v. Brown*, 11 Vt. 278.

101. Where one member of a partnership makes a contract, and the partnership is not disclosed nor known to the other party, but credit is given to such partner alone, he may be sued without joining the other partners. *Blin v. Pierce*, 20 Vt. 25. *Hagar v. Stone*, 20 Vt. 106. *Cleveland v. Woodward*, 15 Vt. 302.

102. Where a contract is made with one of several partners by one who is not aware of the partnership, but supposes he is contracting only with the individual, such partner may maintain an action upon the contract in his own name; or, he may bring it in the name of all the partners. *Curtis v. Belknap*, 21 Vt. 433.

103. One who is a nominal and ostensible partner may be joined as plaintiff, although he has no interest in the firm. *Waite v. Dodge*, 34 Vt. 181.

104. A partner whose "name was not known nor used in the business of the firm," was held to be a dormant partner. *Waite v. Dodge*.

105. A dormant partner may, or may not, be joined as plaintiff in a suit, and the joinder or omission is no ground for abatement, nonsuit, or writ of error. *Id.* *Lapham v. Green*, 9 Vt. 407. *Hilliker v. Loop*, 5 Vt. 116. *Morton v. Webb*, 7 Vt. 123.

106. Joinder of claims. A plaintiff may join, in one action, his individual claims with those he has as a surviving partner. *Wood v. Insurance Co.* 31 Vt. 565.

107. In an action by one as surviving part-

ner, the defendant may set off a claim against the plaintiff individually, unless it appears that partnership creditors have a lien upon the balance of the plaintiff's account. *Meador v. Leslie*, 2 Vt. 569. *Meador v. Scott*, 4 Vt. 26. 31 Vt. 565.

108. Individual contract. An order drawn upon a firm for the funds which the drawer had in the firm, directing the firm to pay the plaintiff whatever they, or either member of the firm, might have in possession, was accepted by the defendant, one of the partners, individually, he having the control and management of the business out of which the money was expected to come. *Held*, that the defendant was individually liable on his acceptance, either on a special count, or for money had and received. *Prentiss v. Foster*, 28 Vt. 742.

## PATENT.

Where a patented invention is only a new combination of old materials before in use, it is not an infringement to use one or all the materials forming the composition, and for the same purpose, provided they are not used in the combination patented; nor is it an infringement to use them in combination with some other material—the difference not being merely colorable. *Byam v. Eddy* (U. S. C. C.), 24 Vt. 666.

## PAUPER.

### I. OVERSEERS OF THE POOR.

### II. SETTLEMENT.

1. *In one's own right.*
2. *By derivation.*
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### III. REMOVAL OF PAUPER.

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### VI. WRONGFUL TRANSPORTATION OF PAUPER.

### VII. CERTAIN CONTRACTS.

### I. OVERSEERS OF THE POOR.

1. Binding out pauper. Authority of overseers of the poor to bind out pauper children as apprentices, under the statute of 1797. *Warner v. Swett*, 7 Vt. 446. 22 Vt. 530.

2. Overseers, in binding out to apprenticeship a pauper child, have no authority to bind the town by a covenant for faithful service of the apprentice for the term. *Baldwin v. Rupert*, 8 Vt. 256.

3. **Binding town by contract.** Overseers may bind the town by contract for the support of the poor; and one of them, requested by the others to take charge of a particular pauper, may contract for his support so as to bind the town. *Washington v. Rising*, Brayt. 188.

4. The selectmen and overseers of the poor cannot bind the town by contract to pay for the support of a pauper having a legal settlement in such town, beyond the sum of five dollars, without an order from a justice of the peace, in pursuance of section 20 of the pauper act of 1797. *Ives v. Wallingford*, 8 Vt. 224.

5. Otherwise, in case of a transient pauper. *Harrington v. Alburgh*, 14 Vt. 182.

6. An overseer of the poor has authority to employ counsel, at the charge of the town, to give legal advice and assistance in the matter of paupers, their removal, &c. *Burton v. Norwich*, 84 Vt. 845.

7. **Personal liability.** The defendant, one of the overseers of the poor, contracted, in behalf of the town, with the plaintiff, for the support of a poor person belonging to the town and needing relief, but he neglected to procure an order from a justice for an allowance, according to section 20 of the act of 1797, so that the town, in a suit for such support, was held not liable beyond the sum of five dollars (8 Vt. 224). *Held*, that the defendant was liable in assumpsit for such support, above the sum of five dollars. *Ives v. Hulet*, 12 Vt. 814. *Williams, C. J., and Redfield, J., dissenting.*

8. An overseer of the poor received a small legacy due the plaintiff, who was a *non compos* without a guardian, and a town pauper, and gave his receipt therefor, as overseer, to the executor, and applied a part of the legacy, properly and judiciously, in the necessary support of the plaintiff. *Held*, that the estate of the overseer was liable for the balance unexpended, but for that only. *Thurston v. Holbrook*, 81 Vt. 354.

9. **Custody of pauper.** The plaintiff agreed with a town, in town meeting, to board for one year, at a small price per week, a certain child of six years who was a fixed charge upon the town as a pauper. *Held*, that the plaintiff thereby acquired the right to the custody, control, and earnings of the child, for the year, and that the overseer of the poor had no right to remove the child, even for the purpose of binding him out—the town, his superior, having acted. *Houston v. Kimball*, 22 Vt. 575.

10. *Held*, also, that the father of the child, who was wholly destitute of a home and means of support, and who had never contributed to

the support of the child, could not interfere with the plaintiff's custody of the child. *Id.*

11. **Pauper in jail.** An actual commitment to jail of a pauper, casts upon the jailer and overseer of the poor, after the requisite notice, the duty of providing for his support; and this duty is not dependent upon the legality of the process on which he stands committed. *Newfane v. Dummerston*, 34 Vt. 184.

12. **Overseer's book.** A book of accounts kept by an overseer of the poor, under the requirements of G. S. c. 20, s. 88, showing the expenditures for the poor, was *held* to be original evidence, in behalf of the town, of the fact of an expenditure for a particular pauper. *Cabot v. Walden*, 46 Vt. 11.

## II. SETTLEMENT.

### 1. In one's own right.

13. **Act of 1779.** A legal settlement was acquired in a town by one year's continuous residence therein, between the years 1779 and 1787, under the pauper act of 1779. *Corinth v. Newbury*, 18 Vt. 496. *Londonderry v. Andover*, 28 Vt. 416.

14. **Act of 1797.** "Coming and residing in this State," as provided in the settlement act of 1797, does not require the coming from another State, but applies also to such persons as were within the State at the passage of the act who had no settlement in it. *Burlington v. Calais*, 1 Vt. 885. *Starksboro v. Hinesburgh*, 18 Vt. 215.

15. **"Able-bodied."** The health ordinarily enjoyed by men of health, and the physical ability ordinarily possessed by men of sound bodies, make one "healthy and able-bodied," within the meaning of the act of 1797, s. 1, relating to legal settlement; and this, notwithstanding casual and temporary illness, or bodily unsoundness producing an occasional and temporary effect upon the man's capacity to gain a livelihood by his bodily exertions. *Starksboro v. Hinesburgh*, 15 Vt. 200.

16. **Repeal.** The repeal of the settlement act of 1797 by the act of 1801, although without a saving clause, did not terminate a settlement acquired under the first act. *Starksboro v. Hinesburgh*, 18 Vt. 215.

17. **Residence.** Residence under the settlement acts does not require that the head of the family should remain constantly in the town with his family, if he there keeps up his family establishment, and intends living in that town unless he finds a place that suits him elsewhere. *Burlington v. Calais*, 1 Vt. 885.

18. The residence of a man in a town so as to confer a settlement, is not continued by his wife and family in his absence from the State, where the family establishment is discontinued



and broken up. *Middletown v. Poultney*, 2 Vt. 437. 7 Vt. 410.

19. The time a person is a patient in any lunatic asylum is not to be computed toward making up a settlement. (G. S. c. 20, s. 40.) *Peacham v. Weeks*, 48 Vt. 78.

20. A single woman, in the year 1812, went to her brother's in T, taking with her her bed, chests, chairs, &c., which remained there for several years, though she was generally absent in other towns. She returned to her brother's in T, winters, staying with him from one to three months; and, generally, she went to her brother's once or twice summers, staying a few days. *Held*, that for purposes of settlement, her residence, or home, was in T. *Newbury v. Topsham*, 7 Vt. 407.

21. The residence of a pauper who is a single man, is at the place where he makes his home. [Certain facts stated indicating such home.] *Williams, C. J. Kirby v. Waterford*, 14 Vt. 414.

22. Act of 1817—*Sui juris*. Since the act of 1817 (G. S. c. 19), such residence, to give a settlement, must not only have been continuous during the entire seven years, but must have been *sui juris*. Residence as wife, or child not emancipated, cannot be tacked to a subsequent residence in one's own right, so as to make up the requisite period. *Brookfield v. Hartland*, 10 Vt. 424. *Poultney v. Glover*, 23 Vt. 328.

23. A settlement by residence for the term of seven years, under the act of 1817, is confined to persons "of full age"—that is, the age of legal majority. A residence during minority, though the infant was emancipated, is not to be reckoned. *Hartford v. Hartland*, 19 Vt. 392.

24. Chargeable. Where there is a necessity for granting relief to a poor person, and it is granted, in good faith, by the town where he resides, this may prevent his residence ripening into a settlement, although such relief was not furnished upon his personal application, nor by his authority. *Walden v. Cabot*, 25 Vt. 522. (G. S. c. 19, s. 1.)

25. Aid furnished by a town to a poor person, in discharge of an obligation assumed by contract, and not of a duty imposed by statute, does not prevent his acquiring a settlement. *Cavendish v. Mt. Holly*, 48 Vt. 525.

26. A poor person does not become chargeable to a town, so as to prevent his acquiring a settlement by residence, by receiving aid from the town upon a sufficient pledge of his property as security for payment, the town realizing payment from the pledge. This is only a borrowing of money. *Montpelier v. Calais*, 5 Vt. 571.

27. Registry. Under the act of 1817, residence to give a settlement is to be computed only from the date of registry; and, under the

act of 1823, a previous residence, without registry, is not to be computed towards the gaining of a future settlement. *Newfane v. Dummerston*, 84 Vt. 184.

28. Residence—voluntary. In order that one's living in a town should confer a legal settlement, it must not be the result of legal coercion, but there must be liberty of choice whether to live there, or elsewhere. *Woodstock v. Hartland*, 21 Vt. 563.

29. A person *non compos* cannot be said to go to a town to reside, though he may have lived there 14 years. He is to be regarded, all the while, as a transient person, except in the town of his legal settlement. The *animus manendi* cannot be predicated of him. *Ryegate v. Wardsboro*, 32 Vt. 411-414.

30. A pauper, by procurement of her brother who was under obligation to support her, went to live with another brother in Landgrove, and lived with him there for more than seven years. She was not "what is called bright;" was taken care of and provided with everything, by way of support; worked about the coarser kitchen work; knitting and sewing some; handy about taking care of small children; and, on the whole, doing sufficient service to compensate for her support. She could read in easy reading, but not long hard words; in conversation appeared broken and childlike; was accustomed to attend church, and behaved with propriety. If left to look out for herself, she was not capable of taking care of herself by seeking employment and making contracts, and providing herself with places to live, and with proper clothing and support, nor of exercising an intent of remaining or moving in, and to, and from, different places, except as she was controlled by those who had care of her. *Held*, that this was not a finding that the pauper was an idiot or *non compos*, but only that she was a person of weak intellect, yet having sufficient mental capacity to have a choice and desire as to her place of residence; and, it not appearing that she was acting under any compulsion, or restraint, or against her wishes, nor that she did not act freely and of her own choice as to her place of living, *held* that such residence gave her a settlement in Landgrove, although acting under the influence of her friends. *Ludlow v. Landgrove*, 42 Vt. 137.

31. The question whether a pauper has come to reside in a town, is one of fact. Two things are necessary to show such a residence; first, he must have come to the town *actually*, not by mere intention or constructively; secondly, he must have come there *animo manendi*, or, being there, he must intend to remain there, and must have abandoned all intention of returning to the town whence he came. Coercion or necessity, by taking away the intention of remaining, takes away from residence the

essential elements of its existence as a legal residence, under the statute. *Brownington v. Charleston*, 32 Vt. 411.

32. Where a man having his residence, home, and family in town A, was arrested and confined in jail in town B upon a bailable criminal charge, leaving his family in A and intending to return there when his imprisonment should be ended;—*Held*, that the period of his imprisonment should be reckoned as part of the time requisite to give him a legal settlement in A. *Northfield v. Vershire*, 33 Vt. 110.

33. **Transient person.** A person brought from another town and confined in jail is a "transient person" under the pauper acts, and cannot be said to have "come to reside." He is not subject to an order of removal, and cannot acquire a settlement by such enforced residence. *Pawlet v. Rutland*, Brayt. 175. *Manchester v. Rupert*, 6 Vt. 291. *Danville v. Putney*, 6 Vt. 512. 21 Vt. 568.

34. Where a debtor from the town of H was committed to jail in W on execution, and gave a jail-bond and was admitted to the liberties, and then removed his family to W within the liberties, hired a house there and resided in it with his family, and supported them for more than seven years, and paid his taxes in the town of W, and committed no breach of his bond;—*Held*, that he acquired no settlement by such residence, and that on being recommitted to close jail and being then aided by W, that town could recover of the town of H where he had his legal settlement when first committed to jail, the sum expended in his support. *Woodstock v. Hartland*, 21 Vt. 563. 32 Vt. 414. 33 Vt. 113.

35. **Continuous residence.** To gain a settlement under the act of 1817 by a residence "for the term of seven years," the residence must be continuous for seven successive years, without interruption. *Royalton v. Bethel*, 10 Vt. 22. *Monkton v. Panton*, 12 Vt. 250. 19 Vt. 397. 33 Vt. 159.

36. **Residence a fact—Home.** A person residing in Jamaica purchased some land in another part of the town, cleared a part, and had cut some timber for building him a house upon it, when he removed to Londonderry with his wife and family, taking all his furniture and implements of housekeeping, except a few articles of little value, or use, and resided there 29 days, when he moved back to Jamaica. The court charged the jury, upon these facts, that although such person [a pauper] when he moved to Londonderry, intended speedily to build said house and return and live therein, yet, if he left no shelter or dwelling in existence in Jamaica to which he intended to return, and intended also to remain in Londonderry until he built said house, such removal would interrupt his residence in Jamaica. *Held* correct.

Residence is a fact. Mere intention does not constitute a residence; as, in this case, the man had no local habitation or place which he could justly call home, to return to. *Jamaica v. Townshend*, 19 Vt. 267. 26 Vt. 552. 33 Vt. 59. *Id.* 164.

37. Where a pauper, with his family and effects, moved from Hartford into New Hampshire in order to learn the trade of shoemaking, staid three or four months and then moved back to Hartford;—*Held*, that although he may have contemplated a return to Hartford at some future and uncertain time, his residence at Hartford was interrupted. *Hartford v. Hartland*, 19 Vt. 392. 33 Vt. 163.

38. M, having no family, nor property, except his clothes and two axes, worked at different places in B, from 1850 to 1859, except that from July, 1852, to the spring of 1853, and from January, 1855, to the following spring, he worked in three other towns, taking with him his effects. He had no particular home anywhere; his engagements to labor were not for any particular periods, but he seemed to desire to stay, as long as he could, wherever he could find employment and people would keep him,—he being subject to fits, &c. *Held*, that an intention on his part to return to B, to seek a home and employment there at the expiration of his particular term of service elsewhere, he having no particular place or home to which he intended to return, was not sufficient to keep up his residence in B during such absences therefrom. *Barton v. Irasburgh*, 33 Vt. 159.

39. **Intent.** The *animus revertendi*, as aiding to continue a residence during a personal absence, must be a present, fixed, and continuous intention, and not a mere desire, or mental purpose of return at some future indefinite time. *Id.* *Jamaica v. Townshend*, 19 Vt. 270. *Hartford v. Hartland*, *Id.* 397.

40. **Residence under former act.** A residence commenced under the act of 1801 cannot be computed as any part of the term of seven years' residence required by the act of 1817, for gaining a settlement. *Monkton v. Panton*, 12 Vt. 250. (G. S. c. 19, s. 1, eighth.)

41. **Previous settlement.** Under the act of 1817, a settlement was not gained by residence in a town for seven years, unless the person had a previous legal settlement in some other town in this State. *Sutton v. Burke*, 15 Vt. 730.

42. **Foreigner.** The statute providing for the acquiring of a settlement in a town at the time of its organization (Slade's stat. 882. G. S. c. 19, s. 1, 7th division), applies to unnaturalized foreigners, as well as to all other persons of full age. *Derby v. Salem*, 30 Vt. 722.

43. **Jurisdictional limits.** A settlement is gained by residence within the *jurisdictional*

limits of a town, although without the charter boundaries. *Corinth v. Newbury*, 18 Vt. 496. *Landgrope v. Peru*, 16 Vt. 422. *Reading v. Weathersfield*, 30 Vt. 504.

44. But if the jurisdictional line is disputed and unsettled, the jurisdiction being claimed and exercised by both towns, then the settlement will be determined by the charter boundaries. *Landgrope v. Peru*.

45. Where town C, for more than seven years, had levied and collected taxes of a resident upon land outside its charter limits, caused his children to be returned as belonging to one of its school districts, and allowed him to vote at its town meetings, there being no evidence of counter-jurisdiction exercised over this particular land and resident by town W, within whose charter limits they were situate;—*Held*, that the party thereby acquired a settlement in town C. *Reading v. Weathersfield*, 30 Vt. 504.

46. Change of settlement. A settlement acquired by residence within the jurisdictional limits of a town, although without its charter boundaries, is not changed by an act of the Legislature changing the jurisdictional line. *Landgrope v. Peru*, 16 Vt. 422.

47. A settlement once obtained in this State is not lost by afterwards acquiring a settlement in another State of the United States. *Georgia v. Grand Isle*, 1 Vt. 464.

48. All that is required in order to change a legal settlement by seven years' residence is, that the person, being *sui juris*, should have his permanent domicile for seven consecutive years in the second town, and keep himself, and family, if he have one, from becoming chargeable to either town. *Tunbridge v. Norwich*, 17 Vt. 493.

49. Evidence. The declarations of a pauper that he was then living in a particular town and had been for a year previous thereto, were held inadmissible to prove the fact of residence in such town previous to the date of the declarations, though within the year named—and *quære* whether admissible to prove the fact of residence at the date of the declarations. Such declarations as to a past residence, are clearly not evidence of the fact. *Londonderry v. Andover*, 28 Vt. 416. *Derby v. Salem*, 30 Vt. 722. 41 Vt. 106.

50. The supporting of a poor person by the overseers of the poor, upon the supposition or understanding that his legal settlement was in such town, was held not conclusive of the settlement. *Barre v. Morristown*, 4 Vt. 574.

51. Settlement by paying taxes. In order to gain a settlement under the act of 1797 by reason of having been charged with, and the payment of, public rates or taxes, &c., it must appear that a tax had been assessed against, as well as paid by, the pauper. *Starksboro v. Hinesburgh*, 18 Vt. 215.

52. — by being listed. In order to acquire a settlement under sec. 4 of the act of Nov. 4, 1817, by reason of a list of \$60 or upwards for five years in succession, the party's estate must be "set in the list" at that sum. It is not enough that the party's estate remained sufficient to produce that sum if the listing law had not, before the fifth year, been changed. *Manchester v. Dorset*, 14 Vt. 224.

53. And held, that the party's list of April 1, 1817, could not be counted as one of the five to complete the settlement, the act being prospective. *Id.*

54. — by purchase of estate. Under section one of the pauper act of 1797, it was held a sufficient payment on the "purchase of a freehold estate of the value of \$100," that the party purchased land for the price of \$250 and paid \$100 down, taking a deed, and with no lien on the land for the balance. *Kirby v. Waterford*, 15 Vt. 758.

55. Estate in one's own right. Where one took a farm to carry on at the halves and to pay one-half the taxes, and the farm and stock were set in the grand list to himself and the owner jointly;—*Held*, that this was not a holding "in his own right" so as to give a settlement under the pauper act of 1817. *Newfane v. Dummerston*, 34 Vt. 184.

56. Real estate of a wife is not, as the statutes now are, so held by the husband "in his own right," as that the assessment of their estate to him for purposes of taxation, at the sum of three dollars or upwards for five years in succession, will affect his settlement under G. S. c. 19, s. 1. *Baltimore v. Chester*, 47 Vt. 648.

57. Holding office. Where a pauper had been a lister in the town of W in the year 1823, and also in 1827, but had, between those dates, resided in another town some ten months;—*Held*, that he did not thereby, under the law of 1817, acquire a settlement in W; that the two years of holding the office need not be consecutive, but that the residence was required to be continuous. *Lincoln v. Warren*, 19 Vt. 170.

## 2. By derivation.

58. Common law—Wife and children. Previous to the pauper act of 1817, a wife took a derivative settlement from her husband, and minor children from their father, upon principles of the common law, there being then no statute upon the subject. *Wells v. Westhaven* 5 Vt. 322. *Manchester v. Springfield*, 15 Vt. 385. *Londonderry v. Andover*, 28 Vt. 416.

59. Wife's maiden settlement. When a husband has a legal settlement in this State, the wife takes it, and retains it after divorce *a vinculo* the same as if he were dead. It is

only in case that the husband has no settlement in the State, that the wife is remitted to her maiden settlement. *Royalton v. West Fairlee*, 11 Vt. 488.

60. The marriage of a woman having a legal settlement, to a man having no legal settlement in this State, does not destroy her maiden settlement, nor so far suspend it as to prevent her children, born of that marriage, from taking that settlement. The marriage only suspends, during coverture, one of the ordinary incidents of a settlement, viz: the right of removal; and this, only for the reason that such removal would separate the family. (G. S. c. 19, s. 1.) *Newark v. Sutton*, 40 Vt. 261.

61. **Void marriage.** A marriage celebrated by a justice of the peace without the consent of the parties, by the constraint and coercion of others, and not followed by cohabitation, was held void, and not to affect the settlement of the woman. *Mount Holly v. Andover*, 11 Vt. 226. 13 Vt. 467. 42 Vt. 725.

62. The marriage of a woman does not confer upon her the settlement of the man to whom she was married, where a decree of nullity of the marriage has been rendered. Such decree is conclusive evidence of the invalidity of the marriage. (G. S. c. 70, s. 16.) *Reading v. Ludlow*, 43 Vt. 628.

63. **Abandonment.** When the husband, having no legal settlement in this State, abandons his wife and goes without the State, she is remitted to the settlement she had before marriage. *Royalton v. West Fairlee*, 11 Vt. 488. *Bethel v. Tunbridge*, 13 Vt. 445. *Rupert v. Winhall*, 29 Vt. 245. *Wilmington v. Jamaica*, 42 Vt. 694. *Winhall v. Landgrove*, 45 Vt. 376.

64. A wife was held to take the settlement of her husband and to be removable with him, although he had abandoned her and his family, in the State of New York, more than twenty years before the order of removal and had never cohabited with her after such abandonment, and although she and the family remained in the State of New York during all the time that he was acquiring, by residence, a settlement in the town to which they were removed. *Tunbridge v. Norwich*, 17 Vt. 493.

65. **Minor child.** Before the revised statutes of 1889, a child not of age nor emancipated, took the settlement of his father; and if the father died, and the mother subsequently acquired a new settlement in her own right, the child took the new settlement of the mother. *Bradford v. Lunenburg*, 5 Vt. 481.

66. But since 1889, it is only where the father has no settlement in the State, that the child follows and has the settlement of the mother. (G. S. c. 19 s. 1.) *Sharon v. Cabot*, 29 Vt. 394.

67. A child takes the settlement of his mother, when the father has none in the State, although the right of removal may not exist; and when such right of removal arises, as by the pauper's becoming of age, he may be removed to the town of the mother's settlement. *Rupert v. Winhall*, 29 Vt. 245.

68. Where a widow gains a settlement in her own right, this is communicated to her minor children; but her settlement acquired by marriage is not communicated to her children by a former husband. *Wells v. Westhaven*, 5 Vt. 322.

69. —**born in another State.** Children born in other States of the United States, of parents who have a settlement in this State, take such settlement themselves, by derivation, on coming into this State, whether the parent, whose settlement they thus take, ever returns into the State, or not. *Westford v. Essex*, 31 Vt. 459. *Londonderry v. Andover*, 28 Vt. 416. *Waterford v. Fayston*, 29 Vt. 530.

70. —**born out of U. S.** A child born in a foreign State—as, Canada,—of a parent who, having a settlement in this State, removed therefrom and became permanently domiciled in such foreign State, is an alien born, and does not, on coming into this State, whether a minor or of full age, take the settlement of such parent, whether or not the parent also returns. *Westford v. Essex*. *Lyndon v. Danville*, 28 Vt. 809. *Albany v. Derby*, 30 Vt. 718. *Elmore v. Calais*, 33 Vt. 468.

71. —**an apprentice.** A minor, bound out as an apprentice, does not gain a settlement by residence with his master, but his settlement follows that of his father. *Benson v. Westhaven*, Brayt. 187.

72. **Emancipation.** A child becoming of full age, and emancipated, does not take derivatively the settlement subsequently acquired by his father, though perfected, as to the father, by a continued residence commenced before such emancipation. *Poultney v. Glover*, 23 Vt. 328. *Sharon v. Cabot*, 29 Vt. 394. (G. S. c. 19, s. 2).

73. A child by arriving at full age becomes, at least *prima facie*, emancipated, so as not to take an after acquired settlement of the parent; and, *quaere*, whether, under our statute, a child, unless *non compos*, can, by continuing to reside with his parent, after becoming of full age, take by derivation an after acquired settlement of the parent. *Hardwick v. Pavlot*, 36 Vt. 320.

74. Emancipation under the pauper laws exists, when the infant contracts a new relation inconsistent with being a part of the family of his parents. *Williams, C. J., in Wells v. Westhaven*, 5 Vt. 326. *Aldis, J., in Sherburne v. Hartland*, 37 Vt. 529. *Bradford v. Lunenburg*, 5 Vt. 490.

75. As, where the infant marries. After that, he was *held* subject to a warning-out process under the act of 1801; and *held*, that, not being warned out, he acquired a new settlement distinct from his parents, by one year's residence after marriage and during his infancy. *Sherburne v. Hartland*, 37 Vt. 528.

76. A mere residence with another, separate from the family of the parent, is not emancipation. Where an infant from the age of sixteen to twenty-one lived separate from his mother, a widow;—*Held*, that he followed his mother's settlement. *Bradford v. Lunenburg*, 5 Vt. 481.

77. In order to constitute the emancipation of an infant by act of the parents, it must appear that they have absolutely transferred all their right to the care and control of the infant, and all their right to his services; and that the person to whom such rights are transferred has accepted the infant as his own, and agreed to stand in *loco parentis*. It should clearly appear that such was the intention of the parties. *Wilson, J., in Tunbridge v. Eden*, 89 Vt. 21. In this case, the pauper was given, at 18 months old, by his parents to another "to keep as his own child," and they had no further care or control of him. *Held*, that the infant was thereby emancipated, and did not take the subsequently acquired settlement of his parents. *Id.* 17

78. A child upon becoming of full age is *prima facie* emancipated, though continuing to reside in the family of the parent. This presumption is liable to be rebutted, by showing that the child was not *in fact* emancipated, but continued to reside in the family of the parent upon the same terms as during his minority. *Kellogg, J., in Poultney v. Glover*, 23 Vt. 332.

79. The mere fact that a minor child is not removed with the parents under an order of removal, is no proof of emancipation. *Rupert v. Sandgate*, 10 Vt. 278.

80. **Bastard.** Before the pauper act of 1817, the rule of the common law prevailed, that a bastard has his settlement where born, unless fraud was practiced to occasion the birth to happen at that place, or the mother had been transported or conducted thither under legal authority. A bastard did not take a derivative settlement from the mother. *Manchester v. Springfield*, 15 Vt. 385. *Burlington v. Essex*, 19 Vt. 91.

81. A woman having no settlement in the State, but then residing in the town of W, being pregnant of a bastard, was procured by the overseers of W to be removed into the town of B, in order that the child might be there born, and it was there born. *Held*, that for the purposes of a settlement, the child should be treated as if born in W. *Plymouth v. Windsor*, 7 Vt. 327.

82. Under the act of 1817, providing that illegitimate children "shall have the settlement of their mother";—*Held*, that an illegitimate does not take the settlement of the mother derived by marriage after the birth of the child, but only such settlement as she acquires in her own right. *Burlington v. Essex*, 19 Vt. 91.

83. *Held* to be the same under the revised statutes (G. S. c. 19, s. 1), where the expression is, "shall follow and have," &c. *Newport v. Derby*, 22 Vt. 553. *Morristown v. Fairfield*, 46 Vt. 38.

84. The intermarriage of the parents of an illegitimate child, if recognized by the father as his child, legitimates the child "to all intents and purposes," and so that the child takes the legal settlement of the father. (C. S. c. 55, s. 5; G. S. c. 56, s. 5.) *Roostingham v. Mount Holly*, 26 Vt. 653.

### 8. Act of 1801.

85. *Note.*—By the settlement act of 1801 it was provided, that "whenever any person or persons shall come and reside within any town in this State, the selectmen of such town may, at their discretion, warn such person or persons to depart said town." The statute then prescribed the direction and form of the warning, that it should be served as a writ of summons, should be returned to the town clerk within eight days after service and be by him entered on the records of the town,—the effect of which was to prevent the acquiring of a settlement by residence. Otherwise, one year's residence gave a settlement. 1 Tolman's Stat. 400.

86. **Application.** This act applied to one who was in the town at the time of the passage of the act, as well as to one who came into the town afterwards. *Poultney v. Fairhaven*, Brayt. 185. *Stamford v. Whittingham*, 2 Aik. 188.

87. It applied only to such as were competent to gain a settlement by residence, and did not extend to infants not emancipated, whether legitimate or illegitimate. *Wells v. Westhaven*, 5 Vt. 322. *Manchester v. Springfield*, 15 Vt. 385. *Sherburne v. Hartland*, 37 Vt. 528.

88. But did apply to an infant emancipated,—as, by marriage. *Sherburne v. Hartland*.

89. **Warning—Effect.** The effect of a warning under the act of 1801 was to prevent the gaining of a settlement by the then, or any future, residence in the town. *Ira v. Clarendon*, Brayt. 180. 4 Vt. 567.

90. But a warning to the parents did not extend to a child who resided in the town more than one year after arriving at full age, and who was not himself warned. *Middlebury v. Hubbardton*, Brayt. 183.

91. The warning of a man, his wife and

family, was *held* to have no effect as to the woman who was living with him as his wife, but under a void marriage, nor as to their children; but that the woman, while so cohabiting with him, acquired a settlement in her own right by residence. *Manchester v. Springfield*, 15 Vt. 385.

92. **Form.** The warning must be according to the form prescribed, or it will be invalid. Warning *held* invalid, for certain specified variations from the form. *Wheelock v. Lyndon*, 6 Vt. 524.

93. A warning signed by the selectmen as *selectmen* simply, not adding the name of the town, was *held* sufficient where the name of the town sufficiently appeared in other parts of the instrument. *Shrewsbury v. Mount Holly*, 2 Vt. 220.

94. A warning-out process in this form: "Hereof fail not, but of [this precept with] your doings hereon due return make according to law" (omitting the words in brackets), was *held* good. *Dummerston v. Jamaica*, 5 Vt. 399.

95. **Service and return.** The service, return and record must be as prescribed by the act, or the whole proceedings will be invalid. The return of service must state the particular situation in which the copy was left. *Brandon v. Pittsford*, Brayt. 183.

96. The return stated that it was "by leaving a true and attested copy of the same lying on the table at the last and usual place of abode of" the person required to be warned out. *Held* insufficient. *Castleton v. Weybridge*, 46 Vt. 474.

97. A warning-out process, served by leaving a copy at the dwelling house of the person named, or at his last place of abode, without stating with whom or in what situation, is insufficient. *Barre v. Morristown*, 4 Vt. 574. *Hale v. Turner*, 29 Vt. 350. 46 Vt. 477.

98. So, when served by copy left at the last and usual place of abode of the party warned, with a person named, the return omitting to add, "*then resident therein*,"—*Held*, that for this cause the service was fatally defective. *Reading v. Rockingham*, 2 Aik. 272. 46 Vt. 477. 47 Vt. 496.

99. The return of service by leaving a copy at the last and usual place of abode, &c., "with a person of discretion residing therein" (not naming the person), was *held* insufficient. *Barnet v. Concord*, 4 Vt. 564.

100. A return is void which omits to state that the officer's return was upon the copy of the process which was served. *Castleton v. Clarendon*, Brayt. 181. *New Haven v. Vergennes*, 3 Vt. 89. *Winhall v. Landgrove*, 45 Vt. 376.

101. The return set forth the service as made in a certain mode (which was good), or, in a certain other mode (which was bad). *Held*

insufficient. *Marshfield v. Montpelier*, 4 Vt. 284.

102. The return on a warning-out process was as follows: [Date.] "Then served the within precept by leaving a true and attested copy with the with Jonas," &c. *Held* insufficient, and that it could not be read as if written the *within named Jonas*. *Townshend v. Athens*, 1 Vt. 284. This is an authority for no other word whatever. *Collamer, J.*, in *Fairles v. Corinth*, 9 Vt. 268.

103. Where a process against several persons is required to be served by copy, or as a summons, the return must show a copy left with each. Leaving "a copy with the within named persons," or "defendants," is not sufficient. *Smilie v. Runnels*, 1 Vt. 148. *Waterford v. Brookfield*, 2 Vt. 200. *New Haven v. Vergennes*, 3 Vt. 89. *Reading v. Weathersfield*, 3 Vt. 349.

104. Several persons being named in one warning-out process, the return was of proper service on some of them, and then set forth a service upon the others, "*as above stated*," *Held*, that, by reference, the return was sufficient. *Marshfield v. Montpelier*, 4 Vt. 284.

105. "Served this warning by leaving a true and attested copy with the within named," &c. This is sufficient, by intendment, as a copy of the warning. *Waterford v. Brookfield*, 2 Vt. 207. 9 Vt. 269.

106. The return was as follows: [Date.] "I then served this precept by leaving a true and attested copy of the same and return," &c. *Held* sufficient, it being plainly understood as if written, *this return*. *Fairles v. Corinth*, 9 Vt. 265.

107. To a warning-out process against *Oliver Taft* residing in the town of B, the officer made return of service, dated at B, "by leaving in the hands of *Oliver Taft*, at his abode, a true and attested copy of the same, with my return thereon indorsed." *Held* good, in the absence of proof that there was more than one person of that name residing in B. *Dummerston v. Jamaica*, 5 Vt. 399.

108. Where the warning issues against a man and his wife, a service on the man alone is sufficient. *Barrett v. Concord*, 4 Vt. 564. *Dummerston v. Jamaica*, 5 Vt. 399.

109. **Evidence.** The time when a warning-out process was returned by the officer to the town clerk's office, may be proved by parol—it not being required to be matter of record. *Pittsford v. Brandon*, Brayt. 183.

110. The *onus* of proving the warning-out of a pauper, under the act of 1801, is upon the party claiming the benefit of the proceeding. *Fayston v. Richmond*, 25 Vt. 446. 5 Vt. 325; and that the proceedings were recorded within the year. *Pavlet v. Sandgate*, 17 Vt. 619.

111. **Record.** In order to be of any effect,

a warning out process, with the return of service, must be recorded in the town clerk's office within a year; and neither the return nor record can be thereafter changed. *Mount Holly v. Panton*, Brayt. 182. *Brandon v. Pittsford*, Brayt. 188. *New Haven v. Vergennes*, 8 Vt. 89.

112. A copy of a warning-out process, having indorsed upon it by the then town clerk: "Received into record 9th October, 1807," was certified by the town clerk, in 1848, as "a true copy of record as recorded among the records of the town," &c. *Held*, that the court would not intend that the paper was recorded, that is, transcribed upon the record books, in 1807, but that the time of such record, or transcription, must be proved affirmatively by the town claiming the benefit of the record as in fact made in 1807. *Pawlet v. Sandgate*, 17 Vt. 619.

113. A warning-out process and the return of service were copied upon the town records and attested by the town clerk, under proper date, as follows: "Received this warning on record,"—and was signed; which attestation was made at the lower left hand corner of the precept, but above the return. From these facts, and from the custom of the town clerk in making like records, as seen from an inspection of the book;—*Held*, that the attestation included the return; and that the word "warning" in the attestation included both the precept and the service. *Salisbury v. Middlebury*, 28 Vt. 283.

114. Where the certificate of record of a warning-out process and return of service was: "February 17, rec'd. and record'd by David Tuthill, Town Clerk";—*Held*, that it was not competent to show by extrinsic evidence in what year the record was made. *Winhall v. Landgrove*, 45 Vt. 876. (*H. E. Royce, J.*)

### III. REMOVAL OF PAUPER.

#### 1. Who are subject to removal.

115. **Insane person.** The insanity of a pauper does not prevent an examination and order of removal. *Londonderry v. Windham*, 2 Vt. 149.

116. A lunatic female pauper may be removed to the place of her settlement, although such removal may separate her from the family of her mother. *Randolph v. Braintree*, 10 Vt. 486. 20 Vt. 577.

117. **Coming to reside.** If a person comes into a town and resides in a family, for even a few days, as a servant, though hired for no definite time, this is a "coming to reside" within the pauper acts, and subjects such person to an order of removal on becoming chargeable to the town. In such case, such person is not a "transient person," so as that an action

lies against the town of his settlement for aid furnished him as a pauper. *Middlebury v. Wal-  
tham*, 6 Vt. 200. 19 Vt. 271. 33 Vt. 164. 44 Vt. 386. 46 Vt. 611. (G. S. c. 20, ss. 4, 13.)

118. A pauper had separated from his wife in G, she going to S to live. After some three months he took his trunk, clothing and effects, and went off roaming, without any purpose of returning to G, and went to S, but without any purpose of remaining there any length of time, or of living with his wife. They soon concluded to live together again, and he hired her boarded there, by the week, and went out to work in the neighborhood, having no particular time in contemplation during which he should remain in S. After some 14 days, he fell sick and became chargeable to S. *Held*, that he had come to reside in S so as to warrant an order for his removal to the town of his legal settlement. *Sharon v. Cabot*, 29 Vt. 394.

119. The pauper, a single man, went to the town of P in May, for the purpose and with the intention of hiring out in the vicinity for the season, and to go to Massachusetts in the fall. Soon after stopping there, he was taken sick and was aided by the town of P as a pauper. *Held*, that he had "come to reside" in P, and was subject to an order of removal, and was not "a transient person" so as to sustain an action by P against the town of his settlement for the aid furnished him. *Pittsford v. Chittenden*, 44 Vt. 382.

120. The pauper, having separated from his family, came into the town of S and hired out to work there by the month to one V, and after working several weeks, quit before the term of his service expired and engaged himself elsewhere for a term to commence that evening; but before entering upon it he went back to V's in S to get some things he had there, and there broke his leg, and was aided by S. *Held*, that he had come to reside in S and was not a transient person; and that, not having entered upon the new service, his residence in S continued. *Stamford v. Readsboro*, 46 Vt. 606.

121. **Transient person.** There is nothing in any statute which extends the right of removal to a transient pauper. *Sutton v. Cabot*, 19 Vt. 522.

122. A person who goes into a town other than that in which his family resides, and there lives and works under a temporary contract, is a "transient" person in such town, and is not subject to an order of removal. He has not "come to reside," for his residence remains where his family is. *Bristol v. Rutland*, 10 Vt. 574. 21 Vt. 567.

123. **Chargeable.** A person is not "likely to become chargeable," so as to be liable to removal, unless, at the time of making the order, there was a prospect or strong probability, arising from circumstances then existing, that he

or his family would soon become chargeable to the town. *Londonderry v. Acton*, 3 Vt. 122. *Pomfret v. Barnard*, 44 Vt. 527.

124. The fact that two years prior to an order of removal the pauper was likely to become chargeable, does not tend to prove that he was so when the order was made. *Danville v. Wheelock*, 47 Vt. 57.

125. Whether a person is legally chargeable to a town so as to be the subject of removal, must depend upon the degree of his destitution and poverty when the proceedings are taken. (For special circumstances, see case.) *Hartford v. Hartland*, 19 Vt. 392.

126. The ability of a husband to support his wife, under the pauper acts, means a pecuniary ability in the present tense, and is not affected by the fact that he had before disposed of all his property, provided such disposition was binding upon him. *St. Johnsbury v. Waterford*, 15 Vt. 692.

127. No person can become legally chargeable to a town so as to be subject to an order of removal, while he has the means of supporting himself. *Ludlow v. Weathersfield*, 18 Vt. 39. *Londonderry v. Acton*, 3 Vt. 122. *Randolph v. Braintree*, 10 Vt. 442.

128. A pauper is subject to removal to the town of his legal settlement, although he is a minor and has a father of sufficient ability to support him, residing in another town of this State. *Berlin v. Morristown*, 20 Vt. 574. *Bennett, J.*, dissenting.

129. Though a husband and father may be unable to support himself, yet if he is supported by his wife and children, constituting his family, so that the family is self-supporting, neither he nor they are subject to an order of removal, as "likely to become chargeable." *Danville v. Wheelock*, 47 Vt. 57.

130. An unmarried man having no property in this State, but owning a lot of land, uncumbered, in the State of New York, worth four or five hundred dollars, was insane, and, on the application of his friends, had been assisted by the town where he was, as a pauper. *Held*, that the town was under no legal obligation to furnish him relief, and that he was not removable to the town of his legal settlement, as being chargeable, or likely to become chargeable. *Ludlow v. Weathersfield*, 18 Vt. 39.

131. **Owning freehold.** No person is a subject of removal, as a pauper, while he owns and occupies a freehold estate. *Londonderry v. Acton*, 3 Vt. 122.

132. This applies to a tenant in dower. *Brookfield v. Hartland*, 6 Vt. 401; though the dower has not been actually assigned, or set out. *Dummerston v. Newfane*, 37 Vt. 9.

133. The rule is the same, whether the estate be a legal, or an equitable freehold; as, a trust estate. *Walden v. Cabot*, 25 Vt. 522.

134. A married woman is not subject to an order of removal, where her husband owes an equity of redemption in lands, which equity is worth (say) \$285, and may be made available for her support. *Chelsea v. Brookfield*, 27 Vt. 587.

135. **Estate not freehold.** Where a husband abandoned his wife, and he owned an interest, not freehold, in land which yielded but a small share of what was necessary for her support, and it did not appear that it could have been made more productive;—*Held*, that she could be subject to removal as a person likely to become chargeable to the town. *Winhall v. Landgrove*, 45 Vt. 376.

136. **Expending estate.** It is not fraudulent, so as to affect the question of the rightful removal of a lunatic pauper, for the overseers of the poor to procure the appointment of a guardian of the lunatic, and to have him sell and convey the real estate of the pauper, so as to render him removable after expenditure of the proceeds in his support. *Randolph v. Braintree*, 10 Vt. 436.

137. **Family.** The wife of a minor son is not of the family of the father whom he is bound to support, within the meaning of the pauper and settlement acts; nor are the children of his wife by a former husband. *Manchester v. Rupert*, 6 Vt. 291.

138. **Separation of.** An order of removal can never be allowed to have the effect to separate husband and wife, so long as they cohabit together in the family relation; and an order which would require the removal of either from the other, and thereby break up the family relation between them, should be treated as void. *Dummerston v. Newfane*, 37 Vt. 9. *Hartland v. Pomfret*, 11 Vt. 440. *Northfield v. Roxbury*, 15 Vt. 622. *Rupert v. Winhall*, 29 Vt. 245. *Hartland v. Windsor*, 29 Vt. 354.

139. In such case, if either is irremovable, the other is. *Dummerston v. Newfane*. *Danville v. Wheelock*, 47 Vt. 57.

140. When a husband ceases to be the head of the family—as, by his death, his utter abandonment of his family and removal beyond the limits of the State, or by a divorce *a vinculo*—that office devolves upon the wife; and their minor children, while they form a portion of her family, have the domicile and settlement of the mother, and are removable with her. *Bethel v. Tunbridge*, 18 Vt. 445.

141. The confinement of a husband in jail by virtue of legal process cannot be regarded as an abandonment of his family, or as breaking up the family relation, so as to justify an order of removal of his wife and minor children, without him. *Peasack v. Waterford*, 46 Vt. 154.

142. Where husband and wife lived separate by agreement, but on friendly terms, he



supporting part of the children and she the others;—*Held*, that this was not such an abandonment of the wife, or legal separation, as that the parties could be separated by an order of removal. *Danville v. Wheelock*, 47 Vt. 57.

143. Minor children, whose tender age, or physical or mental weakness or condition, makes it necessary that they should have the care, sympathy, and control of their parents, rendering it improper upon the principles of humanity that they should be separated, are irremovable from them, notwithstanding the general unqualified language of the statute. But the simple fact that the pauper is a minor does not render him irremovable from them, where their places of legal settlement are not the same. *Morristown v. Fairfield*, 46 Vt. 88.

144. The objection that a minor cannot come to a town to reside, within the meaning of the pauper act, cannot prevail where such minor was with his parents, as part of the family, when they removed there to reside and commenced their residence. *Ib.*

### 2. Order of removal.

145. Complaint. The signature of one overseer of the poor to a complaint, as a basis for an order of removal, is sufficient. *Castleton v. Clarendon*, Brayt. 186.

146. It is no cause for quashing an order of removal, that the complaint was served by a constable who was also the overseer of the poor who made the complaint. *Bristol v. Braintree*, 10 Vt. 208.

147. The complaint need not set forth the place of the pauper's legal settlement; but this, and other facts found and determined by the justices, should be set forth in the order of removal. *Wilmington v. Jamaica*, 42 Vt. 694.

148. It is no objection to an order of removal of A, appealed from, that B also was joined in the complaint. *Windham v. Chester*, 45 Vt. 459.

149. Order. An order of removal of a pauper to a town in which he has no legal settlement, does not lie, although such town had fraudulently sent the pauper into the other town. The right of removal depends upon settlement. *Charlotte v. Colchester*, 20 Vt. 91.

150. The justices. Justices, though rated inhabitants and tax-payers of a town, are, by G. S. c. 20, s. 4, qualified to make an order of removal in behalf of such town, notwithstanding their interest. *Morristown v. Fairfield*, 46 Vt. 88.

151. The record. An order of removal will not be quashed on the ground that the justices found that the pauper "is likely to become chargeable," where the complaint was that "she is chargeable." The latter includes

the former. *Hardwick v. Pawlet*, 36 Vt. 320.

152. Certificate. The certificate of the justices upon the copy of an order of removal to be served, to the effect that it is a true copy, is an indispensable requisite and a constituent part of the process to be served, and without it, the statute (G. S. c. 20, s. 11) is not complied with. For such defect the order was quashed. *Sharon v. Strafford*, 37 Vt. 74. The defect, not being in the officer's return, is not, after service, amendable. *Ib.*

153. Warrant. It is no objection to a warrant of removal that it bears date the day of the order. *Georgia v. St. Albans*, 3 Vt. 42.

154. As to family. *Dictum*. An order of removal of a pauper, "his family and effects," (using the statute form), will be quashed on appeal, as to the family, who are not named; but *held*, where such order, followed by removal, was not appealed from, that it was conclusive as to the settlement of the wife and minor children constituting the family. *Hartland v. Williamstown*, 1 Aik. 241. A like order was quashed as to the wife and family, and held binding only as to the pauper named, in *Newbury v. Brunswick*, 2 Vt. 151. An order will not be quashed because the "family" are not named, unless it appear that the pauper has a family. It would, in either case, be good as to the pauper named. *Bristol v. Braintree*, 10 Vt. 208.

155. The above cases reviewed, and *held*, that such order in the statute form—"his family and effects"—was good as to the wife and minor children. *Landgrove v. Pawlet*, 20 Vt. 309. *Chester v. Wheelock*, 28 Vt. 554. *Windham v. Chester*, 45 Vt. 459.

156. Motion to quash an order of removal as to four children of the pauper, because not named and not alleged that they were minor children. The order stated that the justices considered that H M, with his wife, S M, "and his four children," had become chargeable, &c.; that he ought to be removed "with his said wife and family;" and it was ordered that the said H M do remove with his said wife, S M, "and their four children, &c." *Held*, that the children being described as of his family, they should be presumed to be minors subject to parental control; and the motion to quash was overruled. *Burlington v. Essex*, 19 Vt. 91.

157. An order of removal of "Nancy Webb and her daughter Sarah A. Webb," was quashed upon motion, the said Sarah A. Webb not being otherwise described, nor as of the family of Nancy Webb, except in the complaint of the overseer. *Derby v. Barre*, 38 Vt. 276. *Peck, J.*, dissenting.

158. Motion to quash an order of removal, because embracing two persons not of the same family. The order named the paupers as W G and I G, "her child," and ordered that the said

W G and I G, "her child, do remove with her family and effects, &c." *Held*, that the fair indentment was that the words *her family* meant the family of W G, and that I G, *her child*, was of her family. Order sustained. *Danville v. Peacham*, 41 Vt. 838.

159. Notice of order. A general notice, and demand of payment of the sum expended in supporting the pauper, is not a sufficient notice of the order. *Fairfield v. St. Albans*, Brayt. 176.

160. A majority of the court inclined to the opinion, that, before the statute of 1817, no effectual notice of the order could be given except in cases of removal by warrant. *Hartland v. Williamstown*, 1 Aik. 241.

161. Copy. The act requiring an attested copy of an order of removal to be left with the overseer, is not satisfied by a copy of the warrant containing a copy of the order, certified and left by the constable serving it. *Georgia v. St. Albans*, 8 Vt. 42.

162. The copy of the order to be left with the overseer, under the act of 1817, must correspond with the original in every substantial part. A fault in the copy, which would be fatal in the original, is fatal to the proceeding. *Barnet v. Concord*, 4 Vt. 564.

163. The leaving of a "true and attested copy of the original complaint and warrant of removal," is not due service of the order of removal, under the statute which requires a copy of the order to be left with the overseer. *Dorset v. Rutland*, 16 Vt. 419.

164. Where an order of removal was made, but there was no removal in fact, and there was no copy of the order left with the overseer within the thirty days after making the order, although the warrant of removal was served, the order was quashed upon motion. *Marahfield v. Calais*, 16 Vt. 598. (Altered by C. S. c. 18, s. 13. See 88 Vt. 254.)

165. Under G. S. c. 20, s. 11, as changed by the substitute act of 1864, No. 18, it is not necessary, on the removal of a pauper under an order and warrant of removal, if done within 30 days after making the order, that a copy of the order should be served upon the overseer. *Barnet v. Woodbury*, 40 Vt. 266. 45 Vt. 404.

166. In G. S. c. 20, s. 11, the words, "which copy of the notice," are to be read, *which copy and notice*; and under that statute, as under C. S. c. 18, s. 13, there need be no copy of the order of removal, *certified to be such by the justices*, delivered to the overseer, but the service of a copy of the order and of the notice, as a writ of summons, is sufficient. *East Haven v. Derby*, 88 Vt. 253; and see acts of 1864, No. 18.

167. Removal. It is not a reason for quashing an order of removal, that the pauper was removed on the warrant before the day

named in the order that he should remove himself, where such removal was with the pauper's consent; and, *quære*, whether the appealing town could avail itself of this ground to quash the proceedings, even if the pauper had not consented. *Plymouth v. Mendon*, 23 Vt. 451; —substantially overruling, on this point, *Barnet v. Concord*, 4 Vt. 564.

168. Service of order. Since the statute of 1817, an order of removal may be served before an actual removal and before the day fixed by it for the removal; and, if so served, is conclusive as to the settlement of the pauper, although no actual removal was ever made under it. *Poultney v. Sandgate*, 35 Vt. 146. *Stowe v. Brookfield*, 26 Vt. 524.

169. Service of an order of removal was duly made by an officer as a writ of summons, by copy left at the house of the usual abode of the overseer, &c., under the act of 1850 (G. S. c. 20, s. 11). The overseer received no actual notice of the order, or of the service, in season for an appeal. *Held*, that the order was, nevertheless, conclusive as the settlement of the pauper. *Poultney v. Sandgate*; and see *East Haven v. Derby*, 88 Vt. 253.

170. An officer's return of service indorsed upon a warrant of removal, that he had served a certified copy of the order of removal, &c., was held sufficient evidence of the fact, although no copy of the order of removal appeared among the appeal papers. *Windham v. Chester*, 45 Vt. 459.

171. Service of an order of removal on H, overseer of the poor of W, "by leaving a true and attested copy of this order of removal and citation at his house, in the hands of Wales Williard, he being a person of suitable discretion with whom to leave the same," was held wholly inoperative to affect the settlement, though not appealed from. *Whittingham v. Wardsboro*, 47 Vt. 496.

172. Record. The omission in the justices' record of the statement that they examined the pauper, does not render the proceedings void; and *quære* whether this is cause for quashing the proceedings. *Hartland v. Williamstown*, 1 Aik. 241.

173. Where the record followed the statute form,—"after hearing the proofs and allegations and examining the same;"—*Held*, not necessary that it should state specially that the justices had examined the pauper. *Bristol v. Braintree*, 10 Vt. 208.

### 3. Appeal.

174. Under the pauper act of 1817 and R. S. c. 16, s. 8 (G. S. c. 20, s. 8), an appeal from an order or warrant of removal must be taken to the term of court next after service of the order, unless so served within 30

days next preceding such term. *Stratford v. Hartland*, 2 Vt. 565. *Braintree v. Westford*, 17 Vt. 141. *Poultney v. Sandgate*, 35 Vt. 146.

175. An order of removal was made, and within 80 days thereafter a copy of the complaint and warrant, but not of the order, was left with the overseer of the defendant town. After the next term of the county court, the pauper was removed upon the warrant, and the defendant town thereupon appealed to the next term thereafter. On motion to dismiss the appeal,—*Held*, (1), that in order to prevent such proceedings from becoming conclusive upon the defendant town, the same not being void, but merely voidable, an appeal was necessary; (2), that the appeal was taken in season, being to the next term of court after the defendant town was made a party to the proceedings by the actual removal of the pauper. *Dorset v. Rutland*, 16 Vt. 419.

176. Where an order of removal was made, but no copy of the order was left with the overseer of the defendant town, and no removal made, but only a copy of the warrant of removal was so left within 80 days after the date of the order;—*Held*, that an appeal lay, and the order was quashed. *Marshfield v. Calais*, 16 Vt. 598. *Hobard, J.*, dissenting. 38 Vt. 255.

177. Where a copy of the order of removal is not left within the time prescribed by the statute, and the pauper is afterwards removed upon a warrant of removal, an appeal lies to the term of the county court next after the service of the warrant. Under this, as well the question of settlement as all other questions that legitimately arise, can be litigated. *Landgrove v. Pawlet*, 18 Vt. 325.

178. In such case, an appeal professedly taken from the warrant of removal, without mention of the previous order, is authorized by the statute. *Id.*

179. Form of appeal. No particular formality is required in taking an appeal from an order of removal; all that is required is, that notice of the appeal should be given to the justices, or one of them. If the appellant intended, by what he said, to take such appeal, and the justice supposed he so intended it, this is sufficient. On a refusal of the justices, in such case, to certify the appeal, a peremptory *mandamus* was ordered. *Orange v. Bill*, 29 Vt. 442. 32 Vt. 680.

180. Agreement. Where an order of removal had been made and the pauper removed, but the time for taking an appeal had not expired;—*Held*, that it was competent for the overseers of the poor of the two towns, by mutual agreement, to abandon all proceedings and claim, take back the pauper, and restore things as if the order had not been made. *Pawlet v. North Hero*, 8 Vt. 196.

181. Where an order of removal of a man and his [professed] wife and children was made by M to H, and H forbore to appeal in consideration of M's waiving the order as to the wife and children;—*Held*, that the order did not affect the settlement of the wife and children. *Morristown v. Fairfield*, 46 Vt. 33.

#### 4. Pleadings.

182. A verdict in a pauper case upon the plea of *unduly removed* [treated as a general issue], is conclusive of the settlement of the pauper. Therefore, questions not affecting the fact of settlement cannot be tried under this issue, but must be presented and decided as dilatory pleas. *Bradford v. Corinth*, 1 Aik. 290. *Richmond v. Milton*, Brayt. 188. *Waterbury v. Fairfax*, 1 Aik. 295.

183. On appeal from an order of removal, the question whether chargeable or likely to become chargeable, or not, must be raised by a motion to quash, or by plea in bar, such defense being interlocutory; while a plea to the merits should state and rest upon the fact that the town to which the removal was made is not the legal settlement of the pauper;—a plea that the pauper was "unduly removed," simply, means anything, or nothing, and is a mere nullity. *Corinth v. Bradford*, 2 Aik. 120.

184. A motion to quash, or to dismiss, in such case, is proper only when the defect appears of record. *Waterford v. Brookfield*, 2 Vt. 200.

185. The question whether the pauper had come to reside in the removing town, may be presented by plea. *Button v. Cabot*, 19 Vt. 522.

186. A plea that the pauper, at the time of the order, "was well seized and possessed in his own right of a certain messuage and lands," &c., was *held* ill, for not averring that it was a freehold estate. *Middletown v. Pawlet*, 4 Vt. 202.

#### 5. Validity and effect of order.

187. Validity. The validity of an order of removal must be determined upon the facts as they existed at the time the order was made, and is not affected by events subsequently happening. *Hartland v. Windsor*, 29 Vt. 354.

188. Effect. An order of removal of a pauper, with notice duly given, either not appealed from, or affirmed on appeal, is conclusive that the pauper's settlement, at the time of the order, was in the town to which the removal was ordered; and this, in favor of any town as against any other town, where the settlement is brought in question. *Dorset v. Manchester*, 8 Vt. 370. *Barre v. Morristown*, 4 Vt. 574. *Rupert v. Sandgate*, 10 Vt. 278. *Hartland v. Williamstown*, 1 Aik. 241. *Stowe v.*

*Brookfield*, 26 Vt. 524. *Hale v. Turner*, 29 Vt. 350. *Poultney v. Sandgate*, 35 Vt. 146. *Cabot v. Washington*, 41 Vt. 168.

189. Such order is not conclusive where a copy is not left within the thirty days; and this provision of the statute cannot be waived by any agreement between the overseers. *Barre v. Morristown*, 4 Vt. 574.

190. Such order is as conclusive of every fact necessary to uphold it, as it is of the settlement. *Poultney v. Sandgate*, 35 Vt. 146.

191. An order of removal of a man and "his wife" (naming her), not appealed from, where a copy of the order had been duly served, was held conclusive, on the question of settlement, as to the relationship between them; as much so, as if the paupers had been actually removed. *Chester v. Wheelock*, 28 Vt. 554.

#### IV. EXPENSES FOR RELIEF OF PAUPER.

192. Statute obligation. No obligation, except as imposed by statute, rests upon towns to sustain their own poor. It is altogether a matter of positive law, and the right of any one to compel towns to pay for the support of their poor is one *stricti juris*, and cannot be enforced except in accordance with some statutory provision. *Castleton v. Miner*, 8 Vt. 209. *Middlebury v. Hubbardton*, 1 D. Chip. 205. *Jamaica v. Guilford*, 2 D. Chip. 103. *Aldrich v. Londonderry*, 5 Vt. 441. *Ives v. Wallingford*, 8 Vt. 224. *Houghton v. Danville*, 10 Vt. 537. See *Worcester v. Ballard*, 38 Vt. 60.

193. Action. It is no objection to an action by one town against another to recover, under the statute, the sum expended for the relief of a transient poor person, that a remedy therefor might be had, by petition to the county court, against certain relatives of the person relieved. *Woodstock v. Hartland*, 21 Vt. 563.

194. Under a. 4 of the pauper act of 1797, a town cannot recover of the town of legal settlement the expenses of supporting a resident sick pauper, unless such pauper has been actually removed under the order of removal, or such removal has been prevented by the extreme sickness or death of the pauper. *Essex v. Milton*, 8 Vt. 17. (G. S. c. 20, a. 6.)

195. No such expenses can be recovered, in such case, which accrued before the order was made; nor can the costs of removal be recovered, except where the sickness of the pauper prevents an execution of the order for a time. *Londonderry v. Windham*, 2 Vt. 149. 3 Vt. 24.

196. Where an appeal from an order of removal was, by agreement, discontinued "with costs";—*Held*, under R. S. c. 16, a. 9, that the expense of maintaining the pauper during the pendency of the appeal was not taxable. *Brookfield v. Braintree*, 21 Vt. 447.

197. The expenses of keeping a poor person, not acknowledged by the overseer of the poor to be a pauper, and where the overseer does not contract to pay, cannot be recovered of the town of such person's settlement. *Thetford v. Hubbard*, 22 Vt. 440.

198. Neglect of overseer. It is not a "neglect" of the overseer to provide for a transient poor person, which subjects the town to an action upon G. S. c. 20, a. 18, for the support furnished, where the overseer, at the time of the application for support, expressly promises the person furnishing it to pay him therefor, but fails to do so. In such case, the action should be upon the promise. *Hove v. Royalton*, 32 Vt. 415.

199. One town is not liable to another for the neglect or misconduct of its overseers in allowing its poor to stroll into such other town and to become chargeable thereto; nor for other unlawful acts of the overseer without the scope of his authority. *Chelsea v. Washington*, 48 Vt. 610.

200. Poor person. One who, having no property except growing crops not worth over \$25, sustains a personal injury so as to be helpless for some weeks, is "a poor person who has fallen into distress and stands in need of immediate relief," so as to oblige the town to pay for support furnished him after notice to the overseer. (G. S. c. 20.) *Blodgett v. Lovell*, 33 Vt. 174.

201. The plaintiff at whose house a poor person, without means of support, was left, directly after receiving a disabling injury, immediately applied to the overseer of the poor to support the man. The overseer sent back word to the plaintiff to take good care of the man, and, "If he does not pay you, I will see that you have good pay." In an action against the town to recover for support of the pauper;—*Held*, that the circumstances excluded the idea of a collateral guaranty, and that the town was directly liable by force of the statute. *Id.*

202. Notice. Under the statute requiring fifteen days' notice in writing of "all the charges and expenses" of maintaining a pauper unable to be removed (G. S. c. 20, a. 6);—*Held*, that the defendant town is entitled to notice of the *specific* expenditure, and that, in order to a recovery therefor, it is not sufficient that it is embraced in some other item, without specific designation. *Pawlet v. Sandgate*, 19 Vt. 621.

203. Extent of recovery. In such action, —*Held*, that the plaintiff town was entitled to recover all such charges and expenses as it was legally bound to pay at the commencement of the suit, though not then paid and only payable in future, and even after the determination of this suit; with interest from the expiration of fifteen days after giving the notice in

writing, required by the statute, but no interest before such notice. *Id.*

204. *Held*, also, that the plaintiffs could not recover the sum which they were liable to pay for services rendered by a physician attending such pauper under a contract with the plaintiffs, that if they succeeded upon the appeal from the order of removal then pending, he should have a reasonable compensation, but that if they should fail he should have nothing—although in fact they did succeed. Such contract is in the nature of a gambling contract, and, as between towns, is against sound policy. *Id.* 23 Vt. 204.

205. Nor can the plaintiffs, in such case, recover a larger sum than they would be liable to pay in case the pauper's settlement had proved to be in the plaintiff town. *Id.*

206. The plaintiff town was allowed to recover of the defendant town, as expenses of supporting an insane pauper of the defendant, the expense of supporting the pauper at an insane asylum; also, for clothing destroyed by the pauper and replaced; also, for money paid to another town for the pauper's support after an order of removal, which was vacated—the whole being reasonable in amount. *St. Johnsbury v. Waterford*, 15 Vt. 692.

207. Several towns, including S and F, entered into a mutual arrangement for supporting together their respective paupers upon a farm purchased by them for that purpose in the town of S; under which arrangement F sent to the farm to be supported there a pauper legally chargeable to F, but who had no legal settlement in the State. The towns subsequently terminated this arrangement by mutual consent, but F neglected to remove its pauper, who was thereafter supported by S. *Held*, that S could recover of F, in an action on the case, the expense of supporting such pauper after the termination of the arrangement. *Sheldon v. Fairfax*, 21 Vt. 102.

208. Person in jail for intoxication. L was arrested in Vershire under act of 1852, s. 2, No. 24, for being found intoxicated, and was committed to jail in Chelsea for refusal to disclose, &c. Being unable to support himself, Chelsea supported him in jail and sued Vershire for reimbursement. *Held*, that the action would not lie, no statute giving it; that Vershire, if liable for the support, was liable directly to the jailer, and there was no occasion for Chelsea to interfere. *Chelsea v. Vershire*, 35 Vt. 446.

209. *Estoppel*. Where a town had removed a pauper under an order not appealed from;—*Held*, that it could not recover of the town to which the removal was made the expense of the pauper's support prior to the order, on the claim that he was in fact a transient pauper,—his purpose, as to residence,

continuing the same from the time he came into town down to the time the order was made. *Pittsford v. Chittenden*, 44 Vt. 382.

210. *Interpretation of statute*. G. S. c. 20, s. 13, giving it a sensible interpretation, though not precisely literal, includes all transient persons who are in need of present relief, though not "confined at any house." *Charleston v. Lunenburg*, 28 Vt. 525.

211. Notwithstanding the very plain words of C. S. c. 18, s. 9;—*Held*, that the town in which a pauper had his legal settlement and to which he had been ordered to be and had been removed, could not recover of the removing town the money expended in the support of the pauper after his removal, where the judgment of *unduly removed* was rendered because the pauper had not come to reside in the removing town. *Ryegate v. Wardsboro*, 30 Vt. 746.

212. *Form of action*. In a proper case under the statute, *indebitatus assumpsit* will lie against a town for money expended in support of a pauper. *Danville v. Putney*, 6 Vt. 512. 19 Vt. 680;—overruling *dictum* of Chipman, C. J., in *Middlebury v. Hubbardton* (1 D. Chip. 206), that the count must be special upon the statute.

213. *Contract*. To make a town liable to pay for support furnished its pauper, as upon a contract, there must be an express promise to pay; such promise can never be implied. *Aldrich v. Londonderry*, 5 Vt. 441. *Castleton v. Miner*, 8 Vt. 209. *Houghton v. Danville*, 19 Vt. 587. *Putney v. Dummerston*, 13 Vt. 370. *Churchill v. West Fairlee*, 17 Vt. 447. But see *contra*, *Worcester v. Ballard*, 38 Vt. 60. *Wolcott v. Wolcott*, 19 Vt. 37. *Sheldon v. Fairfax*, 21 Vt. 102, 107. *Jamaica v. Guilford*, 2 D. Chip. 108.

214. If such relief be afforded at the request of the overseer of the poor, the law implies a promise to pay, and there is no more need of an express promise than between private persons. *Worcester v. Ballard*. *Wolcott v. Wolcott*.

215. *Action by jailer*. *Held* (in 1838), that a jailer could not recover of the town where the jail was situate for the support of an imprisoned pauper, although the overseer had been applied to, to furnish such support, and had neglected to do so. *Houghton v. Danville*, 10 Vt. 587. See *Holmes v. St. Albans*, Brayt. 179.

216. *Action against pauper*. Money expended by a town in the support of a pauper cannot be recovered of the pauper, without a special contract for repayment. *Bennington v. McGennes*, N. Chip. 45. S. C. 1 D. Chip. 44. *Benson v. Hitchcock*, 37 Vt. 567.

V. PROCEEDINGS AGAINST AND BETWEEN  
KINDRED.

217. A minor, transient in the town of N, fell sick and was supported by that town, and upon claim made on the town of B, where such minor and his father had their legal settlement, B paid N the expenses. *Held*, that B could not maintain an action against the father for reimbursement, although he was of sufficient ability to support the minor. *Broomfield v. French*, 17 Vt. 79.

218. *Dictum*, where a relative would be liable at common law to support another, a town, or an individual, furnishing relief to such person under the pauper laws, may support an action therefor against such relative, notwithstanding the statute which gives such action against the town of such person's legal settlement. *Id.* 21 Vt. 569.

219. One son of a pauper was made party to a petition that he contribute to the pauper's support. (G. S. c. 20, s. 20.) He appeared, and suggested that another son should be made a party defendant; and thereupon a citation was ordered to be issued to the second son to appear at the next term and show cause, &c., and the cause was continued. On the second term after the appearance of the second son, he moved that the petition be dismissed as to him, because the pauper had died before the service of the citation upon him, but after it had issued. *Held*, (1), that the motion was out of time, for not having been made at the first term of his appearance; (2), that the motion had no merits, for that, by the statute, he became a party "as if he had been summoned on the original complaint," and because the statute made the defendants liable for past as well as future support; and (3), *quære* whether such proceedings could be revised on exceptions. *Tinmouth v. Warren*, 17 Vt. 606.

220. Kindred of a poor person who have been to expense for his relief and support, may maintain proceedings in their own name, under G. S. c. 20, s. 20, to have other kindred assessed for past and future support of such poor person, although he never became chargeable to any town to the extent of having received relief and support from the town, in a case where the town was liable to be charged, or should and would have relieved him but for the relief and support of the petitioning kindred. *Walbridge v. Walbridge*, 46 Vt. 617.

## VI. WRONGFUL TRANSPORTATION OF PAUPER.

221. The first clause of G. S. c. 20, s. 31, subjecting to a penalty to the town aggrieved any person who shall bring into it a pauper with intent to charge such town with his support, is strictly penal; while the second clause,

making such person liable to damages for the support of the pauper, is purely remedial. Different degrees of proof are required to establish the respective liabilities. *Calais v. Hall*, 11 Vt. 494. *Barnet v. Ray*, 33 Vt. 205. *St. Johnsbury v. Goodenough*, 44 Vt. 662.

222. In order to charge one with the penalty for transporting, or aiding in transporting, a poor person from one town to another without an order of removal, with intent to charge the latter town with his support, the *intent* must be proved as charged. It is not sufficient merely, that by means of the aid furnished, such poor person came to the plaintiff town and became chargeable to it. *Wallingford v. Gray*, 18 Vt. 228. (G. S. c. 20, s. 31.)

223. Where an order of removal was regularly made, and the defendants assisted the pauper voluntarily to remove within the time prescribed by the order;—*Held*, that the defendants were not liable to the penalty under G. S. c. 20, s. 31, for so removing the pauper, although the removing town failed to serve a copy of the order, or to issue a warrant of removal. *Morgan v. Mead*, 16 Vt. 644. 28 Vt. 454.

224. The overseer of town B hired the defendant, living in town P, to support there a transient pauper of B for three months. After the expiration of this period, the pauper remained some five months in P, supporting himself and intending to reside there, when he became destitute and the defendant then removed him back to B and left him with the overseer. *Held*, that although the defendant had a right to return the pauper to B at the end of the three months, he was, under the circumstances, liable to B under G. S. c. 20, s. 31. *Barnet v. Ray*, 33 Vt. 205. 44 Vt. 670.

225. In an action to recover damages for the removal of a pauper into the plaintiff town, with intent to charge such town with his support, &c., the fact that the pauper had a settlement in some other town, or had a father able to support him, is no defense. *Marshfield v. Edwards*, 40 Vt. 245.

226. Where the defendant, by consent of the overseer of the poor of S, removed a pauper to his house in D, upon the terms that the pauper should be well taken care of and be at no expense to S, but the defendant retained the right to determine the arrangement when he saw fit;—*Held*, that his subsequent removal of the pauper to S, before the pauper had become chargeable to any other town, and while she was in need of relief, did not subject him to the penalty given by G. S. c. 20, s. 31. *St. Johnsbury v. Goodenough*, 44 Vt. 662.

## VII. CERTAIN CONTRACTS.

227. A bond to a town, conditioned to indemnify the town against the maintenance of

any person whose legal settlement is in such town, is a legal contract, whether such person be, or be likely to become, chargeable to such town, or not. *Williston v. White*, 11 Vt. 40. *Pawlet v. Strong*, 2 Vt. 442. 14 Vt. 323.

228. Where a poor person in need of relief transferred to the town of his legal settlement, as an indemnity for his support, a horse and other things of not much value;—*Held*, that this was on sufficient consideration, and that the town could hold the property against an attaching creditor of such poor person. *Lyndon v. Belden*, 14 Vt. 423.

229. The defendant's overseer promised the plaintiff to pay for keeping a pauper until he should remove her. He afterwards went to remove the pauper and demanded her. The plaintiff told him to do as he pleased about taking her. Some dispute arising, the overseer left, saying he should never come for the pauper again, and the plaintiff continued to keep her. *Held*, that this left the original promise in force and made the town liable. *Buck v. Worcester*, 48 Vt. 1.

## PAYMENT.

- I. WHAT CONSTITUTES PAYMENT.
- II. PART PAYMENT AS A FULL SATISFACTION.
- III. APPLICATION OF PAYMENTS.
- IV. PAYMENT AS AFFORDING A RIGHT OF ACTION.
- V. PAYMENT AS AFFECTING THE SECURITIES.
- VI. PLEADING.
- VII. EVIDENCE; PRESUMPTION.

### I. WHAT CONSTITUTES PAYMENT.

1. **Base coin etc.** Where one, without fault, receives payment in base coin, or counterfeit, or worthless bank paper, or the bills of a suspended and insolvent bank (*Gilman v. Peck*, 11 Vt. 516), although such suspension and insolvency may not be known, except in the immediate vicinity of the bank, and the bills may be current at the place of payment (*Wainwright v. Webster*, 11 Vt. 576), or in forged paper, as, a promissory note (*Goodrich v. Tracy*, 48 Vt. 314), he may treat it as no payment, and resort to his original cause of action. *Id.*, and see *Torrey v. Baxter*, 18 Vt. 452.

2. The plaintiff's agent to collect a debt took in payment some bank bills, the value of which he did not know, but took a sufficient guaranty that the bills were good, and delivered the same bills and the guaranty to the plaintiff, who, doubting the bills, said he would take them and see what he could do with them. The bills were in fact worth only 20 cents on

the dollar, the bank having failed. The plaintiff kept the bills two or three months before ascertaining their worth, when he made claim on the agent for the deficiency. *Held*, in an action of account, that the agent was not liable; that the plaintiff by his delay had exonerated him, and made the money his own. *Pickett v. Pearsons*, 17 Vt. 470.

3. **Order.** An order was received in satisfaction of a judgment, if accepted and paid, and no funds of the drawer were in the hands of the drawee. The order not being paid was held no payment of the judgment. *Goodrich v. Barney*, 2 Vt. 422.

4. An order drawn by a debtor in favor of his creditor upon a third person, as a matter of convenience and not as an ordinary commercial transaction, does not operate as payment of the debt where the order does not prove productive. *Heald v. Warren*, 22 Vt. 409. *Tracy v. Pearl*, 20 Vt. 162.

5. C owed B on book, and B owed A. For convenience, merely, B gave A a letter of request to C to pay the balance due from him on account to A. This order C accepted, at first verbally, and afterwards by a written acceptance, he not knowing upon what agreement or understanding it had been given. B afterwards sued C on the account, and on the hearing produced the order and, by consent of A, cancelled the acceptance. *Held*, that the order and acceptance were not a payment of C's debt to B. *Tracy v. Pearl*.

6. **Demand against third person.** An agreement to take a debt due the defendant from a third person, as payment *in presenti* towards the defendant's debt to the plaintiff, was held to be a virtual purchase by the plaintiff of such demand, and to operate *pro tanto* as payment upon the plaintiff's demand. *Hayden v. Johnson*, 26 Vt. 768.

7. The plaintiff took of the defendant on account, and in supposed satisfaction of it, the note of B. By mistake B charged the note in account to the plaintiff, instead of the defendant, and the plaintiff in subsequent settlement with B, accounted to him for the note. The defendant received the note back of the plaintiff, paying him the cash therefor, and surrendered it to B, who credited him therefor on account, of which credit the defendant, in after settlement, took the benefit. *Held*, that the note should not be treated as any payment of the plaintiff's account; nor the money, which was but an equivalent for the note. *Lockwood v. Hoskisson*, 18 Vt. 87.

8. **Securities.** A person giving a security in payment vouches for its genuineness. *Phelps, J.*, in *Bank of St. Albans v. F. and M. Bank*, 10 Vt. 145.

9. The plaintiff sold the defendant a horse at an agreed price, and took in part payment

two promissory notes signed by one D, payable in specific articles to the defendant, and then upon their face appearing to be due and overdue—the plaintiff taking the risk of the responsibility of D. Before this, the defendant had contracted with D to extend the time of payment for a period not then elapsed, of which the plaintiff was not informed. Upon giving D notice of the transfer, he was informed by D of such contract of extension, and he then seasonably offered the defendant to rescind the whole contract, which offer was declined. When the period for which the notes were agreed to be extended had elapsed, D was insolvent. *Held*, that the temporary bar created by the agreement to extend was a defense to the notes as against the plaintiff, when assigned; that the plaintiff was deceived, and the defendant chargeable with such deceit; that the plaintiff was not limited to a special action for the deceit, or on the contract, but might treat the notes as no payment, and maintain an action of book account to recover their amount, as the balance due and unpaid on the sale of the horse. *Loomis v. Wainwright*, 21 Vt. 520.

10. The plaintiff, having sold the defendant certain property, directed his agent to call on the defendant and get the pay, or else take his note. The defendant, upon the agent's call, wrote a note, but for less than the amount due, and signed it as agent for a third person, and delivered it to the plaintiff's agent, who could not read, saying to him that it was his own note for the amount due. The agent delivered the note to the plaintiff and he retained it, but without either attempt to enforce it, or offer to return it, and brought his action for goods sold and delivered, and on trial produced and offered to surrender the note. *Held*, that as the note came into the plaintiff's hands through the defendant's fraud, he owed the defendant no duty in respect to it; and that, unless he consented to accept it as payment, the taking and keeping of the note was not a bar to the action. *Hatch v. Barnum*, 28 Vt. 133.

11. The plaintiff, at the defendant's request, gave an officer's receipt for property of the defendant attached, taking from the defendant a written agreement of indemnity. The plaintiff was afterwards made chargeable on the receipt, and, on the defendant's request and promise of indemnity, signed a note with the defendant to the creditor for the defendant's debt, and took up the receipt and cancelled it, and the defendant gave him, as collateral security for so signing the note, certain notes against a third person. *Held*, that the second contract of indemnity superseded and discharged the first, although it turned out afterwards that such collateral notes had been attached by the trustee process—the court

below not having found, as a fact, that the defendant was guilty of a fraud in the transaction. *Baxter v. Downer*, 29 Vt. 412.

12. Where a promissory note, received as collateral security, has been transferred by the creditor for value, without rendering himself liable upon it, this will operate as payment. But if so negotiated as to render the creditor personally liable upon it, and he has afterwards taken it up, this does not operate as payment. So *held*, although the indorsee had obtained judgment against the maker, which the creditor had satisfied. *Dickinson v. King*, 28 Vt. 378.

*Promissory note of debtor as payment of subsisting claim*—see *BILLS AND NOTES*, III.

13. *Remittance*. The defendants were commission merchants in Lowell, Mass., and there held produce of the plaintiff, residing in Vermont, for sale, the avails payable in Lowell. The plaintiff gave them a single special order to remit to him in Vermont a specified sum, part of the avails of the sales, in a particular way—which was done. *Held*, that this did not authorize a further remittance in the same way; and that, in the absence of other authority, a further remittance in the same way was at the risk of the defendant; and, the money not coming to the hands of the plaintiff, that the remittance did not operate as payment. *Dodge v. Smith*, 84 Vt. 178.

14. Where the defendant was, by his agreement, to pay his note to the plaintiff by sending money, instead of a draft, and the defendant, of his own motion, sent a draft;—*Held*, that the plaintiff's relation to the draft would not subject him to the rules of the law-merchant as to notice and return on its non-acceptance; but in such case he would be the agent of the defendant in sending the draft forward for acceptance, and payment, and would only be bound to exercise good faith and proper diligence. *Moore v. Quint*, 44 Vt. 97.

15. *Sale of pledge*. Where a creditor having two demands, the one secured by the obligation of a surety and both by a pledge of property, sells the pledge for enough to pay both, this satisfies both, and discharges the surety. *Strong v. Wooster*, 6 Vt. 536.

16. *Privity*. The plaintiff agreed with the defendant, a newspaper publisher, to report the proceedings of the State senate for the defendant's newspaper at two dollars per day, and performed his contract. No reporters were employed by the State, or by any State officer, or by either branch of the legislature; but on the night of adjournment of the legislature, a joint resolution was adopted to pay the reporters of the senate and house two dollars per day for the session. Under this resolution the plaintiff received of the State the compensation voted. *Held*, that the defendant could not



claim the application of this upon his contract with the plaintiff. *Smile v. Walton*, 41 Vt. 174.

17. **Ratification.** In an action on a note given to the plaintiff as executor, which, after his removal as executor, the defendant had paid to the administrator *de bonis non*;—*Held*, that the presentation of his account, as executor, to the probate court for allowance, in which he claimed the amount of that debt as a credit, was *prima facie* an authorization or ratification of the payment to the administrator. *Nason v. Potter*, 6 Vt. 28.

18. **Payment after suit.** A defendant cannot avail himself of payment after the commencement of the suit, as a defense, unless he pays the costs as well as the debt; and unless the costs are paid, or relinquished, the plaintiff may recover nominal damages, so as to carry the costs. The rule is the same, where the plaintiff is properly pursuing separate remedies for the same debt, or demand, at the same time. The payment of one can be no discharge of the other, except on the payment of the costs in all the actions. *Stevens v. Briggs*, 14 Vt. 44.

19. Payment of the debt and costs, although made while a suit therefor is pending, extinguishes the claim upon which the suit is predicated. *Root v. Ross*, 29 Vt. 488.

20. The acceptance of money paid into court operates as payment *pro tanto*, and also as a conclusive admission of the conditions upon which it was paid into court. *Goslin v. Hodson*, 24 Vt. 140.

21. **Assumpsit**:—Pleas, *non assumpsit* and tender. The defendant, during the pendency of the suit, made an offer of money on account of the plaintiff's claim for debt and costs, sufficient to satisfy both, which the plaintiff declined to receive. The defendant claimed on trial, that the money was legally tendered. The plaintiff denied this. Afterwards, and after an increase of interest and costs, the defendant offered the plaintiff the money as the tender which he claimed that he had before made, and the plaintiff accepted it. *Held*, that the question whether the offer first made was a proper tender was immaterial, for that the acceptance of the money, as such tender, operated as a payment at the date when it was claimed to have been tendered. *Carpenter v. Welch*, 40 Vt. 251.

## II. PART PAYMENT AS A FULL SATISFACTION.

22. **General rule.** Payment of part of a debt is no satisfaction of the remainder, although the creditor agrees to receive the sum paid, and gives a receipt, in discharge of the whole demand. *Seely v. Spencer*, 8 Vt. 884. *Wright v. Allen*, 4 Vt. 572.

23. Payment of part by one of two joint debtors, with an agreement not to call on him for the residue, or that he shall be discharged, is no bar to an action against both. *Id. Spencer v. Williams*, 2 Vt. 209.

24. W was employed by the defendant to purchase, for his benefit and at a discount, a debt against himself, he furnishing money for that purpose. W so made the purchase, professedly on his own account and without disclosing the facts. In an action by the creditor on the original demand;—*Held*, that such purchase operated only as part payment of the debt. *Shaw v. Clark*, 6 Vt. 507.

25. The payment, in money, of part of a debt then wholly due, and so admitted, is not a legal consideration for an agreement to accept that sum in full satisfaction of the debt. It is payment only *pro tanto*. *Wheeler v. Wheeler*, 11 Vt. 60. *Goodwin v. Follett*, 25 Vt. 886.

26. **Exceptions.** But the acceptance by the holder of a promissory note, either in money or in the debtor's own note, of an amount less than the sum due upon such note, in full satisfaction and payment thereof, with a surrender of such note to the maker, is a full discharge of it, this being equivalent to a release under seal—"an agreement executed; a release in practical operation." *Ellsworth v. Fogg*, 35 Vt. 355. *Draper v. Hitt*, 43 Vt. 489.

27. The doctrine that the receiving of part of a debt due, under an agreement that the same shall be in full satisfaction, is no bar to an action to recover the balance, does not extend to any case except where the plaintiff's claim was for a fixed and liquidated amount; or where the sum could be ascertained by mere arithmetical calculation. *McDaniels v. Lapham*, 21 Vt. 223.

28. A note, with surety, received as in full of a judgment, is a payment of it, though the discharge given names a less sum. *Curtis v. Ingham*, 3 Vt. 267.

29. The plaintiff received from the defendant, his debtor, in satisfaction of his claim, a note signed by the defendant and his wife for a less sum, which note the parties supposed to be binding upon the wife. The note was afterwards paid from the wife's separate property. *Held*, that this constituted a valid discharge of the original debt. *Bowker v. Harris*, 30 Vt. 424; and see *Wheeler v. Wheeler*, 11 Vt. 67.

30. H & Bros., partners, sold and assigned all their demands against the defendant to a third person at 40 cents on the dollar. The defendant had before this given his note payable to one of the partners to apply on his account, but it was not credited, and the debt was reckoned without reference to the note. The defendant paid the assignee the sum paid by him, and he discharged the defendant from the debt. In an action by such partner upon the

note;—*Held*, that these facts constituted a defense. *Heartt v. Johnson*, 18 Vt. 89.

31. A agreed with the debtor of an estate to purchase the debt, and that they would share equally in the difference between the price to be paid and the true amount of the debt. A did purchase the debt for less than the amount due and took it to himself. *Held*, that this operated as a payment or extinguishment in behalf of the debtor, to the extent of the one half of such difference. *Chapman v. Comings*, 48 Vt. 16.

32. Instance of non-assent to the acceptance of a sum as in full satisfaction of the plaintiff's claim, which was so offered, where the plaintiff said it was not enough, but that there would be no trouble about it. *Willey v. Warden*, 27 Vt. 655.

### III. APPLICATION OF PAYMENTS.

33. One who pays money may, at the time of payment, direct the application, and, on his neglecting to do so, the payee has the right to make the application at any reasonable time thereafter; and if neither party elect, the law will make the application first to those demands which have the most precarious security. *Briggs v. Williams*, 2 Vt. 268. (17 Vt. 60). *Hutchinson*, J, dissenting, and holding that the creditor must make his election before suit brought, or the debtor's right of election is restored. *Id.*; and see *Pierce v. Knight*, 31 Vt. 701. *Langdon v. Bowen*, 46 Vt. 512.

34. As to the right of a creditor to make an appropriation of a general payment, not designated by the debtor, such appropriation need not be made at the very time of receiving payment. Some of the cases say that it must be done in a reasonable time (*Briggs v. Williams*, 2 Vt. 268); some, that the creditor may make it at any time before a controversy arises (*Robinson v. Doolittle*, 12 Vt. 246); but the general course of decision in this country, and the more reasonable rule, is, that it should be exercised before suit brought, and that if not then made, the application is left to be made by the law. *Pierce v. Knight*, 31 Vt. 701.

35. When the debtor makes no appropriation of money paid generally, the creditor may make his own application, unless there be something in the case to show a different expectation on the part of the debtor. *Rosseau v. Cull*, 14 Vt. 88.

36. Payments are to be applied according to the understanding of the parties, when that can be ascertained; and this may be ascertained by circumstances, or presumption. *Robinson v. Doolittle*, 12 Vt. 246. *Emery v. Tichout*, 18 Vt. 15. *Pierce v. Knight*, 31 Vt. 701.

37. In the application of payment, the right of designation among several demands is essen-

tially the right of the debtor; and if he waives it in favor of the creditor, it should be intended that he does so, relying upon an application to which he could not justly or reasonably object, and such as is usually adopted in the course of business. Thus, where the creditor has two or more demands, and a general payment is made without direction as to application, and the payment is less than either one of the demands, the creditor is not authorized, without the consent of the debtor, to divide the payment and apply a part on each demand, whether such demands are barred by the statute of limitations, as in *Ayer v. Hawkins*, 19 Vt. 26; or not, as in *Wheeler v. House*, 27 Vt. 785.

38. Where the creditor and debtor both neglect to direct the application of payments, courts will not look particularly to the interest or supposed wish of one party more than the other, but will make such application as is just and equitable between them. *Pierce v. Knight*, 31 Vt. 70; and see *Robinson v. Doolittle*, 12 Vt. 246.

39. Where a person has two demands, one recognized by law, the other arising on a matter prohibited by law, and the debtor makes a payment which is not specifically appropriated by either party at the time of the payment, the law will afterwards appropriate it to the demand it acknowledges, and not to the demand which it prohibits. *Wood v. Barney*, 2 Vt. 369. *Peters v. Slack*, 18 Vt. 590. *Bancroft v. Dumas*, 21 Vt. 456. *Backman v. Wright*, 27 Vt. 187. *Backman v. Mussey*, 31 Vt. 547.

40. The plaintiffs, liquor dealers in New York, had sold liquors to the defendant for use in this State, one bill through their agent who took the order in this State (which the court held to be an illegal sale), and one bill on a direct order of the defendant to the plaintiffs in New York, (which the court held to be a legal sale). The defendant had made two part payments on the first bill. In their action of book account the plaintiffs presented to the auditor all the items of their account, both debt and credit, for adjustment, treating the whole as open for adjustment. *Held*, that, as presented, the several charges were to be determined according to their validity to go into the accounting, and to affect the general result accordingly; and that the credits were to be treated as payments upon the running account, and not as payments upon any particular items, or bill of the account, and were to be computed in favor of the defendant in arriving at the ultimate balance. Under this rule, all the plaintiffs' first bill was disallowed, and all the defendant's payments were allowed, leaving a balance in his favor. *Erwin v. Stafford*, 45 Vt. 390.

41. In the case of an open account, general payments, not applied, will be applied by the

court, in the order of time they were made, to the charges in the order they accrued; the earliest credits to pay the earliest charges. *Pierce v. Knight*, 31 Vt. 701. *Shedd v. Wilson*, 27 Vt. 478; and see *Morgan v. Tarbell*, 28 Vt. 498. *St. Albans v. Failey*, 46 Vt. 448. *Langdon v. Bowen*, 46 Vt. 512.

42. The rule is well settled in this State, and in the United States supreme court, as well as in England, that general payments and credits will be applied to extinguish indebtednesses in the order of time in which they accrued, unless it appears that the intention of the parties was otherwise. And where the rights of sureties are involved, the court would be more stringent in enforcing this rule, as it is deemed just and equitable. *St. Albans v. Failey*. *Langdon v. Bowen*.

43. Payments made without direction as to their application, to a creditor holding demands due, and not due, must ordinarily be applied by the creditor first upon the demands due. *Early v. Flannery*, 47 Vt. 258.

44. In mutual accounts, where the parties thereto agree that certain items shall go in liquidation of certain other items, and provide for no further act to be done in respect thereto, the law makes the application at once. *Bond v. Clark*, 47 Vt. 565.

45. Payments upon a judgment should first be applied to the extinguishment of interest. *Allen v. Lyman*, 37 Vt. 20.

46. A payment made in satisfaction of one's recognizance for costs the law will apply upon the execution, rather than upon the charges for keeping the property attached. *McNeil v. Bean*, 32 Vt. 499.

47. The defendants in settlement of an account gave the plaintiffs an order on R for the amount, payable in freighting, which order R accepted and promised to pay. R afterwards did freighting for the plaintiffs to much more than this amount, but finally failed, owing the plaintiffs on open account much more than the order. Held, that, as to the defendants, the order and the account must be treated as paid. *Sherwin v. Colburn*, 25 Vt. 618.

#### IV. PAYMENT AS AFFORDING A RIGHT OF ACTION.

48. **General rule.** A payment creates no indebtedness, is never a subject of book charge, and cannot give a right of action in any form, nor of set off. It is matter of defense only, and operates presently to extinguish the debt. *Jewett v. Winship*, 42 Vt. 204. *Slason v. Davis*, 1 Alk. 78. *Stevens v. Tuttle*, 8 Vt. 519. *Strong v. McConnell*, 10 Vt. 231. *Chellis v. Woods*, 11 Vt. 466. *Corey v. Gale*, 13 Vt. 639. *Brooks v. Jewell*, 14 Vt. 470. *Peach v. Mills*,

14 Vt. 371. *Bronson v. Rugg*, 39 Vt. 241. *Crushman v. Hall*, 28 Vt. 656.

49. **Qualification.** But to constitute payment, it must be both delivered and received as payment. If left for subsequent adjustment or future application, this is not payment, and may be the subject of an action, if not applied and the debt has been otherwise paid. *Id.*

50. Articles delivered in payment of, and to be applied upon, a note, cannot be recovered for by action. *Stevens v. Tuttle*, 8 Vt. 519.

51. No recovery can be had for services performed in payment of a pre-existing debt. *Beeman v. Webster*, 15 Vt. 141.

52. **Instances.** The plaintiff delivered to the defendant, in part payment of a note, 125 bushels of potatoes in parcels at different times, which the defendant entered on his book as they were received. The potatoes were not indorsed upon the note, and it was otherwise paid. Held, that the book was evidence of an agreement for future adjustment and application of the payments, and, that fact being proved, the plaintiff could recover therefor. *Crushman v. Hall*, 28 Vt. 656.

53. The parties had mutual running accounts between them, and the plaintiff charged on his book for five days work done for the defendant, supposing this would be adjusted in their mutual accounts. The defendant soon after, without the knowledge or consent of the plaintiff, indorsed upon a note he held against the plaintiff the price of the five days work. In an action of book account;—Held, that the defendant had no authority to appropriate the charge as a payment upon the note, as there was no mutual understanding to that effect; but it stood as the subject of mutual current account, and the plaintiff could recover therefor, notwithstanding the indorsement, and notwithstanding the defendant, after this suit had been commenced, had brought suit upon the note and had taken judgment by default, deducting from the amount due upon the note said indorsement. *Cass v. McDonald*, 39 Vt. 65.

54. The plaintiff delivered to the defendants, (a firm), certain articles, upon an agreement that on settlement of accounts the balance should be applied in payment of a note which J, one of the defendants, held against the plaintiff. J, on an attempted settlement, unreasonably refused to apply such balance on the note. Held, that the defendants were liable for the value of such articles in an action of book account. *McNeal v. Strong*, 16 Vt. 640.

55. The defendant, who held a note against the plaintiff, sold a lot of pelts for the plaintiff. Before the defendant had received the money for the pelts, the plaintiff told him that he (plaintiff) did not want the money but wanted it applied on the note. The defendant said "very well," or, "all right." The defendant

did not apply the money, when received, upon the note, but appropriated it elsewhere without authority, and sued and took judgment for the full amount of the note. *Held*, that this differed from the case of the delivery of money or other property in hand as payment; and that the agreement was not so far consummated but that either party, before the application of the money upon the note, could have repudiated the understanding, and that the act of the defendant was such repudiation; and that the plaintiff was entitled to recover the money. *Bronson v. Rugg*, 89 Vt. 241.

**56. Party in fault.** The plaintiff gave the defendant a negotiable promissory note, and, before it fell due, paid it, but through inadvertence the note was not surrendered, nor was the payment actually applied upon the note. Before the note, by its terms, fell due, the defendant sold and transferred it to a *bona fide* holder who sued the plaintiff upon it and obtained judgment, which the plaintiff paid. While that suit was pending, the plaintiff brought this action of assumpsit upon the common money counts, to recover back the sum so paid the defendant upon the note. *Held*, that by the assignment of the note the defendant had put it out of the power, either of himself or the plaintiff, to make the payment effectual, and thereafter he held the money in his own wrong and had forfeited his right longer to retain it, and that the plaintiff was entitled to recover. *Conn. & Pass. R. R. Co. v. Newell*, 31 Vt. 384.

**57. Forged check.** The payment by a bank of a forged check, drawn upon it, to a *bona fide* holder who has received it in due course of business for value, cannot be recovered back from him; and where such check had been placed to the credit of such holder, and notice of the forgery was not given to him for two months;—*Held*, that the bank had made the check its own. *Bank of St. Albans v. Farm. & Mech. Bank*, 10 Vt. 141.

**58. Sale and payment concurrent.** When property is sold and paid for at the time, there is no debt or credit, and of course no right to charge on book. If there be any special agreement in relation to the property delivered in payment, giving rise to a subsequent claim, the remedy must be on such agreement. *Nason v. Crocker*, 11 Vt. 463.

**59. Voluntary payment.** We understand, that where a party pays money which he is under no legal obligation to pay, with full knowledge of the facts, he cannot recover it back; and though legal proceedings are threatened, or even commenced, to enforce payment, if they are *bona fide*, and no undue advantage is taken of the situation of the party, and he is thereby induced to make the payment, this does not prevent the payment from being in a legal sense voluntary. And when payment is thus

voluntarily made, it amounts to nothing to make it under protest, or objection. *Poland, C. J.*, in *Taggart v. Rios*, 37 Vt. 47.

**60.** By the defendant's request, the plaintiff received of him two notes given to him by his son, and \$100 cash advanced by him to be paid to a creditor of his son, for which several amounts, deducting a debt due from the defendant to the plaintiff, the plaintiff gave his note to the defendant; upon the defendant's promise that he would not call for payment of the note until the plaintiff had collected the amount of the son, and that the plaintiff should lose nothing by the transaction. After making part payment of the note, the plaintiff gave a new note for the balance payable on demand, which, before the plaintiff did or could collect anything of the son; the defendant transferred to one R, who called on the plaintiff for payment, and he paid it without attempting to defend against it. *Held*,—no question being raised as to the admission of parol evidence to establish the case—that this was not a case of voluntary payment of a note legally invalid for want of consideration; that the note was upon good consideration, and this was a case of an independent counter claim against the defendant, which the plaintiff was not bound to set up as a defense to his note, and that the plaintiff could recover therefor. *Ib.*

**61.** The payment of a claim, made at any time before final judgment and execution upon it, though made on account of having been sued upon it, is regarded as voluntary, unless where *mens* process against the body might be used as an instrument of *actual duress*, to extort satisfaction of an unlawful claim. *Wheatley v. Waldo*, 36 Vt. 237.

**62.** Where the plaintiff gave a note on the purchase of a patent right, and afterwards paid the note, having full knowledge, or means of knowledge, as to the validity of the patent, and the seller was guilty of no fraud;—*Held*, that the payment was voluntary, and that the plaintiff could not recover back the money paid, although the patent might be void. *Stevens v. Head*, 9 Vt. 174.

**63.** In an action to recover for work done under a special contract, the defendant successfully resisted to the extent of the price unpaid, on the ground that the plaintiff had failed to fulfill the contract according to its terms;—but *held*, that he could not recover back any payments made on the contract after his discovery of the damage suffered on account of the plaintiff's breach; that such payments were voluntary and a waiver of damages to the extent of such payments. *Williams v. Colby*, 44 Vt. 40.

**64.** The plaintiff held the legal title to land. The defendant was in possession, having in fact the equitable title. The plaintiff denied the defendant's equity and his right to possession.

The plaintiff, without the request of the defendant, paid the taxes assessed on the land. The plaintiff, by decree of chancery, was afterwards compelled to convey the land to the defendant. *Held*, that such payment was voluntary, and the plaintiff could not recover the sum so paid. *Bryant v. Clark*, 45 Vt. 483.

V. PAYMENT AS AFFECTING THE SECURITIES.

65. When kept on foot. The cases are numerous, where a debt or claim has been paid to the creditor, and the securities have been kept alive for the benefit of others interested, and suits have been maintained on those securities; as, in *State Treasurer v. Cross*, 9 Vt. 289.

66. Upon the dissolution of a partnership, partner A agreed to pay a certain debt of the firm, but failed to do so. Partner B, for the purpose of having the debt collected of A, induced C to become the purchaser of it, and negotiated an assignment to C, at C's own risk and cost, who paid the creditor the amount. In an action by C in the name of the creditor against A and B;—*Held*, that by the agreement made on the dissolution B became a surety for A, and that A could not insist that the debt was paid. *Atina Ins. Co. v. Wires & Peck*, 28 Vt. 98.

67. Where a surety for a debt due a bank, for the purpose of controlling the collection of the debt from his principal, let the bank's president have money enough to pay the debt, taking the president's note therefor, and turned out the note to the bank's attorney as collateral security for the debt, and afterwards caused suit for the debt to be brought in the name of the bank, and controlled the suit;—*Held*, against the defense of the principal, that such facts did not tend to prove payment, but that the debt was kept on foot. *White River Bank v. Downer*, 29 Vt. 332.

68. When not. One joint debtor cannot become the owner of the claim—as, by payment, or professed purchase and assignment—in such way as that an action will thereafter lie upon it; but such payment, or purchase, satisfies and extinguishes the debt as to all. *Porter v. Gile*, 44 Vt. 590. *Allen v. Ogden*, 12 Vt. 9. 18 Vt. 65. 22 Vt. 418.

69. Where a debt is paid and extinguished, though by a surety, all liens and securities created or obtained in the proceedings to enforce its collection are extinguished also, and so cannot be enforced by him. *Moore v. Campbell*, 36 Vt. 361.

70. A creditor is entitled to hold a collateral security until he gets his pay, and is not obliged to surrender it on bringing suit, or taking judgment. *Bank of Rutland v. Woodruff*, 34 Vt. 89.

71. The plaintiffs made a parol agreement with their father, by which they were to pay

all his debts, and he was to convey to them certain lands and his personal property. They took possession and paid part of the debts, when the father died without having reduced the agreement to writing. After his death, the plaintiffs made a written confirmatory contract with the other heirs of the deceased, by which they again agreed to pay all the debts of the estate and pay the widow \$1000, and the heirs quit-claimed all their interest in the lands and property of the estate to the plaintiffs. The plaintiffs afterwards, having paid the debts, caused administration to be taken of the estate and presented to the commissioners a claim for the sums so paid by them. *Held*, that such payments constituted no legal claim; that payment of the debts freed the estate from all lien of creditors thereon; and that the plaintiffs could not take advantage of an administration and representation of insolvency to set such claims on foot,—the estate being in effect closed, so far as creditors were concerned. *Sutton v. Sutton*, 13 Vt. 71. *Williams*, C. J., dissenting.

VI. PLEADING.

72. In an action upon a promissory note, the defendant may, under the general issue, show the delivery of articles of ordinary book charge in payment. He is not obliged to file his declaration on book in set-off. *Pierce v. Clark*, 1 Tyl. 140.

73. A tender, whether of money or specific articles, unless received, is not payment, and does not sustain a plea of payment. *Downer v. Sinclair*, 15 Vt. 495.

74. Payments, although required to be pleaded in order to bar the action, may nevertheless be proved in reduction of damages. *Ferris v. Mosher*, 27 Vt. 218.

75. To a declaration in a writ of review the defendant pleaded, that after the rendition of the judgment sought to be reviewed, the plaintiff paid and the defendant accepted a certain sum in satisfaction and discharge of said judgment and subject matter and action. *Held* good on demurrer;—that it must be taken, on this plea, that the payment was voluntary; if an enforced payment, that fact should have been replied. *Watson v. Joslyn*, 27 Vt. 611.

76. In an action upon a promissory note, a plea was held good on demurrer, averring in substance that the note was given for property belonging to A B which the plaintiff held as a mere cover to protect it from A B's creditors, and upon an agreement that the defendant should sell the property and pay the avails to A B, and that should be payment of the note; and that he had so done and performed his agreement. *Carpenter v. McClure*, 37 Vt. 127.

## VII. EVIDENCE; PRESUMPTION.

**77. Promissory note.** A promissory note, either of the debtor or of a third person, given in settlement of an account or for a previous debt, is, by Vermont law, *prima facie* payment, so that a suit cannot be maintained upon the original indebtedness, whether the note be paid or not. See **BILLS AND NOTES, III.**

**78. Release to witness.** A discharge executed by an administrator to a witness of a collateral interest does not necessarily imply payment, as he may be so discharged without payment. *Huntington v. Wilder*, 6 Vt 334.

**79. Payment to third person.** Where it is necessary in a trial to show a payment to some third person, not a party or privy in the suit, evidence, which would be good against that party to establish such payment, is admissible; as, the written receipt of such person. *Gilson v. Gilson*, 18 Vt. 464. So, a verbal admission of payment. *Reed v. Rice*, 25 Vt. 171.

**80. Habit of party.** Evidence that the defendant was prompt and punctual in the payment of his debts, was *held* not admissible in aid of the defense of payment. *Strong v. Slicer*, 35 Vt. 40.

**81. Pecuniary circumstances.** As tending to disprove the plaintiff's claim, which had run for an unusual and unreasonable time, but short of the statute of limitations;—*Held*, that evidence was admissible that the plaintiff's pecuniary condition was such as to make it especially inconvenient and burdensome for him to go unpaid, and that the defendant had all along possessed the means of paying if called upon. *Id.*

**82. Presumption.** Presumption of payment of a bond is a legal inference after the lapse of twenty years, unless satisfactorily rebutted. The circumstances admissible to rebut such presumption must be such as prevented the recovering of a judgment. The poverty and imprisonment of the plaintiff, and of the defendant, and that the plaintiff sued out a writ but did not deliver it for service, are not sufficient. *Rogers v. Judd*, 5 Vt. 236.

**83.** Where notes signed by several joint principals had been taken up, and were found in the possession of one of them;—*Held*, that such possession alone did not furnish a presumption of payment by him. *Mills v. Hyde*, 19 Vt. 59.

**84. Execution—Injunction.** In an action of debt on judgment, the presumption of payment arising from the non-production of an execution issued upon it was *held* to be effectually rebutted by the fact, that the defendant, after the expiration of such execution, had obtained an injunction against the collection of the judgment. *Bradley v. Briggs*, 22 Vt. 95.

## PLEADING.

## I. RULES OF GENERAL APPLICATION.

## II. THE DECLARATION.

1. *In general.*
2. *How aided by plea, or verdict.*

## III. PLEAS.

1. *Dilatory pleas, and motions to dismiss.*
2. *Special pleas in bar.*
3. *General issue with notice.*

## IV. REPLICATION.

## V. DEMURRER.

## I. RULES OF GENERAL APPLICATION.

1. **English language.** The mark commonly used to denote dollars (\$), is not part of the English language, within the meaning of the statute which requires *pleadings*, etc., to be in the English language. *Clark v. Stoughton*, 18 Vt. 50.

2. So, the common signs for degrees and minutes of courses in surveying (° ' ) are insufficient in an indictment against a town for not making a highway, surveyed and laid out by such designation of *termini* and courses. *State v. Jericho*, 40 Vt. 121.

3. **The term, "Legislature."** The term, *legislature*, instead of *general assembly*, is well enough in pleading. *State Treasurer v. Weeks*, 4 Vt. 215.

4. **Sense plain.** The omission of a nominative case in a pleading does not vitiate, where the sense is plain. *Williams v. Wilson*, 1 Vt. 266.

5. **Statutes of other States.** The public statutes of another State are treated here as private statutes, as to the necessity of pleading them. *Herring v. Selding*, 2 Aik. 13. *Peck v. Hibbard*, 26 Vt. 698.

6. **Videlicet.** The averments of a plea must be made in direct terms, and not leave the main fact as matter of inference—as, by stating a date with a *continuando* under a *videlicet*. *Britton v. Bishop*, 11 Vt. 70.

7. A seeming repugnancy created by the stating of dates, in stating the order of events in the performance of a contract, when such dates are stated under a *videlicet*, is not material, where each event is alleged in conformity to the contract, and within the times limited therein. *Stevens v. Chamberlin*, 1 Vt 25.

8. Where a *videlicet* is followed by that which is material and necessary to be alleged, it is considered as a direct and positive affirmation or averment which is traversable, unless contrary to the preceding matter. It must be proved, when material, as much as if it had been averred without a *videlicet*. A *videlicet* never renders that immaterial which would otherwise be material. [Applied to a material

date of a material fact laid under a *videlicet*.] *Ladue v. Ladue*, 16 Vt. 189.

9. **Directness — Argumentativeness.** Whatever facts are necessary to make the act charged unlawful, must appear by averments, in opposition to argument and inference; characterizing it as contrary to law, or concluding *contra formam statuti*, does not help the matter. *Adams v. Nichols*, 1 Aik. 816.

10. An averment in pleading, that notes which were executed and made payable to a married woman, during coverture, "became and were the sole property" of the husband, is not a sufficient averment that the husband reduced them to his actual possession. It is rather a legal conclusion of the pleader. *Stearns v. Stearns*, 80 Vt. 218.

11. An averment in a plea that the plaintiff was, by the listers, for his real estate, set in the grand list for a sum named, is a sufficiently direct and positive averment that he had a grand list to that amount for real estate. *Adams v. Hyde*, 27 Vt. 321.

12. An averment in pleading that "John J. Crandall became bail by indorsing his the said Crandall's said name of J. J. Crandall on said writ, as bail," &c., was held to amount to an averment that he indorsed the writ by the name of J. J. Crandall, and that this name is identical with *John J. Crandall*—and to be sufficient. *Blood v. Crandall*, 28 Vt. 396.

13. An averment that a judgment was rendered at a term of court commencing March 23, that an execution issued dated March 29, and was committed to an officer April 26th following, was held not a sufficient averment that it was so committed to the officer within 30 days from the time of rendering final judgment. *McK. Ormsby v. Morris*, 28 Vt. 711.

14. **Continuous fact.** Where a fact, continuous in its nature, is averred in pleading as existing, it is to be taken as continuing unless the contrary be averred, and that should come from the opposite party. Except in pleas of abatement, it is not necessary that the defendant should anticipate in his plea matter appropriate for a replication, and negate it. *Kinsman v. Page*, 22 Vt. 628. *Day v. Abbott*, 15 Vt. 682.

15. **Condition.** Where a condition is to do a thing when thereto requested, the request is a part of the condition—a traversable fact—and must be averred with all necessary circumstances of time and place. *Jones v. Cooper*, 2 Aik. 54.

16. **Profert.** Where a deed is the foundation of the action, the declaration must make *profert* of it, though professed to be set out *in hæc verba*. *Austin v. Dills*, 1 Tyl. 808.

17. The omission of a *profert*, when necessary, is only cause for special demurrer. *Way v. Swift*, 12 Vt. 390.

18. **Oyer.** The defendant is not entitled to *oyer* where there is no *profert*. Where *profert* is unnecessarily made, the defendant is not on that account entitled to *oyer*, but must plead without it; but if *oyer* is asked for and is given, he may make use of it. *Story v. Kimball*, 6 Vt. 541.

19. **Matter of record.** In pleading matters of record, the record must be vouched to verify them. *Holden v. Scanlin*, 80 Vt. 177.

20. *Scire facias* against bail was held ill on special demurrer, for want of a *prout patet per recordum*. *Wright v. Brownell*, 2 Vt. 117.

21. **Contradicting record.** A pleading is bad, which contradicts a record by matter *in pais*. *Lopham v. Briggs*, 27 Vt. 26.

22. **Departure.** Instance of a departure in pleading. *Houghton v. Jewett*, 2 Tyl. 183. *Joslyn v. Taylor*, 33 Vt. 470.

23. Instance of a departure in a replication; repugnancy; no denial of facts stated in the plea, nor avoidance, &c. *Watson v. Joslyn*, 29 Vt. 455.

24. **Duplicity.** If the facts alleged in a plea are ever so multifarious, yet if they all go to make up one entire result and require but one answer, there is no duplicity. *Torrey v. Field*, 10 Vt. 353, 412. *Waddams v. Burnham*, 1 Tyl. 238.

25. Several matters in a plea do not render the plea double, if they are constituent parts of the same entire defense, or are alleged as inducement to, or as a consequence of, another fact. *Mott v. Haasen*, 27 Vt. 208.

26. In order to determine whether a plea is double, reference must be had not only to the matter, but also to the general frame and structure, of the plea. Where two defenses are combined in one plea, it is not necessary that each should be a sufficient defense in order to render the plea double. The plea in this case was held bad for duplicity. *Vaughan v. Everts*, 40 Vt. 526.

27. In trespass *de donis*, the defendant pleaded in bar the organization and existence of a school district, the warning and holding of a school meeting, the voting of a tax, the plaintiff's liability to be taxed, the assessment of the tax by the prudential committee, the issuing and delivery of the tax warrant to the defendant, who was collector, and his proceedings under it in taking the property, &c.: *Replication*, that said supposed tax "was not legally and duly assessed by the then prudential committee of said school district upon the lists of said district." Held, upon special demurrer, that the replication presented but a single issue, viz: the actual assessment by the prudential committee, and whether, from the vote of the district and the grand list, they did truly ascertain and fix the amount to be paid by each person liable to be taxed—all the proceedings

preliminary to such assessment being admitted by the pleadings. *Moss v. Hinds*, 28 Vt. 279. *S. C.*, 29 Vt. 188.

## II. THE DECLARATION.

### 1. In General.

**28. Is part of the writ.** By G. S. c. 83, s. 9., the writ and declaration are blended in one instrument, and the declaration is thereby made a part of the writ. Hence, the writ may be referred to, to aid a defective averment in the declaration proper; as, that one of the plaintiffs is wife of the other. *Church v. Westminster*, 45 Vt. 380.

**29. Several counts.** Every special count must contain in itself all the averments necessary to show a cause of action. *Farnsworth v. Nason*, Brayt. 192.

**30.** Where a declaration contains several counts, each for a separate cause of action, each count should be complete in itself and not require aid by reference to the others. Where only such general reference is made, the court cannot be required to look into the pleadings and assort the parts, and appropriate them in aid of the needy counts. *Holton v. Muzzy*, 80 Vt. 385.

**31. Declaration on record.** In declaring upon a matter of record of a justice court, it is not necessary to set forth the proceedings at large, as by a transcript, but only to aver the facts with a *prout patet per recordum*. *Chittenden v. Catlin*, 2 D. Chip. 22.

**32. —on contract.** A written contract must be declared on according to its legal effect, and not by setting out its words. It cannot be referred to, and so be made a part of the declaration, as is done in chancery. *Estes v. Whipple*, 12 Vt. 373.

**33.** To declare upon a contract in the words of it, is sometimes sufficient, and sometimes not. That depends upon the degree of precision with which the contract is drawn. The declaration should be certain to a certain intent, and when the contract is not so, but is vague and uncertain, the pleader must intelligently express that view of the contract upon which the claim is founded; otherwise, the declaration will be bad on demurrer, and, many times, on motion in arrest. But if described in the words of the contract, there cannot be said to be a variance. *Royalton v. R. & W. Turnpike Co.*, 14 Vt. 311.

**34.** Declaration upon a note, or written contract, for the payment of a certain sum, at a certain time and place, in certain due-bills—omitting to aver that the plaintiff was present then and there ready to receive them;—*Held* good—certainly, after verdict. *Carpenter v. Coit*, 1 D. Chip. 88.

**35.** In the case of mutual covenants, where the declaration avers that the defendant has disabled himself from performance, the plaintiff need not aver a tender of performance on his part, but must aver that he was ready and willing to perform. *Stow v. Stevens*, 7 Vt. 27. *Joslyn v. Taylor*, 33 Vt. 470.

**36. Matter of evidence.** C. S. c. 20, s. 12, provided that a contract with a school-teacher for teaching should be null and void if he should fail to obtain a certificate of qualification before the commencement of the school. In an action by a teacher upon such contract;—*Held*, that the declaration need not aver that he had obtained such certificate; that this is matter of evidence pertaining to the remedy. *Doyan v. School Dist. Montgomery* 35 Vt. 520; and see *Kent v. Lincoln*, 32 Vt. 591.

**37. Consideration.** A contract was set out in a plea as made "upon a good and valuable consideration." *Held* insufficient on general demurrer. The consideration should be set out, that the court may see that it is a good and valuable one—that it is *legally* sufficient. A demurrer does not admit this. It admits such facts only as are well pleaded. *Marshall v. Aiken*, 25 Vt. 327. (See *Paddock v. Jones*, 40 Vt. 474.)

### 2. How aided by plea, or verdict.

**38. Aided by plea.** A plea may, by a direct admission of facts omitted or obscurely expressed in the declaration, aid the declaration; it may, by intendment, aid that which is defectively set forth; but will not, by intendment, aid that which is the very gist and point of the action. *Ralston v. Strong*, 1 D. Chip. 287. *Post* 144.

**39. Aided by verdict.** A motion in arrest for the insufficiency of the declaration will not prevail, where it contains the substance of a good declaration, and all the facts necessary to a recovery, though imperfectly stated. *Battles v. Braintree*, 14 Vt. 348. *Closson v. Staples*, 42 Vt. 225.

**40.** Defects merely formal are aided by verdict; and many defects which would be reached by general demurrer are also cured by verdict. The omission of that which must necessarily be presumed to have been proved on trial, is not cause of arrest; but nothing is presumed to have been proved, which is not expressly stated in the declaration, or necessarily implied from those facts which are stated. *Vadakin v. Soper*, 1 Aik. 287. *Keyes v. Throop*, 2 Aik. 276.

**41.** The language of a declaration is to be favorably construed to sustain a verdict; as, where an equivocal term is used. *Manwell v. Manwell*, 14 Vt. 14.

**42.** A declaration, ill on demurrer, may be good after verdict on motion in arrest. After



verdict, every reasonable presumption should be made in favor of the sufficiency of pleadings. A title defectively stated is cured by verdict, but not a defective title. *Brown v. Hitchcock*, 28 Vt. 452. *Lincoln v. Blanchard*, 17 Vt. 464.

43. Judgment will not be arrested after verdict, for lack of an essential averment in the declaration which is contained by implication in the averments used, or which may be considered to have been proved as a part of what is alleged. *Morey v. Homan*, 10 Vt. 565;—which is implied or must have appeared in proving what is actually alleged. *Needham v. McAuley*, 18 Vt. 68. *Lincoln v. Blanchard*. *Brown v. Hitchcock*. *Curtis v. Burdick*, 48 Vt. 166.

44. In an action upon an award embracing the arbitrator's fees, the court refused to arrest judgment upon a verdict for the plaintiff including such fees, although the declaration did not aver that the plaintiff had paid them. He could not have recovered them without such proof. *Blanchard v. Murray*, 15 Vt. 548.

45. Under G. S. c. 52, s. 17, requiring an action, for an injury causing death, to be brought by the personal representative of the deceased within two years from the decease, the declaration averred the date of the decease, and this date was, in fact, within two years from the commencement of the suit; but it did not aver (otherwise) that the decease occurred within such two years. On motion in arrest;—*Held*, that the declaration was sufficient; and the fact being one which was necessary to be proved in order to a recovery, it would, after verdict, be presumed to have been proved, even if the time of the decease had not been alleged at all. *Hill v. New Haven*, 37 Vt. 501.

46. In case for fraudulent representations as to land sold, the declaration alleged that the plaintiff bargained with the defendants to buy of them a certain piece of land; that said land was described in a deed from the defendants to the plaintiff; and that the plaintiff purchased of the defendants the land described in said deed. *Held*, on motion in arrest, that the word purchased implied payment of a price, and that the presumption was that these several averments of the declaration were proved on trial. Motion overruled. *Curtis v. Burdick*, 48 Vt. 166.

47. Defects in a declaration in the statement of value, kinds and enumeration of articles of property, &c., were held cured by verdict. *Wetherbee v. Foster*, 5 Vt. 136. *Fuller v. Fuller*, 4 Vt. 123.

48. The lack of averring a special demand, when necessary, is cured by verdict. *Bliss v. Arnold*, 8 Vt. 252.

49. A declaration in debt for goods sold and delivered was held good after verdict, where there was no averment that the goods were so sold, &c., "at the special instance and request

of the defendant." *Durrill v. Lawrence*, 10 Vt. 517.

50. A new or an amended declaration, not concluding with an *ad damnum*, but where the *ad damnum* was set forth in the original declaration, was held sufficient on motion in arrest. It must be considered as referring to the original declaration. *Parlin v. Bundy*, 18 Vt. 582.

51. Whatever may be the rule in regard to supplying what is necessary in one count by reference to others, where the objection to such reference is taken by special demurrer, such objection cannot prevail on motion in arrest. *Curtis v. Belknap*, 21 Vt. 438.

52. In a declaration to recover for work done in building a railroad, upon a contract in which it was agreed that the payments should be made from time to time according to estimates of the engineers of the amount of work so done, it was held, on motion in arrest, that an omission to aver that such estimates had been made was cured by an averment that it was the duty of the defendant to have such estimates made, and that it was through his fault that they were not made. *Camp v. Barker*, 21 Vt. 469.

53. In declaring upon a promise, the want of an averment of consideration, or the averment of an insufficient consideration, is not cured by verdict. *Vadakin v. Soper*, 1 Aik. 287.

54. Counts in case for a false warranty cannot be joined with a count in *assumpsit* upon an express warranty. After a general verdict in such case for the plaintiff, judgment was arrested on motion. *Joy v. Hill*, 36 Vt. 333.

55. In a plea which should have concluded to the country, the conclusion was wholly omitted. *Held* good after verdict. *Stearns v. Stearns*, 32 Vt. 678.

56. Good and bad counts. Where one count of a declaration is fatally defective, although joined with other good counts, and the verdict is general, judgment will be arrested. *Haselton v. Weare*, 8 Vt. 480. *Bloss v. Kittridge*, 5 Vt. 28. *Harding v. Crogin*, 8 Vt. 501. *Walker v. Sargeant*, 11 Vt. 327. *Wood v. Scott*, 13 Vt. 47. *Needham v. McAuley*, *Id.* 68. *Sylvester v. Downer*, 18 Vt. 32. *Barrett, J., in Joy v. Hill*, 36 Vt. 336. *Dunham v. Powers*, 42 Vt. 1.

57. The same doctrine applied to a declaration in set-off. *Bloss v. Kittridge*. *Walker v. Sargeant*.

58. The above rule criticised in *Wood v. Scott*, 13 Vt. 47. *Whitcomb v. Wolcott*, 21 Vt. 368. *Camp v. Barker*, *Id.* 469. *McDuffee v. Magoon*, 26 Vt. 518; and apparently held, that where it appears that the evidence was applicable solely to the good counts, a general verdict will be sustained; or that it would be presumed that the verdict was upon the good counts only, the contrary not appearing.

59. *Note.* Now settled by stat. 1865, No. 12, enacting that where the counts are for the same cause of action, a general verdict in such case "shall be deemed as the finding of the jury on the good count or counts, unless it otherwise appears," &c.

60. But unless for the same cause of action, the judgment in such case will be arrested; and so done in *Dunham v. Powers*, 42 Vt. 1. *Kimmis v. Stiles*, 44 Vt. 351.

61. Where it appears by the whole record that the verdict was in no part founded upon a defective count, the judgment will not be arrested on account of the defective count, though the verdict be general. *Montgomery v. Maynard*, 33 Vt. 450.

### III. PLEAS.

#### 1. Dilatory pleas and motions to dismiss.

62. **Title of plea.** By our practice, the title to a plea is of very little importance. It is sufficient if it follows the docket entry, and identifies the suit. So *held*, as to a plea in abatement. *Cleft v. Hosford*, 12 Vt. 296.

63. **Time of pleading—Waiver.** Matter in abatement, simply, must be pleaded at the earliest opportunity, or it is waived;—as, in a justice suit, on the first day of appearance. *Martin v. Blodget*, 1 Aik. 875. *Stone v. Proctor*, 2 D. Chip. 108.

64. Where a justice suit was postponed by agreement of parties to a future day, without an express reservation of the defendant's right to insist upon dilatory matter;—*Held*, that such right was thereby waived. *Wheelock v. Sears*, 19 Vt. 559.

65. So, where a suit by order of the county court was allowed to be entered later than the time fixed by the rules of practice for such entry, and later than the day fixed by the rules for filing dilatory pleas;—*Held*, that without a reservation, in the order, of the right to file such plea, the right was waived. *Dow v. School Dist. Walden* 46 Vt. 108.

66. A personal privilege must be seasonably asserted, or it is waived;—this applied to the place of trial. *Forbes v. Davison*, 11 Vt. 660.

67. Defect of trial venue in the writ is cured by appearance, and trial upon the merits. *Stone v. Van Curler*, 2 Vt. 115.

68. In an action of book account, before a justice, against the defendant and another, there was no service on the other nor excuse therefor. The defendant entered a general appearance before the justice and went to trial on the general issue. On appeal, the defendant pleaded in abatement the want of service on the other defendant. *Held*, that the plea was bad, as being out of time, and that the defect was waived. *Pike v. Blake*, 8 Vt. 400.

69. The objection to a writ, that no minute of the true time of issuing it was entered upon it, as required by G. S. c. 62, must be taken at the earliest opportunity;—as, on the return day of a justice writ; or, at the first term in the county court, under the rule applicable to matters in abatement. Otherwise, the objection is waived. *Pollard v. Wilder*, 17 Vt. 48. *Wheelock v. Sears*, 19 Vt. 559. *Hill v. Morey*, 26 Vt. 178.

70. Where a judgment against the defendant, rendered by default by a justice in an action for a penalty, had been set aside on petition to the county court, and the cause there entered;—*Held*, in the absence of any rule made as to dilatory defenses, that the court, at the first term, properly entertained a motion to dismiss the action for want of the required minute of the true day, &c., when the writ was signed—that being the defendant's first opportunity. *School Dist. Granby v. Austin*, 46 Vt. 90.

71. In an action on a probate bond, under G. S. c. 60, s. 2, an objection that the prosecutor's name was not indorsed on the writ, was *held* waived by continuance and trial on the merits, or on demurrer. *Probate Court v. Strong*, 24 Vt. 146; and see 32 Vt. 775.

72. A writ not signed by any proper authority, is not absolutely or incurably void, but is confirmed and the defect waived, by the appearance of the defendant and pleading to the merits without objection to the process. The objection is in substance merely dilatory, and must be presented, if at all, at the first opportunity. *Huntley v. Henry*, 37 Vt. 165.

73. After plea of not guilty, and the commencement of the trial of a liquor prosecution on appeal from a justice, the respondent filed a motion to dismiss, alleging that the justice acted as attorney and counsel for the State upon the trial before himself. *Held*, that the court properly refused to entertain the motion; (1), because not founded upon any fact or matter of record apparent upon the face of the proceedings; (2), because not seasonably made. *State v. Haynes*, 35 Vt. 565.

74. The appearance of a foreign corporation by counsel at the first term and suffering a general continuance at that and the next term, are a waiver of all dilatory pleas, and of all objections to the service of the writ. *Stanton v. Proprietors of the Haverhill Bridge*, 47 Vt. 173.

75. Where a plea in abatement is filed out of time, as after the first term, such objection can be taken advantage of by demurrer. The plaintiff may either sign judgment, move to have the plea set aside, or demur. *Jennison v. Hapgood*, 2 Aik. 31.

76. *Seemle*, if the county court sustains a motion to dismiss, and the record shows that the motion was not seasonably filed, the

supreme court, on exceptions, will hold it error. *Dow v. School Dist. Walden* 46 Vt. 108—citing *Pollard v. Wilder*, 16 Vt. 605, note.

77. **Distinction between plea and motion.** A motion to dismiss is confined to cases where the defect is apparent upon the face of the record, or papers, on inspection. That which requires proof *aliunde*, must be presented by plea in abatement upon which an issue can be formed. *Conn. & Pass. R. R. Co. v. Bailey*, 24 Vt. 465. *Waterford v. Brookfield*, 2 Vt. 200. *Culver v. Balch*, 23 Vt. 618. *Bliss v. Smith*, 42 Vt. 198. *Johnson v. Williams*, 48 Vt. 565.

78. Generally, causes for dismissing the action, and causes of abatement, 'apparent from the papers on file which constitute the proceedings in the cause, though not of record in the strict technical sense, may be taken advantage of by motion. *Peck, J.*, in *Bent v. Bent*, 43 Vt. 44. *Bennett v. Allen*, 30 Vt. 684.

79. **Reference to writ.** In a motion to dismiss for an apparent defect in the writ, it is not necessary to make such specific reference to the writ as in a plea in abatement,—the writ being under the hand and eye of the court. *Barnet v. Emery*, 43 Vt. 178.

80. A written motion to dismiss a suit because "no minute of any recognizance," &c., "was made upon the plaintiff's writ," &c., was met by a parol demurrer. *Held*, that the writ was tacitly referred to, and so as to authorize an inspection of the writ to determine the truth and sufficiency of the motion. *Perkins v. Walker*, 16 Vt. 240.

81. A plea in abatement which verifies the facts by the record, may be treated as a motion to dismiss, and, as such, be sufficient. *Gray v. Flowers*, 24 Vt. 533.

82. A plea in abatement, defective in form as such, was *held* good as a motion to dismiss for want of a recognizance for costs in the writ. *Whittaker v. Perry*, 37 Vt. 631; and see *Barnet v. Emery*, 43 Vt. 178.

83. So, where a defective plea showed, by the record, want of jurisdiction in the court. *Ferris v. Ferris*, 25 Vt. 100.

84. Matter in abatement to be proved by evidence *aliunde* the record, though (perhaps) allowed to be urged in the form of a motion, must be so presented by averment that a traverse of the averment shall form an issue, the finding of which, either way, will definitely settle the legal right involved. *Barrows v. McGowan*, 39 Vt. 238. *State v. Intoxicating Liquor*, 44 Vt. 208.

85. A motion to abate a writ, made returnable to Franklin county court, averred that the plaintiff resided at Buffalo in the State of New York, and the defendant at Cambridge in the county of Lamoille. *Held* ill on demurrer; because, on a traverse, a negative finding of

either or both the issues would not determine the right to bring the suit in Franklin county. *Barrows v. McGowan*.

86. In deciding the sufficiency of a plea in abatement, the court will not look into the writ and officer's return, unless they are referred to in the plea. *Pearson v. French*, 9 Vt. 349.

87. But may, if so referred to. *Ingraham v. Leland*, 19 Vt. 304.

88. **Requisites of plea in abatement.** A plea in abatement must stand good by itself, and cannot be aided by facts alleged in the writ or declaration, unless expressly referred to. *Bowman v. Stowell*, 21 Vt. 309.

89. In a plea in abatement for defective service of a writ, an omission to lay traversable facts with time and place, was *held* not supplied by a general reference to the writ and return. *Morse v. Nash*, 30 Vt. 76.

90. A plea in abatement cannot be helped by matters alleged in subsequent pleadings; as, a rejoinder. *Lincoln v. Thrall*, 34 Vt. 110.

91. More than one plea in abatement is not warranted by either the common law, or the statute. Where three such pleas were filed in one suit;—*Held*, that the plaintiff was not confined to a motion to have all the pleas but one taken from the files, but he might demur generally; and such pleas were *held* ill for duplicity, on general demurrer. *Culver v. Balch*, 23 Vt. 618.

92. One prayer of judgment in one plea,—as, in a plea in abatement,—is as good as more. *Gray v. Flowers*, 24 Vt. 533. *Landon v. Roberts*, 20 Vt. 286.

93. A plea in abatement which avers matter *dehors* the record, is defective by having a prayer of judgment both in the commencement and the conclusion of the plea. It should only conclude with such prayer. *Smith v. Chase*, 39 Vt. 89. *Landon v. Roberts*.

94. Whether such informality is a fatal defect on demurrer—*quære*. It seems not. See cases above, and *Gray v. Flowers*, 24 Vt. 533. *Wires v. Griswold*, 26 Vt. 97. *Morse v. Nash*, 30 Vt. 80. *Essex v. Prentiss*, 6 Vt. 53.

95. In a plea in abatement, a prayer that the writ may be quashed is equivalent to a prayer of judgment of the writ, that it abate. *Gray v. Flowers*, 24 Vt. 533.

96. All defects in pleas in abatement are reached by a general demurrer. *Id.* *Landon v. Roberts*, 20 Vt. 286.

97. A plea in abatement which depends for its support on conclusions which are the result of an inference, or an argumentative demonstration, is fatally defective. *Sumner v. Sumner*, 36 Vt. 105.

98. An averment in a plea in abatement that the defendant resided "in the town of Burlington, and not elsewhere," was *held* insufficient, on demurrer, to present the issue that

the defendant did *not* reside in the town of Charlotte. *Durand v. Griswold*, 26 Vt. 48.

99. An averment in a plea in abatement that the writ was served by A B, "*a constable, &c.*" is merely descriptive of the person, and is not a sufficient averment that A B was constable, or that he served the writ in that capacity. *Sumner v. Sumner*, 86 Vt. 105.

100. A plea in abatement to the service of a writ, must directly and fully negate any other service, either by the same or any other officer. *Morse v. Nash*, 90 Vt. 76. 89 Vt. 89.

101. A plea in abatement for defective service of a writ, averring that *it does not appear* by the officer's return upon the writ, that he left with the defendant a true copy of the writ, &c., was *held ill*, for stating the fact argumentatively. *Hill v. Powers*, 16 Vt. 516.

102. So also, where the averment was "*although said writ was served by copy, &c.*" *Pearson v. French*, 9 Vt. 849.

103. A plea in abatement that H F, "by whom the writ was served, was not at the time of service a person duly authorized and qualified by law to serve the same," was *held ill*. *Crane v. Warner*, 14 Vt. 40.

104. A plea in abatement for defect of service of the writ, averred that the writ was served by A B "*as first constable of, &c.*" and made reference to the writ, and the return thereon which was signed "A B, first constable," and averred that A B was not first constable. *Held* defective, by not averring that A B did not serve the writ in any other capacity than as first constable, since he might have done it as second constable, sheriff, &c.; and that the addition of his name of office in the signing of his return was not conclusive of the fact that he served the writ in no other capacity. *Smith v. Chase*, 89 Vt. 89.

105. A plea in abatement averred that J H, "the justice of the peace who signed said writ" "was at the time of signing said writ" "as justice of the peace as aforesaid, and still is related to said defendant within the fourth degree of affinity." *Held ill*, (1), in not averring, *except by way of recital*, that the writ was signed by J H; (2), in not averring that the writ was not otherwise signed, *at the time of service*, than by J H; (3), in not averring the particular relationship which constituted the affinity. *Landon v. Roberts*, 20 Vt. 286, citing *Pearson v. French*, 9 Vt. 849.

106. Book account: The plaintiff was described in the writ as of New York and the defendant as of Rutland in the county of Rutland. The writ was returnable to Rutland county court. Plea in abatement, that the defendant did not, at, &c., reside in the county of Rutland, but did reside at Woodstock in the county of Windsor. Replication, that the defendant, at, &c., did not reside in Woodstock, but

did reside in the county of Rutland. On issue joined and trial by the court, the court found that the defendant did not, at, &c., reside in the county of Rutland, but did not find where his actual residence was, and thereupon rendered judgment that the writ abate. *Held* erroneous; and the supreme court reversed the judgment, and rendered judgment that the defendant account, and appointed an auditor. *Vanderburg v. Clark*, 22 Vt. 185. 13 Vt. 501.

107. In an action by the guardian of an insane person in behalf of his ward, a plea in abatement for the pendency of a former action, &c., was *held ill*, because it did not aver that the first action was commenced before the plaintiff was placed under guardianship, or that it was commenced by the procurement or assent of the guardian. *Lincoln v. Thrall*, 34 Vt. 110.

108. A plea in abatement in replevin, averred that the writ was served upon a day named, and that neither *before* that day, nor *after*, was any bond taken, &c. *Held ill*, for not including the day of service. *Bent v. Bent*, 48 Vt. 42.

109. Where there were three defendants, a plea in abatement averred matter in abatement applicable to but two of them, and prayed judgment that the writ abate as to all. *Held*, that the prayer was too large, and the plea insufficient. *Bliss v. Smith*, 42 Vt. 198.

110. To a plea in abatement averring the pendency of a former suit for the same cause of action, the replication denied that the former suit was for the same cause, and concluded to the country. *Held*, that the conclusion was correct, since the plea contained matter of fact, as well as of law; and that it was not necessary to allege the grounds of difference between the two actions. *Merrow v. Huntoon*, 25 Vt. 9.

111. In an action of book account, where an issue of fact joined on a plea in abatement was found against the defendant;—*Held*, that the proper judgment was, that the defendant account. *Peach v. Mills*, 18 Vt. 501. *Vanderburg v. Clark*, 22 Vt. 185.

As to matters pleadable in abatement, see ACTION; and the several actions, as ASSUMPSIT, &c.

## 2. Special pleas in bar.

112. General rules—As to extent. Every plea in bar is to be treated as a plea to the whole declaration, unless it is expressly limited to some particular portion; and to be sufficient as such, it must contain a sufficient answer to all that is alleged as the direct ground and gist of the action. Matters of aggravation merely require no justification. *Hathaway v. Rice*, 19 Vt. 102.

113. A plea is ill which does not contain a

sufficient answer to all which it professes to answer. *Torrey v. Field*, 10 Vt. 353.

114. A joint plea which is ill as to one defendant, is good for neither. *Clark v. Lathrop*, 33 Vt. 140.

115. A plea is not ill because not an answer to the whole declaration, or count, if it is good for such part as it professes to answer. In such case, the part not answered stands confessed, and the plaintiff may take judgment, at proper time, therefor. *Carpenter v. Briggs*, 15 Vt. 84.

116. A special plea in bar must admit the truth of so much of the charge in the declaration as it attempts to avoid, excuse, or justify; as, in an action for an assault, that the assault was committed. *Blood v. Adams*, 33 Vt. 52.

117. Where a plea averred that the causes of action did not, nor did either of them, accrue within six years, &c., a replication thereto averring that said causes of action, or some of them, without averring which, did accrue within six years, &c., was held insufficient. *Hotchkie v. Ladd*, 36 Vt. 593.

118. To an action of assumpsit upon a promissory note, a plea in bar averring a want of consideration, was held ill, as amounting to the general issue. *Potter v. Stankly*, 1 D. Chip. 243; and see *Burton v. Bostwick*, Brayt. 195.

119. Conclusion. Whenever new matter is introduced in any of the pleadings, the pleading should conclude with a verification. *Joslyn v. Tracy*, 19 Vt. 569.

120. Adding a *similiter* by the plaintiff to a plea concluding with a verification amounts to nothing; it leaves the plea unanswered, closes no issue, and warrants no trial of it. *Sherwin v. Bliss*, 4 Vt. 96.

121. **Special traverse.** A special traverse consists of an affirmative not compatible with the adversary's former pleading, and a negative (*abegus hoc*) in direct contradiction to it. It is not unlike some of the eastern forms of speech found in the Holy Scriptures; as, "Thou shalt die and not live;" "He shall see for himself and not another." *Day v. Essex Co. Bank*, 13 Vt. 97.

122. **Pleading former recovery.** A plea in bar, averring a former judgment in a suit for the same cause of action, that the defendant recover his costs, was held ill on demurrer, because not averring that the merits were tried. *Swift v. Hamblin*, Brayt. 189.

123. A plea in bar that the facts averred in the declaration were pleaded in bar by the present plaintiff in a former suit against him, and that the court adjudged that the plaintiff in that suit ought not to be barred, is not equivalent to an averment that the court found the matters stated in that plea not proved, and therefore adjudged that that plaintiff was not barred. *Noyes v. Evans*, 6 Vt. 628.

124. **Matter of evidence.** A contract which varies or contradicts a written contract declared upon, when set up in a plea as a defense, need not be averred to have been in writing. This is matter of evidence, and a demurrer to the plea admits the contract stated. *Carpenter v. McOlure*, 37 Vt. 127.

125. **Consideration.** The consideration of a contract was averred in a plea as "a valuable consideration, to wit: in consideration of certain *valuable securities* then placed in their hands as collateral security, &c." Held sufficient on general demurrer. *Paddock v. Jones*, 40 Vt. 474. See *Marshall v. Aiken*, 25 Vt. 337.

126. **Defense arising after suit.** A plea *puis darrein continuance*, which goes to the plaintiff's cause of action and does not simply affect the remedy, has the effect to waive and strike from the record, by operation of law, all previous pleas, and everything stands confessed except the special matter contested by the plea. *Lincoln v. Thrall*, 26 Vt. 304. (Changed by stat. 1867, No. 5.)

### 3. General issue with notice.

127. Special matter may be given in evidence, by way of notice, in all actions and under every general issue; as, under the plea of *non est factum*. *Lawrence v. Dole*, 11 Vt. 549. G. S. c. 30, s. 82.

128. The statute, by allowing special matter to be given in evidence upon notice under the general issue, dispenses with the form only, not the substance of a special plea. The facts relied on must be as particularly set forth in the notice as in a plea in bar, though the same technical precision is not required. *Bowdish v. Peckham*, 1 D. Chip. 144. *Barney v. Goff*, *Id.* 304. *Herring v. Selding*, 2 Aik. 12. *Fullerton v. Mack*, *Id.* 415. *Nott v. Stoddard*, 38 Vt. 25.

129. The statute authorizing a notice under the general issue as a substitute for a special plea, dispenses with the form, but not with the substance of a plea. If the facts alleged in the notice would be defective if set forth in the form of a plea, the evidence under the notice may be objected to at the trial, and, if objected to, should be excluded. *Nott v. Stoddard*. *Rice v. Pollard*, 1 Tyl. 230.

130. The notice of special matter of defense alleged a submission to arbitration, and an award, which "was to the effect, that the defendant was not liable to pay to the plaintiff any damage for the injury complained of." Held sufficient, on the face of the notice. *Edwards v. Harrington*, 45 Vt. 63.

131. In trespass for an assault and battery, the defendant gave notice, under the general issue, that he had recovered judgment against

the plaintiff for *the identical assault and battery* here declared upon. *Held*, that the notice was incongruous and absurd, and disclosed no defense. *Cade v. McFarland*, 48 Vt. 47.

132. Where the effect of the evidence is to show that no cause of action ever existed, and is not matter of discharge of a cause once existing, no notice under the general issue is required by G. S. c. 80, s. 82. *James v. Aiken*, 47 Vt. 28.

133. G. S. c. 33, s. 15. Where a special contract, before a breach of it, is varied as to the manner of performance, performance according to the modified agreement may be shown under the general issue without notice; the statute requiring such notice only in case of "matter operating to extinguish the right of action which once existed." *Harlow v. Dyer*, 48 Vt. 357.

#### IV. REPLICATION.

134. Where a declaration consists of several counts and a plea in bar to the whole is pleaded, if the plaintiff has matter good as a replication to the plea so far as pleaded to one of the counts only, he should limit his replication to the plea so far as pleaded to that count, and pray judgment of that count only; otherwise, the replication is ill. *Carpenter v. McClure*, 38 Vt. 375.

135. In such case, the plaintiff should, by a separate replication, answer the plea in some other way, as respects the other counts. *Id.* *Wood v. Springfield*, 48 Vt. 617.

136. G. S. c. 88, s. 16, provides that "the party against whom matter is specially pleaded in confession and avoidance, in answer to matter by him antecedently alleged, may, by a general form of denial, traverse and put in issue all the material facts so pleaded by the other party." This statute allows a party practically to tender a general issue to his adversary's previous pleading, as to a declaration; and as the statute gives, or refers to no particular form of denial;—*Held*, that a replication denying specifically the several allegations of a plea in the words of the plea, though unnecessarily prolix, was sufficient; and that only the material facts of the plea were thereby put in issue. *Austin v. Chittenden*, 32 Vt. 168.

137. A general replication *de injuria* is a sufficient "general form of denial," under the statute, even in an action of assumpsit—certainly, where the defense is only matter of excuse. *Paddock v. Jones*, 40 Vt. 474.

138. A traverse with *de injuria*, must conclude to the country. *Spencer v. Bemis*, 46 Vt. 29.

#### V. DEMURRER.

139. Confined to the record. Where

pleadings close in a demurrer, no fact can be treated as in the case which does not appear from the pleadings, even though conceded on the hearing. *Hartland v. Windsor*, 29 Vt. 354.

140. How far an admission. A demurrer admits all the facts averred in the declaration, according to their legal effect. It not only admits the substantive facts charged, but also the consequences and results charged, provided these may be fairly considered to be the legitimate results of such facts,—and even the motives charged. *Hyde v. Moffat*, 16 Vt. 371. *Redfield, J.*, dissents from the application of this doctrine to the case.

141. A demurrer admits only such facts as are well pleaded. *Matthews v. Tower*, 39 Vt. 438.

142. Other remedy. It is no objection to a demurrer to a plea which traverses an immaterial fact, that the party might have moved for judgment as for want of a plea. *Marvin v. Wilkins*, 1 Aik. 107.

143. Clerical error. A mere clerical error in a plea which is corrected by papers that, by reference, are made part of the plea, may be disregarded on demurrer. Such errors may be amended at any time, on motion. *Briggs v. Mason*, 31 Vt. 438.

144. Runs through the whole record. On motion in arrest, or on demurrer, the court looks at the whole record, and an informality or an essential omission in the declaration may be supplied by an averment or admission in the plea, or notice. *Wood v. Scott*, 13 Vt. 42. *Probate Court v. Vanduer*, 18 Vt. 135. *Sanderson v. Hubbard*, 14 Vt. 462. *Hoyt v. Smith*, 32 Vt. 304. *Ralston v. Strong*, 1 D. Chip. 287.

145. Fastens to the first substantial defect. A demurrer, general or special, reaches back to the first substantial defect in the pleadings; while no defects of form are reached, even by a special demurrer, except such as appear in the particular pleading demurred to, and are specially noted. *Adams v. Nichols*, 1 Aik. 316. *Carlton v. Young*, *Id.* 332.

146. A demurrer to a plea in abatement to the service of a writ, does not reach back to a defect in the declaration. *Bent v. Bent*, 43 Vt. 42.

147. Where pleadings end in a demurrer to the replication, and judgment goes against the defendant for the insufficiency of his plea in bar, a judgment that "the plea is insufficient" is correct in substance, although, in form, it should have been that "the replication is sufficient." *Day v. Essex Co. Bank*, 13 Vt. 97.

148. An anomalous case in pleadings:—The declaration was insufficient; that defect was cured by the plea; the plea was bad for all other purposes, and the replication was bad.

Judgment on demurrer to the replication, that the replication is sufficient, and that the plaintiff recover his damages and costs. *Probate Court v. Vanduser*, 13 Vt. 135.

149. Plea, settlement since suit: Replication, settlement obtained by fraud and void, and concluding with a verification. Rejoinder, settlement fairly obtained and not by fraud, concluding to the country. On general demurrer to the rejoinder;—*Held* good as an answer to the replication, which should have concluded to the country and as tendering an issue of fact. *Hynes v. Pease*, 47 Vt. 601.

150. Special demurrer. A special demurrer, in reaching back to any former pleading of the adversary, has only the effect of a general demurrer; and it has only that effect as to the very plea demurred to, except in those particulars wherein it is special. *Shaw v. Peckett*, 25 Vt. 423.

151. A defective conclusion of a replication is not reached by a general demurrer. *Hooker v. Smith*, 19 Vt. 151.

152. An objection to a plea that it amounts to the general issue, can be taken only by special demurrer. *Hotchkiss v. Ladd*, 36 Vt. 593.

153. Argumentativeness in a pleading can be taken advantage of only by special demurrer. *Catlin v. Lyman*, 16 Vt. 44. *Woodward v. French*, 31 Vt. 337.

154. Duplicity and argumentativeness in pleading are causes of special demurrer only; and to avail himself of these, the pleader must point out specifically in his demurrer in what the duplicity, or argumentativeness, consists. You must "lay your very finger upon it." Averring that the plea "is double, containing two distinct matters of defense" (*Onion v. Clark*, 18 Vt. 363); or that "the count is double in that it sets out and attempts to count upon more than one distinct and independent wrongful act or neglect of the defendant" (*Buell v. Warner*, 33 Vt. 570); or that "the replication is double, because it is two replications to a single plea;" or that "it is argumentative" (*Carpenter v. McClure*, 40 Vt. 106; *S. C.*, 37 Vt. 127. *S. C.*, 38 Vt. 375), is an insufficient assignment.

For pleadings in different actions, causes of action, and special defenses, see the appropriate special Titles.

## POSSESSION.

1. Possession as title. Possession is, of itself, sufficient title against all the world except the true owner. *Potter v. Washburn*, 13 Vt. 558.

2. The possession of personal property is a

sufficient title to enable the possessor to recover full damages for an injury to it, or its value for a conversion; and the wrong doer cannot, ordinarily, defeat the action or reduce the damages by proof of title, or general ownership, in a third person, unless the defendant connects himself with the right and title of the owner, or it appears that the property has gone to the owner's use, or unless the owner interferes to assert his right. *Wooley v. Edson*, 35 Vt. 214. *White v. Bascom*, 38 Vt. 268.

3. The possession and use of a chattel as apparent owner, is evidence sufficient, in kind, from which a sale or gift from a former owner may be inferred—to be considered with reference to the length of possession and all the circumstances. *Moon v. Hawks*, 2 Aik. 390. *Bulard v. Billings*, 2 Vt. 309.

4. Mere possession of a chattel with consent of the owner will not render it liable to the debts or disposition of the possessor, though reputed owner; but if the possession be fraudulent, and intended to give the person having it a false credit, it may be taken for his debts. *Moon v. Hawks*.

5. Where a son purchased a farm to furnish a home for his indigent father, and put on tools, stock, &c., and suffered his father there to labor and live;—*Held*, in the absence of proof of fraud, that the products of the farm, though it was carried on by the father, were not subject to attachment for his debts. *Brown v. Scott*, 7 Vt. 57.

6. One who is in the actual possession and occupancy of lands under a deed (*Hull v. Fuller*, 4 Vt. 199),—or by consent of the owner, (*Hall v. Chaffee*, 13 Vt. 150),—or having a mere equitable title thereto (*Hough v. Patriok*, 26 Vt. 435), has sufficient title to maintain an action for the wrongful flowing of the land,—this being an injury to the possession. *Ib.*

7. Where there was a provision in a contract for the purchase of land, that the purchaser should not cut certain timber upon the lot until after certain payments should be made;—*Held*, that this did not preclude him from maintaining trespass against a stranger for cutting such timber, the vendor not interfering. *Hunt v. Taylor*, 22 Vt. 556.

8. In trespass, a prior possession of land under a claim of right, not abandoned, prevailed over a later possession, in *McGrady v. Miller*, 14 Vt. 123.

9. Where the rights of both parties to lands stand upon mere possession not yet ripened into a perfect title, he who has the prior possession has the best right; but if he abandon and surrender it to the adverse party he cannot afterwards set it up. *Austin v. Bailey*, 37 Vt. 219.

10. What is possession. Occasional acts of turning in cattle and cutting timber by

others, upon land in the exclusive possession of a landlord and his tenants, are only trespasses, and do not give a possession in fact, or in law, nor defeat the prior possession. *Swift v. Gage*, 26 Vt. 224.

11. The payment of taxes upon unoccupied lands is not an act of possession, but only evidence of claim. *Road v. Field*, 15 Vt. 672.

12. The record of a survey is evidence of neither title nor possession; and marking trees around a piece of land in the forest is not, of itself, actual possession. Upon such evidence alone, the plaintiff cannot maintain trespass against a stranger to the title. *Oatman v. Foster*, 48 Vt. 462.

13. The survey of a lot of land, and the re-marking of the lines of the lot, and the cutting of some small trees and bushes along the line, as convenience required in making the survey, and the recording of such survey, are an evidence of claim of title, but are not acts of possession. They might characterize acts subsequently done upon the premises, as acts of possession, which might otherwise be regarded as but acts of trespass. *Kidder v. Kennedy*, 48 Vt. 717.

14. Such survey and record do not of themselves constitute color of title, but are only evidence of claim. *Child v. Kingsbury*, 46 Vt. 47. *Atkinson v. Patterson*, 46 Vt. 780.

15. Distinguished from a mere trespass. Under our law, where one enters into possession of land he is presumed to enter and claim in his own right; and if he has a deed of land, this gives character to his acts, and they are to be taken as the acts of an owner, and not a trespasser. *McGrady v. Miller*, 14 Vt. 126.

16. Any act done upon land by one having a deed of it, or other claim of title, which will fairly bear the construction of an act of ownership, although equally an act of trespass in a mere stranger, shall be considered an act of ownership, and does constitute a possession, or an eviction of the true owner who is seized merely by virtue of his title. *Redfield, J.*, in *Spear v. Ralph*, 14 Vt. 400, citing *Doolittle v. Linsley*, 2 Aik. 155. *Sawyer v. Newland*, 9 Vt. 868. *Ohlson v. Buttolph*, 12 Vt. 281.

17. Where the character of a party's acts of possession of land was in question;—*Held*, that the fact that his devisor claimed to own the lot, the ground of such claim, as also that the executor claimed it as part of the estate, were admissible evidence tending to give to his acts done under such title, or color of title, the character of acts of possession done under a claim of right. *Soule v. Barlow*, 48 Vt. 182.

18. Where a witness in his deposition testified that he "occupied" certain land, stating the extent as to time and space;—*Held*, that this was admissible; that occupancy is not so far a question of law as to render it incompe-

tent for a witness to testify to it in general terms, though without explanation such general statement would often be open to criticism as to the weight of evidence. *Kidder v. Kennedy*, 48 Vt. 718. Occupation is a fact. The effect of it, when its nature and extent are shown, is a matter of law. *Child v. Kingsbury*, 46 Vt. 47. See *Stevens v. Dewing*, 2 Aik. 112. *Hale v. Rich*, 48 Vt. 217.

19. Where the plaintiff had full color of title, and was doing continuously such acts of possession under such color as would constitute possession in fact as against a person without title, or better right;—*Held*, that if the defendant would stand on adverse possession, he must show a better title in order to give his contemporaneous acts efficacy as against the plaintiff. *Ames v. Beckley*, 48 Vt. 395.

20. In order that the fencing in of a lot of land should avail in making title or possession, it must be for the purpose of inclosing it as one's own, and not merely as a more convenient mode of inclosing the lands connected with it. *Soule v. Barlow*, 48 Vt. 182.

21. Effect as notice. An open exclusive possession and improvement of land for any considerable time, is sufficient notice, as against an attaching creditor or purchaser, of the possessor's title; as, of an unrecorded deed, &c. *Rublee v. Mead*, 2 Vt. 544. 23 Vt. 559.

22. A purchaser from the record owner of land is bound to notice the possession of another, and takes subject to the right indicated by such possession. *Sellick v. Starr*, 5 Vt. 255.

23. It is a general rule, both at law and in equity, that the open and exclusive possession of land is notice to a purchaser, or attaching creditor, of the possessor's title. *Pinney v. Fellows*, 15 Vt. 525. *Griswold v. Smith*, 10 Vt. 454. *Wright v. Bates*, 18 Vt. 350. *Pope v. Henry*, 24 Vt. 560. *Hackett v. Callender*, 33 Vt. 97.

24. Where a wife, in conjunction with her husband, had been for years in the open and exclusive possession of land in which she had an equitable estate arising from a resulting trust;—*Held*, that an attaching creditor of the trustee, in whom was the legal title, was affected with notice of the trust. *Pinney v. Fellows*.

25. Possession of lands under a license is notice to a subsequent purchaser, or incumbrancer, of whatever title the one in possession may have, whether legal or equitable. *Pope v. Henry*, 24 Vt. 560.

26. The possession of land under a claim of title is notice to a purchaser, of such facts affecting the apparent title of the grantor, as the purchaser could have ascertained upon inquiry. In such case, the purchaser takes the title precisely as his grantor held it. (This



applied to the case of an estoppel *in pais* as against the grantor.) *Shaw v. Beebe*, 85 Vt. 204.

27. Where one erects a dwelling upon the land of another by parol license and with the right to remove it, and occupies it, how far his possession is notice of claim of title to a purchaser of the land—*quære*. *Powers v. Denison*, 30 Vt. 752. But see *Wing v. Gray*, 86 Vt. 269. *Rudlee v. Mead*, 2 Vt. 544.

28. **Constructive possession.** Where one purchases a whole lot and goes into possession, though he actually possesses but a part, as one acre, he is, in contemplation of law, in possession of the whole. *Pearsal v. Thorp*, 1 D. Chip. 92.

29. If a person enters upon a lot or tract of land with visible boundaries, under a deed of the entire tract, his actual occupation and improvement of a part is construed as a possession of the whole. His possession, under such circumstances, is co-extensive with his claim of title. *Crowell v. Beebe*, 10 Vt. 38. *Ralph v. Bayley*, 11 Vt. 521.

30. So, if the deed gives definite and certain boundaries to the premises; nor is it essential that the deed be recorded. *Spaulding v. Warren*, 25 Vt. 316, 322.

31. The same is the law as to a pitch and survey, though not recorded, where the lines are actually run and visibly marked upon the land. So, a deed defectively executed, but showing color of title, is evidence of the extent of a possession under it. *Beach v. Sutton*, 5 Vt. 209. 88 Vt. 846.

32. Possession of part of a lot, claiming the whole, gives color of possession of the whole, which, in construction of law, is possession itself. It is not necessary that such claim should be by deed recorded, nor even by a deed. It is enough that it be in writing, capable of being produced on request; or even that it be distinctly indicated upon the land by unequivocal monuments, which would not fail to attract the attention of counter-claimants. *Redfield, C. J.*, in *Swift v. Gage*, 26 Vt. 224.

33. One may have the constructive possession of land as well without written claim of title, as with it. Where the manner of occupying a portion of the land clearly indicates to every observer the extent of the claim of possession, every occasional entry of such possessor will be construed an act of possession, and not a bare trespass—which it would be in one making no claim of title—and this is all that is meant by constructive possession. *Buck v. Squires*, 28 Vt. 498.

34. In ejectment, the defendant claimed title by possession to a quite small piece of land almost inclosed by his fences, and which would be entirely, by extending his fence a little further in the same direction, upon which parcel his acts of possession had been only

occasional and furtive for more than fifteen years. The court charged the jury, that if the fence was so constructed and so far extended towards the disputed land, as to give notice to the public and all concerned that the defendant claimed to exercise exclusive dominion over the disputed land by extending the fence so as to include it, whenever it should be convenient to complete his inclosure, and that it was left open for the time for convenience of use, or because it was not then of sufficient importance to be inclosed, the jury would regard this as sufficient possession. *Held* correct. *Buck v. Squires*. But see *Hodges v. Eddy*, 88 Vt. 827, 848.

35. Where a road was cut leading to some particular portion of a lot, with the apparent and avowed purpose of clearing the land and getting timber, and this was done in connection with a paper claim of title;—*Held*, that this was an act of ownership and a possession of the lot. *Spear v. Ralph*, 14 Vt. 400.

36. Where the plaintiff was in the actual occupation of part of a lot, under a written contract of purchase describing the land as "Lot No. 5 in the 12th Range," &c., although such contract was not recorded and was from one who did not appear to have any title, or claim of title, it was *held* that such possession of part extended by construction to the entire lot, so as to enable the plaintiff to maintain trespass against a stranger for cutting timber on a part of it which was unimproved and uninclosed. *Hunt v. Taylor*, 22 Vt. 556.

37. The general principle, that where one enters into possession of lands under a deed and actually occupies a part, he is presumed to be in possession of the whole, to the limits defined in his deed, extends to the case of an entire undivided tract, formerly made up of different parcels lying contiguous to each other, with title derived from different sources, although, in the deed conveying the entire tract, the several parcels of which it is composed are separately described. *Webb v. Richardson*, 42 Vt. 465.

38. It is now settled, contrary to the earlier decisions in this country, that where a person, though without title or color of title, enters upon a vacant lot having a definite boundary marked upon the land, and actually occupies a portion of it, such person, by claiming to be the owner to the boundary lines of the lot, has a constructive possession of the whole, and will acquire a title to the whole by such partial occupation for fifteen years; and such entry and claim give him a good prior possession of the whole, which is a good title against all the world, except the true owner of the lot. *Poland, C. J.*, in *Hodges v. Eddy*, 88 Vt. 827.

39. Constructive possession, defined to be a possession in law, without possession in fact. *Id.*

40. It is universally held, that the owner of land who enters into and holds possession of a portion of the land covered by his deed, claiming under his deed, is, by construction, and by virtue of his claim under his deed, legally in possession of all that his deed covers, though he has not the actual possession of the whole. While thus in possession, no other person can gain or have a constructive possession of any part of his land, and he can be disseized in no other way than by an actual entry and occupation of another; and an actual occupation of any part of his land by one entering upon him cannot be extended, by construction, beyond the portion occupied. There cannot be two constructive possessions of the same land at the same time. *Poland, C. J. Id.*

41. Possession under a deed which is vague and indefinite as to extent, cannot be extended by construction beyond the actual possession. *Hull v. Fuller, 7 Vt. 100.*

42. An actual possession, within and according to the limits of a survey, cannot extend, by construction, beyond the limits of the survey. *Olsen v. Foster, 18 Vt. 263.*

43. The doctrine of constructive possession will not be extended to land in the actual, exclusive, adverse occupation of a disseizor. *Stevens v. Hollister, 18 Vt. 294.*

44. The doctrine of constructive possession of a whole tract of land by actual possession of a part, applies only to such quantity as may reasonably be supposed to have been purchased and entered upon for purposes of cultivation, and for use; and has no application to a case where a person takes and maintains possession of a few acres in an uncultivated township, especially where the purpose was to gain thereby a title to the entire township by possession, to the exclusion of the rightful owners. *Chandler v. Spear, 23 Vt. 868.*

45. A constructive possession was held limited to the bounds given in the deed under which the party claimed, and not extended to another line beyond, although, for a part of the distance along that line, he had occupied for more than 15 years. (The necessary *indicia* of claim, in order to constitute a constructive possession where there is no paper title or claim—suggested.) *Shedd v. Powers, 28 Vt. 653.*

46. Where the defendant claimed by adverse possession to a line not marked or indicated upon the land so as to be discernible;—*Held*, that the fact that he had for more than twenty years maintained a fence beyond said line and embracing, with the land in dispute, lands of the plaintiff beyond said line, did not give the defendant a constructive possession to such claimed line, by virtue of his actual possession of other parts of the land. *Wood v. Willard, 37 Vt. 377.*

47. Restriction of. A party may withdraw his claim to land of which he has a title, as by adopting a wrong line for his boundary; and by this means, although his title may remain, his constructive possession of the part abandoned ceases, and at the same time the constructive possession of another may commence against him. *Crowell v. Bebee, 10 Vt. 38.*

48. The constructive possession which one would otherwise acquire, coextensive with a recorded survey, by actual possession of a part, may be restricted by his acts and declarations showing that his claim of title is not equally extensive with the survey; as, by pointing out a line within the survey, and recognizing that as his boundary. Possession by construction has never been held to extend beyond the claim of title. *Brown v. Edson, 23 Vt. 357.*

49. Where one is in actual possession of part of a lot of land, and has constructive possession of the whole, a subsequent conflicting possession by another cannot be extended, by construction, beyond the actual limits of the actual adverse occupation. *Ralph v. Bagley, 11 Vt. 521. Crowell v. Bebee, 10 Vt. 38.*

50. The principle enunciated in *Davis v. White, 27 Vt. 751*, that a prior constructive possession of land must yield to a subsequent actual possession, is not law; except with the qualification, that such subsequent possession has continued for fifteen years. *Hodges v. Eddy, 38 Vt. 327.*

51. There is but one mode in which the true owner of land can lose his constructive possession of his land, covered by his deed, without being actually dispossessed. Where the owner agrees with an adjoining proprietor on a line of division between them, which is really within the true line, and withdraws all claim to the land lying beyond the agreed line, his constructive possession is limited to that; and the adjoining proprietor, who claims to such line, has his possession extended by construction to the same line; and if such mutual claim and acquiescence are continued for fifteen years, the title becomes fixed to that line upon both sides. *Poland, C. J. Id.*

52. Where the defendant claimed title to a whole lot by adverse possession for 15 years, the plaintiff put in evidence a deed to the defendant, executed within 15 years, of a part only of such lot. *Held*, that such deed was evidence against the defendant, as tending to limit the extent of his possession and claim, but was not conclusive as matter of law. *Shepherd v. Hayes, 16 Vt. 486.*

53. Possession referable to one's claim of right. Possession merely, as a ground of claim of title, must always be referred to the claim of right which the party makes at the time; and if to a deed, which is finally shown

to convey no right, it would be rank absurdity to presume another independent grant. *Redfield, J.*, in *Smith v. Higbee*, 12 Vt. 118; and see *Ford v. Flint*, 40 Vt. 382.

54. Where one justified his use of water for his mill by right in himself, and also showed an outstanding right in a third person, but did not show that he had succeeded thereto;—*Held*, that he should be holden to have done the act complained of under his own title, and could not avail himself of the other. *Rogers v. Bancroft*, 20 Vt. 250.

55. Where both parties claim title from the same person, the title of such person need not be shown; but he will prevail who has the better right from this common source. *Brooks v. Chaplin*, 3 Vt. 281. 29 Vt. 408.

56. A previous naked possession for a short period, unsupported by any color of right, was held not to prevent the application of this rule, but that such possession was merged in the supposed title afterwards acquired by purchase, so that it could not be set up at the trial as an independent claim of title. *Id.* *Austin v. Rutland R. Co.*, 45 Vt. 215.

57. The purchaser at a land-tax sale, admitted to be invalid, entered upon the land under a claim of title and cut some timber for the purpose of taking possession of the lot, and afterwards obtained a deed of the lot from the collector. *Held*, that such sale gave him no right to enter upon the land, certainly not until the time limited for its redemption had expired; and gave him no color of title which would extend his possession constructively beyond the limits of the land actually occupied; and that his colorable title must be restricted to the time of his obtaining the deed. *Wing v. Hall*, 47 Vt. 182.

58. Where one in the possession of lands without color of title took a deed thereof to his wife;—*Held*, that his possession thereafter, and that of his wife after his decease, should be referred to the apparent right acquired by such deed, and the color of title given thereby. *Austin v. Rutland R. Co.*, 45 Vt. 215.

59. A lost deed whose contents are proved by parol, though it give color of title only, is admissible to characterize a possession under it. *Oatman v. Barney*, 46 Vt. 594.

60. Length and character of possession to give full title. Fifteen years' uninterrupted possession of land, under a claim of title, vests the title in the possessor. *Barlow v. Boune*, Brayt. 135. The same as to the right to a water course. *Rogers v. Page*, Brayt. 169. *Id.* 201.

61. Fifteen years' adverse possession of lands by a defendant will bar the plaintiff's right, whether the defendant's claim be in his own right, or in right of another; as, a town. *Boothe v. Coventry*, 4 Vt. 295. 28 Vt. 614-15.

62. It is perfectly well settled, that an actual adverse possession, continued for fifteen years, by one having even no color of title, will divest the true owner of his title to the extent of such adverse possession, even when the true owner is in possession of a portion of the land covered by his title, in such manner that he would have constructive possession of the residue, except for his actual disseisin by the adverse holder. *Poland, C. J.*, in *Jakeway v. Barrett*, 38 Vt. 328.

63. Title to lands, or any interest therein—as a right of way or other easement—acquired by fifteen years' adverse possession, is as perfect as though derived by deed from the original proprietor. Hence, no verbal transfer, surrender, or declaration, made after the title has so ripened, can affect it. *Hodges v. Eddy*, 41 Vt. 485. *Austin v. Bailey*, 37 Vt. 224. *Tracy v. Atherton*, 36 Vt. 520. *Perrin v. Garfield*, 37 Vt. 304.

64. Adverse possession. If one by verbal contract purchases lands and pays the stipulated price, and goes into possession under such purchase as the present absolute owner, and continues the possession as such owner under such claim for 15 years, his title is thereby perfected. But if, by the contract, he is to have the premises if he pays the price, and never complies with the condition, his possession for 15 years would not ripen into a title, not being adverse, but would enure to the benefit of his vendor. *Adams v. Fullam*, 43 Vt. 592.

65. A and B made a parol exchange of lands, deeds to be executed when B paid A the difference. Each went into possession according to the exchange, and B occupied for more than fifteen years, set the land in his list and paid the taxes, but claimed no title except according to the contract. B, never having paid the difference, and no deeds having been executed, finally surrendered the land to A, and retook possession of the other land. *Held*, that B had acquired no title by such possession under the contract, and had no interest in the land after surrender which was subject to execution for his debts, though existing before the surrender. *Adams v. Fullam*, 47 Vt. 558.

66. Where the property of one man is left upon the premises of another, with the knowledge and assent of that other, so long as he suffers the property to remain upon his premises without objection, or request to remove it [in this case for more than thirty years], exercising no act of ownership and making no claim to it, so long the title remains the same, and is unchanged by mere lapse of time; though such lapse of time might be an element to be considered by the jury in determining the issues submitted. *Noble v. Sylvester*, 42 Vt. 146.

67. *Held*, that in order to show that one's possession of lands was under a claim of owner-

ship, he may prove that, while he occupied, he asserted ownership by bringing and prosecuting to judgment an action of trespass for an entry on the premises. *Hollister v. Young*, 42 Vt. 408.

68. **Continuous.** To constitute a continuous possession of lands, the occupant need not be on the land continually, and the mere fact that time intervenes between successive acts of occupancy does not necessarily destroy the continuity of the possession, which may be preserved by intention; and as evidence of such intention and claim, and of the adverse character of his possession, the declarations of the occupant made at the time are admissible in his own behalf, whether made on or off the land. *Webb v. Richardson*, 43 Vt. 465.

69. **Non-user** is not necessarily an abandonment. This is a question of fact, dependent upon intent. *Cong. Society of Halifax v. Stark*, 34 Vt. 243.

70. In a case resting upon prior possession, a lapse of 15 years or more between any of the acts of possession, does not, *per se*, and as matter of law, constitute an abandonment of the first possession. The question of abandonment is one of fact for the jury, and any presumption to be drawn from such lapse of time is a presumption or inference of fact, and subject to be rebutted. *Patchin v. Stroud*, 28 Vt. 394; and see *Perkins v. Blood*, 36 Vt. 273.

71. The plaintiff sought to make title to lands by fifteen years' adverse possession, and his evidence tended to show possession and continuous claim. The defendant, not having the legal title, proved that during said fifteen years he entered upon the land and "logged it," and cut off a large amount of pine timber, claiming to own it under deeds exhibited. The court ruled that this interrupted the plaintiff's possession, so as to arrest the running of the statute of limitations. *Held* erroneous, and that the question should have been submitted to the jury in connection with the plaintiff's evidence, as it is not every trespass upon one's possession that will have that effect, more especially when committed by a stranger to the title. *Webb v. Richardson*, 43 Vt. 465.

72. *Held*, that such erroneous ruling, made before the plaintiff's evidence in reply was closed, was not cured by a special finding of the jury that, leaving such interruption of possession out of consideration, fifteen years' adverse possession was not shown in the plaintiff; for the effect of such ruling was to cut off further evidence of the plaintiff on that point. *Id.*

73. The plaintiff was in possession of lands under claim by a tax deed, when W, under whom the defendant claimed, entered, claiming to own the land and to have paid the tax, and to have a receipt therefor. The plaintiff and

W then agreed, that W was to continue in possession the remainder of that season, and if he did not produce to the plaintiff that receipt he should surrender up the premises to the plaintiff; but W never produced the receipt and that fall abandoned the possession, and made no claim afterwards. *Held*, that this was no recognition of the plaintiff's right, but a hostile possession during that season, and broke the continuity of the plaintiff's possession, so that he could not tack his prior to his subsequent possession to make out fifteen years' possession. *Austin v. Bailey*, 37 Vt. 219.

74. **Tacking.** Acts of possession upon land by one who is under a contract to purchase it, constitute a possession in the vendor; for, until actual conveyance, the vendee stands in the relation of tenant, or *quasi* tenant, to the vendor. *Spear v. Ralph*, 14 Vt. 400.

75. Acts done upon land by license, or sub-license, enure to the benefit of the first licensor and claimant. *Wing v. Hall*, 47 Vt. 182.

76. Actual occupation under a claim of title, although without color of title, will avail a subsequent occupant, claiming under the former occupant, in making out a possessory title in himself. *Day v. Wilder*, 47 Vt. 583.

77. There is no tenure or privity between a tenant for life, and the remainder man, where each claims under the same devise. Hence the possession of the life tenant will not enure to the remainder man. *Austin v. Rutland R. Co.*, 45 Vt. 215.

78. **Vacant.** While the possession of land is vacant, no presumption can arise against the legal title. *Appleton v. Edson*, 8 Vt. 239. *White v. Fuller*, 38 Vt. 201.

79. **Notoriety.** In this State, all entries under a claim of right, even by strangers, are held to be an actual eviction of the owner of which he is bound to take notice, at the peril of losing his estate after the lapse of fifteen years. *Whitney v. French*, 25 Vt. 663.

80. To constitute a disseisin of the owner of uncultivated lands, by the entry and occupation of a party not claiming title, the occupation must be of that nature and notoriety, that the owner may be presumed to know that there is a possession of his land adverse to his title. *Hagood v. Burt*, 4 Vt. 155.

81. **First entry by license.** One going into possession of land under a parol gift and remaining quietly in possession for fifteen years, acquires good title by the mere acquiescence of the donor, or owner, whoever he may be. And the possession is regarded as quiet, unless interrupted by a forcible ouster, or legal proceedings for that purpose. *Pope v. Henry*, 24 Vt. 560. 2 Vt. 544. 13 Vt. 150.

82. Possession taken under a license to occupy permanently, either absolutely or upon conditions, gives, in equity, a title to the prem-

ises, according to the terms of the license, and a court of equity will, in proper case, decree an assurance of the title stipulated; as, where the contract has been performed on one part, by making permanent erections of value. *Id.*

**83. Possession as evidence of boundary.** While evidence of use and occupation alone has no legal tendency to show where a disputed line was, yet if the occupancy was in accordance with the line in dispute, it tends to show where the line was. *Beach v. Fay*, 46 Vt. 387.

**84.** Sometimes, the condition of lands and the circumstances accompanying the occupancy of them will rebut the presumption that such occupancy was adverse, or under a claim of right. Thus, where the true line between two adjoining proprietors was a straight line of 180 rods, having well-established permanent boundaries, and corners, and for half that distance there was a straight fence upon the line, and for the rest of the distance there was a slash fence running zig-zag in the general course of the true line, but irregular and varying from the true line, apparently as convenience required in the building over broken and ledgy ground;—*Held*, in the absence of affirmative evidence to the contrary, that such facts were sufficient to rebut the presumption that the occupation on either side of the zig-zag fence beyond the true line, was adverse. *Morse v. Churchill*, 41 Vt. 649.

**85. —with acquiescence of adjoining proprietor.** Possession between adjoining proprietors according to a line which is mutually understood to be an uncertain, or not the true line, under an arrangement that the correct line shall be afterwards ascertained and run, is not an adverse possession, but leaves each in possession according to the deeds, claiming to the true line; and such possession does not establish the incorrect line by acquiescence. *Burnell v. Maloney*, 89 Vt. 579.

**86.** As a general rule, an admission by a party of a mistaken line for the true one has no legal effect upon his title; and a mutual recognition of a wrong line by adjoining proprietors, and their acquiescence in such line, unless accompanied by possession of one, or both, according to it, and that continued for fifteen years, are not conclusive as to their respective rights. *Crowell v. Bebee*, 10 Vt. 88.

**87.** But such mutual recognition and acquiescence in a given line, accompanied by actual possession of one, or both, for the period of fifteen years, will be conclusive as to their respective rights. *Spaulding v. Warren*, 25 Vt. 316.

**88.** A mere acquiescence, for fifteen years, in a line as the dividing line between adjoining proprietors, although but one of the owners, and perhaps neither, is in actual possession, is, we think, sufficient to establish that as the true

line of division, if known and claimed by both. *Brown v. Edson*, 28 Vt. 435.

**89.** The recognition by the proprietors of adjoining lots of a particular line as their division line, and their acquiescence in this for 15 years, with possession accordingly, either actual or constructive, of both or either of the lots, establishes this as the true division line. *Clark v. Tabor*, 28 Vt. 232. *Childs v. Kingsbury*, 46 Vt. 47. *Davis v. Judge*, 46 Vt. 655. *White v. Everest*, 1 Vt. 188. *Beech v. Parmelee*, 9 Vt. 352. *Burton v. Lasell*, 16 Vt. 158. *Ackley v. Buck*, 18 Vt. 895.

**90.** A line thus established was *held* conclusive, although in fact the original and true line was in a different place, and neither party had actually occupied the strip between the two lines, and no fence had been built on either line. *Burton v. Lasell*.

**91.** Where the plaintiff took a deed of land described as bounded on the pitch of another, made a survey conformable to his deed, as he supposed, went into possession, and occupied for about thirty years according to the survey;—*Held*, in an action of trespass against a stranger in which the declaration described the premises as in the deed, that it was no defense to show that the description given did not cover the land trespassed upon, where the plaintiff's survey and possession extended beyond the line of the pitch upon which the deed was bounded, and in fact covered the place of the trespass. *Meacham v. Fay*, 6 Vt. 208; and see *Burton v. Lasell*, 16 Vt. 158.

**92.** Where A purchased land of B and went into possession and occupied as owner, but without deed, and afterwards sold the land to C, to whom B afterwards conveyed directly;—*Held*, that the acquiescence of A in a boundary line, during the time of his occupation, was as binding as if the legal title had been in him. *Sheldon v. Perkins*, 37 Vt. 550.

**93. Easements.** Rights to easements acquired by long possession ought to stand on the same ground as rights by possession in lands, and the doctrine of the law in the two cases should harmonize—and so *held*. *Tracy v. Atherton*, 36 Vt. 508.

**94.** The statute of limitations does not extend to incorporeal rights, but, in analogy to it, the uninterrupted use of an easement, under a claim of right, for the period fixed by the statute as a bar to the recovery of lands held adversely [15 years], gives the person so using the easement a full and absolute right to it, as much as if granted to him. The presumption arising from such long-continued possession, unrebuted, is a presumption of *law*, and is conclusive. *Id.* *Townsend v. Downer*, 82 Vt. 204. *Victory v. Wells*, 39 Vt. 494.

**95.** It is the general rule, that the enjoyment of an easement is presumed to be adverse

unless something appears to rebut that presumption. This is the general rule, where there is no express evidence that the use was accompanied by a claim of right, and no express evidence of a disclaimer of the right. *Perrin v. Garfield*, 87 Vt. 304.

96. In order to the acquiring of an easement in lands by use, whether notice of such use to the owner of the lands is necessary—*quære. Ib.*

97. Where one enjoys the use of an easement in a manner otherwise sufficient to gain a right by adverse use, he will not be prevented from acquiring the right, by the owner of the estate in which the right is claimed occasionally objecting or denying the right, but not interfering with or interrupting the enjoyment of it, having the power to do so, where the enjoyment is had in spite of the objection;—the easement being of such a character that the claimant has only to enjoy the use, without other adversary acts on his part. Such permissive use amounts to an acquiescence, which is the same as saying that the possession is *uninterrupted*. *Kimball v. Ladd*, 43 Vt. 747. *Tracy v. Atherton*, 36 Vt. 503.

98. Where one claims a prescriptive right in the lands of another, he must show affirmatively an adverse continuous use for fifteen years, under a claim of ownership, or as of right. In absence of any proof or circumstances indicating the contrary, it may do to assume that the use is adverse and under a claim of right. But where the nature of the use is doubtful, the question of adverse use under a claim of right is for the jury, not the court. *Plimpton v. Converse*, 42 Vt. 712.

99. On the other hand, the *prima facie* presumption is, that the enjoyment of one's own land is an exercise of his right to so enjoy it; and where another claims a right against the owner by an adverse use which has occasionally been interrupted by the owner, the burden is upon the other to show that such interruptions were consistent with his claim, and not upon the owner to show that they were inconsistent with it. *Ib.*

100. **Non-user.** A right arising from a grant, and not from prescription—as, a right of fowling—is not lost by *non-user* where it cannot be used without encroaching upon the rights of others created by deed; but the use may be resumed whenever such adverse right is extinguished. *Mower v. Hutchinson*, 9 Vt. 242.

101. **Adverse possession as avoiding a conveyance.** The statute "to prevent fraudulent speculations, &c.," first passed in 1807, avoiding a conveyance when a third person is in adverse possession (G. S. c. 65, s. 27), was merely a legislative declaration of an established principle of the common law. *Robinson v.*

*Douglass*, 2 Aik. 364. *University v. Joslyn*, 21 Vt. 52. *White v. Fuller*, 38 Vt. 203.

102. It does not apply where the conveyance is by operation of law; as, by levy of execution. *Farnsworth v. Converse*, 1 D. Chip. 139.

103. Or by an officer of the State or of the United States. *Aldis v. Burdick*, 8 Vt. 21.

104. Nor does this Statute apply where a trust estate is conveyed to the uses for which it was originally created. *Mitchell v. Stevens*, 1 Aik. 16.

105. Nor, where a trustee conveys to his *cestui que trust*—as, an administrator to the heirs of the estate; nor, where chancery would compel a conveyance. *Appleton v. Edson*, 8 Vt. 239.

106. Nor, where a conveyance is made by the agents of a municipal or public corporation, acting in the line of official duty. *White v. Fuller*, 38 Vt. 193.

107. When a trust relation exists between the parties, a conveyance by either, that merges the legal and equitable estates, is not within this statute. *Stacy v. Bostwick*, 48 Vt. 192.

108. The defendant's possession under a levy of execution against the plaintiff is not adverse to the plaintiff's title, so as to avoid a deed to the plaintiff from a third person. *Hall v. Hall*, 5 Vt. 304.

109. As between mortgagor and mortgagee, the possession of either does not prevent the other from conveying his title to a third person. *Converse v. Searls*, 10 Vt. 578.

110. To avoid a deed for adverse possession, the possession must be wholly adverse to the grantor, and the claim of the possessor be to an estate entirely to the exclusion of any right or title existing in the grantor, and under a title adverse to him. Thus, where the possessor claims a life estate under the grantor, though against the will of the grantor, such possession does not avoid the grantor's deed, and such deed conveys whatever title the grantor had. *Selleck v. Starr*, 6 Vt. 194.

111. P claimed a life estate in land, and S claimed the fee adversely, both claiming under the same devise. P by deed leased the land to the defendant, while S was in adverse possession. Afterwards S deeded the land to W *subject to P's life estate*, and W conveyed to the plaintiff. *Held*, that the plaintiff could not avoid the lease from P by reason of the then adverse possession of S. *Hibbard v. Hurlburt*, 10 Vt. 173.

112. Where the grantor of land remains in possession of the land conveyed, claiming it as his own, to the knowledge of his grantee, this is such an adverse possession and disseisin of the grantee as avoids his deed to a stranger. *Stevens v. Whitcomb*, 16 Vt. 121. *Robinson v. Douglass*, 2 Aik. 364.

113. Where one entered into possession of land under a parol contract of purchase, and had performed on his part so as to entitle him to a deed, which was refused, and he so continued in possession, claiming adversely;—*Held*, that this was such an adverse possession and claim as avoided a deed of his vendor to a third party. *Ripley v. Yale*, 19 Vt. 156.

114. Contract and deed good between the parties. A contract for the sale of lands of which a third person is in adverse possession, is not corrupt, nor against the policy of the law, nor prohibited by the statute. The only effect of the statute is to render the deed void for the purpose of transferring the legal title; but the equitable title does pass by such deed, and will be protected, in a court of law, against any interference of the grantor. *Edwards v. Parkhurst*, 21 Vt. 472. 26 Vt. 609. 28 Vt. 364.

115. A conveyance executed when a third person is in adverse possession is void only as to the person in adverse possession, and his privies. It is good between the parties to it, and is a license to the grantee to do any act upon the land which the grantor might do, and enables him to do any such acts, in the name of the grantor, as may be necessary to establish the grantor's title, which title, when established, will enure to the benefit of the grantee. *Edwards v. Roys*, 18 Vt. 473. *University v. Joslyn*, 21 Vt. 52. *White v. Fuller*, 38 Vt. 204.

116. Possession a question of fact. Whether there was a possession adverse to the grantor, so as to avoid his deed, is a question for the jury, and is not to be determined by the court upon the question of admitting the deed in evidence. *Stevens v. Dewing*, 2 Aik. 112.

117. Where the question was whether the defendant's cutting of a tree inside of a fence which the plaintiff claimed as the true division line between him and the defendant, but which was in dispute, interrupted the continuity of the plaintiff's adverse possession for fifteen years up to the fence, the court refused so to rule as matter of law, but left the question to the jury. *Held* correct. *Hale v. Rich*, 48 Vt. 217.

118. Chancery. Under the circumstances of the case, an orator obtained a decree who stated his title under a deed from one out of possession, and where the defendant was in adverse possession. *Smith v. Blaisdell*, 17 Vt. 199.

As to change of possession as affecting sales, see SALES, III.; MORTGAGE, 209, *et seq.*

### POSTMASTER.

1. A postmaster is answerable for the negligence of his clerks and servants in the office

who are not his appointed and sworn deputies, whereby a letter is lost. *Christy v. Smith*, 23 Vt. 668; and see *Danforth v. Grant*, 14 Vt. 283.

2. In an action against a postmaster for that he "carelessly and negligently" lost a letter, alleging his negligence in such general terms;—*Held*, that the defendant was not entitled to a charge that the plaintiff must, in order to recover, "show some particular act of negligence in relation to the letter, and that the loss was the direct consequence of that particular negligence;"—that general proof tending to show that the loss was occasioned by negligence, and which satisfied the jury that the loss was so occasioned, was sufficient to sustain the declaration and the action. *Christy v. Smith*.

See OFFICER, 7-8.

### POUNDS AND IMPOUNDING.

1. Inclosure. Under the statute of 1797 (Slade's Stat. c. 55, s. 3), authorizing the impounding of cattle found *damage feasant* in the owner's "inclosure";—*Held*, that the right to impound did not exist unless the *locus in quo* was inclosed by a legal fence, except such fences as the owner or keeper of the cattle, or the adjoining proprietor, was bound to keep in repair. *Mooney v. Maynard*, 1 Vt. 470. *Porter v. Aldrich*, 39 Vt. 326.

2. The word *inclosure*, as used in the impounding acts, (Slade's Stat. c. 55, s. 3. R. S. c. 88, s. 4. G. S. c. 100, s. 4), imports land inclosed by some visible or tangible obstruction, such as a fence, hedge, ditch, or something equivalent, for the protection of the premises against encroachment by cattle; and differs from the word *close*, which embraces land owned by a party, or of which he is in the rightful possession, although inclosed only by the imaginary boundary line which defines its territorial limits. *Porter v. Aldrich*.

3. Under G. S. c. 100 s. 4, enacting that "any person may impound any beast found in his *inclosure* doing damage,"—*Held*, that where the law, under the special facts of the case, has cast upon the owner of the beast the duty of keeping it off the land of another, such land is the inclosure of the owner, whether fenced or not, within the meaning of this statute. *Keith v. Bradford*, 39 Vt. 34.

4. Fences. The remedy by impounding does not extend to beasts found *damage feasant* upon wild, uncultivated, unimproved and unoccupied lands lying open and common; nor, as between the owner of occupied lands and the adjoining proprietor, where the beasts enter

upon such owner's land through his neglect in regard to his portion of the division fence. It is otherwise, as between such owner and persons other than the adjoining proprietor. *Porter v. Aldrich*, 39 Vt. 326.

5. Under R. S. c. 88, s. 16, neither of two adjoining proprietors, whose lands were under cultivation and without division fence between them, could impound the cattle of the other, *damage feasant*. *Hooper v. Kittredge*, 16 Vt. 677.

6. **Pound.** Where a town is destitute of a pound, one may impound in his own inclosure, or in that of another person. (G. S. c. 100, s. 3.) *Riker v. Hooper*, 35 Vt. 457.

7. Where a town was destitute of a pound, but the pound-keeper received the beast as pound-keeper and confined it in his private inclosure;—*Held*, that an action to recover the penalty for not replevying or redeeming the beast, and for the legal charges, must be in the name of the pound-keeper, and not of the impounder. *Ib.* (G. S. c. 100, s. 10.)

8. A "pound" is some place where beasts are to be confined, kept and fed. Where a party, after lawfully impounding cattle in his own barn-yard, turned them out to graze in his inclosed fields near his barn-yard, during the days, but put them in his barn-yard, nights, he was *held* to have lost thereby his legal control of them. *Harriman v. Fifield*, 36 Vt. 841.

9. **Charges—Appraisal.** The impounder of cattle taken *damage feasant* and regularly impounded, may lawfully detain the same until the payment or tender of the legal charges and expenses of impounding and keeping the cattle, although there has been an irregular appraisal of damages, or no appraisal. *Harriman v. Fifield*. *Keith v. Bradford*, 39 Vt. 34. *Porter v. Aldrich*, *Ib.* 333.

10. One having a right to take up and impound cattle *damage feasant*, took them to his own premises and claimed to keep them until the damages done on that and previous occasions should be paid. *Held*, that the taking and detention were unlawful, and that replevin lay therefor. *Ladus v. Branch*, 42 Vt. 574; and see *Holden v. Torrey*, 31 Vt. 690.

11. The impounder of cattle taken *damage feasant* does not become a trespasser *ab initio*, nor is he prevented from justifying the impounding, in replevin, by a neglect to give notice under the statute for the appointment of appraisers to appraise the damage, nor of the time of the appraisal, nor by an appraisal fraudulently procured. Such an appraisal would be void; and as the appointing of appraisers is only to ascertain the damages, no appointment of appraisers is necessary where the claim for damages is waived. *Keith v. Bradford*, 39 Vt. 34. *Moore v. Robbins*, 7 Vt. 363. *Harriman v. Fifield*, 36 Vt. 341.

*Holden v. Torrey*. *Porter v. Aldrich*, 39 Vt. 336.

12. **Notice of impounding.** A party acting in his own behalf, who impounds another's beasts, becomes a trespasser *ab initio* by neglecting to give the statutory notice of the impounding; and this is part of the impounder's justification, to be by him alleged and proved. *Porter v. Aldrich*.

13. A mere servant of the impounder of cattle, acting by the immediate request of his employer in the transaction of impounding, does not become a trespasser *ab initio* by the subsequent neglect of his employer to give the statutory notice of the impounding; otherwise, as to a general agent acting in the absence of his principal. *Ib.*

14. **Limitation.** The limit of forty-eight hours, given in G. S. c. 100, s. 10, for the owner of cattle impounded to replevy or redeem the same, must be understood with this qualification,—if the damages can be so soon ascertained, and, if not, as soon as they can be ascertained. *Mellen v. Moody*, 23 Vt. 674. 31 Vt. 692.

15. Replevin does not lie against a pound-keeper for detaining impounded cattle beyond the forty-eight hours, although no certificate of the appraisal has been received by him, where the damages cannot be ascertained within that time; and before such action will lie against the pound keeper, the owner must first pay the appraised damages, and all just costs. *Ib.*

16. **Certificate of appraisal.** An appraisal of the damages made according to the provisions of the statute, and without fraud, is in the nature of a judgment; and the certificate of the appraisers would be conclusive. *Harriman v. Fifield*, 36 Vt. 343. *Holden v. Torrey*, 31 Vt. 694.

17. **Impounder may defend possession.** A person engaged in the lawful attempt to impound cattle has the right to defend, by reasonable force, his possession of them for the purpose for which he has taken them in charge, and to the same extent that a sheriff has, to protect his possession of property taken by him on legal process. *Barrows v. Fassett*, 36 Vt. 625.

18. **Time for notice.** The twenty-four hours prescribed by the statute for the giving of notice to the owner that his beasts have been impounded, are to be reckoned from the time they are delivered to the pound-keeper. (G. S. c. 100, s. 5.) *Moore v. Robbins*, 7 Vt. 363.

19. **Remedy of pound-keeper.** A pound-keeper cannot recover of the impounder, in an action of book account or on an implied contract, for the keeping of the cattle impounded, whether the impounding be lawful, or unlawful. *Williams v. Willard*, 23 Vt. 369.

20. **Penalty.** The forfeiture of 17 cents a day to a pound-keeper, where the owner of the



cattle impounded does not, after 48 hours' notice, redeem or replevy them (G. S. c. 100, s. 10), is wholly a penalty, and *extra* the compensation for support of the cattle. *Eduards v. Osgood*, 33 Vt. 224.

21. The penalty for not replevying or redeeming a beast impounded, and the legal charges for the keeping, are separate claims, but both may be joined in the same suit. *Riker v. Hooper*, 35 Vt. 457.

22. **Evidence.** The plaintiff's cow was found *damage feasant* on land of the defendant and his partner, and was by such partner taken up and detained as a mode of recovering the damage done—but unlawfully. *Held*, that the defendant's acquiescence and consent to the taking and detention of the cow, after this came to his knowledge, was sufficient to charge him in replevin; and that the fact of such partnership relation was entitled to some consideration, as evidence against him, in connection with evidence tending to show such acquiescence and consent. *Riley v. Noyes*, 44 Vt. 455.

See REPLEVIN.

## PRACTICE.

(*At law.*)

- I. GENERALLY; AND IN COUNTY COURT
- II. IN SUPREME COURT.

### I. GENERALLY; AND IN COUNTY COURT.

1. **Appearance.** One defendant in an action *ex contractu* may, in the absence of instructions to the contrary, employ counsel, enter appearance, plead, and defend fully for all. *Scott v. Larkin*, 18 Vt. 112. 44 Vt. 551.

2. This is limited to the case where the other defendants have had personal notice of the suit. *Whitney v. Silver*, 22 Vt. 634.

3. The defendants were partners and, as such, were sued. There was no personal service on the defendant L, who resided out of the State and had no knowledge of the suit until after judgment therein; but the defendant T, who resided in the State and had the management of the partnership business there, was personally served, and employed an attorney for both defendants, and they, by such attorney, appeared and consented to judgment against both, which was rendered, and execution issued. At the next term suit was brought on the judgment, and at a subsequent term the court, on motion of L for that purpose, vacated said judgment as to him, and ordered the cause brought forward upon the docket for trial as to him.

*Held*, that the county court had the legal power so to do. *Franks v. Lockey*, 45 Vt. 395.

4. After an appearance and imparlance, all defects in personal service are waived. *Cott v. Sheldon*, 1 Tyl. 800.

5. Where a party comes in and challenges a process on account of its defects, an appearance for that purpose concludes the party only to that extent. *Propagation Society, &c., v. Ballard*, 4 Vt. 119.

6. Before the statute of 1807, relating to files lost, &c.,—*Held*, that the county court had no authority to make a general or special rule, so as to compel the defendant to appear and answer to a new declaration, when the original files were lost. *Kinne v. Plumb*, 1 Tyl. 20.

7. **Death of party.** Where a sole defendant died after service of the writ, but before the return day;—*Held*, not a case for entry, and citing in his administrator to defend, under the then statute as to suits *pending*. *Hyde v. Leavitt*, 2 Tyl. 170.

8. Under the probate act of 1821 (Slade's Stat. 345), the administrator of a party who died during the pendency of a suit, where the cause of action survived, could not enter, nor be cited in, to prosecute or defend after the next term of court following the granting of administration. *Tyler v. Whitney*, 8 Vt. 26. *Wentworth v. Wentworth*, 12 Vt. 244. (Changed by R. S. of 1839. G. S. c. 52, ss. 21, 22.)

9. Where one party to a suit dies, it is in the discretion of the court, under G. S. c. 52, s. 24, to say how long the suit shall be continued to await the appointment of an administrator; and where the court dismissed such a suit, because of an unwarrantable delay in the appointment of an administrator, the supreme court refused to examine the question. *State Treasurer v. Raymond*, 16 Vt. 364. 24 Vt. 302.

10. It is not necessary, in the entry of a second administrator to prosecute a pending suit, that it should appear to be by special leave of the court. This is a matter of course which the court could not legally refuse. *Steen v. Bennett*, 24 Vt. 308.

11. **Precedents.** *Precedents*—"as having become incorporated into the common law of procedure in this State." See *Burnell v. Dodge*, 33 Vt. 465. *Eastman v. Curtis*, 4 Vt. 620.

12. **"Not for jury."** Where a party sets down a case "not for the jury," this means, by long-settled practice, that he shall show good cause for a continuance, or submit to a judgment against him. *Briggs v. Gleason*, 32 Vt. 472. *Bradley v. Chamberlain*, 31 Vt. 468. *Chamberlin v. Murphy*, 41 Vt. 110.

13. In such case, he is not entitled to have the damages assessed by a jury. He has declared of record, that there is nothing in his case which he claims to have tried by jury. *Briggs v. Gleason*.

14. In such case, the defendant loses his legal right to a formal trial, either by court or jury, upon any branch of the case, even the damages; and the court might order the damages assessed by the clerk. *Chamberlin v. Murphy*, 41 Vt. 116.

15. But it is in the discretion of the court to determine the damages in either mode; and if submitted to a jury, exceptions will lie to any error of the court on such trial. *Id.*

16. In an action upon a promissory note, judgment passed against the defendant on his setting down the case "not for the jury." *Held*, that the defendant could not show, on the assessment of damages, that the note was given for money lost at play and that the plaintiff had agreed for good consideration to surrender it; and *held*, that the plaintiff was entitled to judgment for the amount appearing to be due upon the note. *Sweet v. McDaniels*, 39 Vt. 272. See *Bradley v. Chamberlain*, 81 Vt. 468.

17. **Questions as to time and order of proceedings.** The time within which a plea in set-off, in an action of book account, shall be filed in the county court, rests solely in the discretion of that court, which cannot be revised by the supreme court. *Ainworth v. Drew*, 14 Vt. 563.

18. A motion to dismiss a new declaration, unless the motion raises a question of jurisdiction, will not be entertained after a plea to the merits has been made to it. *Stevens v. Hewitt*, 30 Vt. 262.

19. In an action upon a probate bond (G. S. c. 60, s. 2), it is within the discretion of the county court to allow the prosecutor to file a certified copy of the bond and the certificate of permission to prosecute, after the entry of the suit and after a motion to dismiss for lack of such papers. *Probate Court v. Niles*, 32 Vt. 775.

20. It is within the discretion of a court to allow a non-suit, even after verdict. *Squires v. Burgess*, 31 Vt. 466. So done, in *Dow v. Hinesburgh*, 2 Aik. 18.

21. A plea in abatement may be waived after a non-suit entered, or after a judgment upon it for the defendant, and the cause proceed to judgment upon the merits. *Egerton v. Hart*, 8 Vt. 207.

22. A replacer cannot be awarded after judgment upon a material issue. *Page v. Walker*, 1 Tyl. 145.

23. **Discretion.** In an action of assumpsit against two, one pleaded and gave in evidence his discharge in bankruptcy under the Bankruptcy Act of 1841, and there was no evidence against it. The defendants then moved for a non-suit or discontinuance as to him, with a view to using him as a witness. The court refused this. The defendants then moved for a continuance, which the court refused, and the

trial proceeded to judgment. *Held*, no error. *Brown v. Munger*, 16 Vt. 12.

24. On a judgment rendered by a justice on default, the plaintiff brought an action of debt, summoning a trustee. Pending this suit in the county court, that judgment was vacated on petition and the original suit brought into the county court, so that both stood on the same docket. The court refused, on the plaintiff's motion, to consolidate the two suits, because not identical, but ordered the discontinuance of this suit and the discharge of the trustee, without disclosure, allowing to the defendant one cent cost, leaving the balance of the costs to abide the event of the suit brought upon the docket by petition, and to the trustee his costs. *Held* correct. *Brigham v. Mosseauz*, 20 Vt. 517.

25. In an action on note, the defendants claimed to have paid all but a trifling balance. Such payment was disputed, and the plaintiff, after the testimony was closed, offered and proposed to the court that if the jury should find the payment proved they should render a verdict for the defendants; and requested the court so to instruct the jury. The defendants objected to this, and the court refused so to instruct the jury, who returned their verdict for only such small balance. (The effect of a verdict for the defendants would have been, to entitle the plaintiff to a review.) *Held*, that there was no error. *Austin v. Bingham*, 31 Vt. 577.

26. **Affidavits.** In the administration of justice, *ex parte* affidavits are frequently admitted to bring facts to the notice of the court; as, on motions for a continuance, and for a new trial, &c. The other party usually has the right to produce counter affidavits, and no injury can result, as the court will take care that no unfair advantage is had. *Hill v. Hogaboom*, 18 Vt. 141.

27. **Agreed statement.** An agreed statement of facts filed in the county court is subject to the control of that court, the same as the pleadings; and the court may, in its discretion, allow the same to be withdrawn. *Fayston v. Richmond*, 25 Vt. 446.

28. **Specification.** A specification, or bill of particulars, filed, is treated and considered as incorporated with the declaration, and the plaintiff is not allowed to give any evidence out of them. Under counts for money had and received, and on an account stated, the plaintiff filed a bill of particulars specifying, as his claim, two promissory notes particularly described. *Held*, that it was not competent to give evidence of, and recover upon, the pre-existing debt, or original consideration. *Bank of U. S. v. Lyman* (U. S. C. C.), 20 Vt. 666.

29. A bill of particulars or specification of the plaintiff's demand under a general count,

is not to be regarded as a part of the declaration for the purposes of the subsequent pleadings, but only as a limitation upon the plaintiff's proof. *Lapham v. Briggs*, 27 Vt. 26; and see *Phelps v. Conant*, 80 Vt. 277.

30. A specification is only a bill of particulars to advertise the defendant of what he is to meet; and it is not important that it be determined to which particular count the claim applies. *Hicks v. Cottrill*, 25 Vt. 80.

31. The particularity or minuteness required in a specification under the general counts, there being no variance, is matter of practice and discretion, and not ground of error. *Hodges v. Rut. and Bur. R. Co.* 29 Vt. 220.

32. The plaintiff is not precluded by his specification from recovering upon a cause of action not included therein, where it is embraced in the declaration and would be proper matter for specification, and grew out of the subject matter of the specification actually filed, in a case where the defendant admits such cause of action on trial. The purpose of a specification is to prevent surprise. *Greenwood v. Smith*, 45 Vt. 87.

33. In an action of general assumpsit, where a specification, describing the claim substantially, was filed, and the testimony was offered and received without objection;—*Held*, that after the close of the plaintiff's testimony, it was too late to object for a variance between the testimony and the specification. *Phelps v. Conant*, 80 Vt. 277.

34. The plaintiff did certain mechanical work for the defendant, agreeing to furnish his own tools. In fact he used the defendant's tools, and credited the defendant therefor in his specification. The defendant did not expect to charge for such use, but this was unknown to the plaintiff. On the trial, the plaintiff sought to withdraw such credit, but the defendant insisted upon it. *Held*, that, as in justice and equity the credit ought to be allowed, the plaintiff should be held to the credit he had given in his specification, either in abatement of so much of his claim, or as a counter-claim. *St. Martin v. Thrasher*, 40 Vt. 460.

35. **Paying into court.** The county court may provide by a general, or special rule, for the paying of money into court, conditioned that the plaintiff accept it and discontinue his suit, or proceed at his peril as to further costs. *Redfield, C. J.*, in *Sanborn v. Chittenden*, 27 Vt. 171.

36. The sum paid in must include the costs up to that time. *Goslin v. Hodson*, 24 Vt. 140.

37. The defendant paid into court a sum of money sufficient to satisfy any damages which the plaintiff could recover under his declaration, and the costs to that time, which sum the

plaintiff took, but did not discontinue his suit. He afterwards, by leave of court, filed a new count, but for the same cause of action, enlarging his right of recovery under a new rule of damages. *Held*, that under the new count he could recover the excess. *Hill v. Smith*, 84 Vt. 535.

38. **Evidence subject to objection.** Receiving evidence *subject to objection* is a reservation of the right to point out the objection at a future stage of the trial. If not so done, the objection is waived, or, rather, not made. *Hills v. Marlboro*, 40 Vt. 648.

## II. IN SUPREME COURT.

39. By act of Nov. 18, 1824 (Slade's Stat. 118), the authority of the supreme court to try issues of fact was virtually taken away, and they were required to be tried in the county court. *Bishop v. Bothwell*, 2 Aik. 231.

40. **Original papers.** There is no rule requiring a party to file in the clerk's office original papers used by him at the trial below. The excepting party must see to it, at his peril, that he has copies for the court, and, for that purpose, may have access to such papers on application to the opposite party or his counsel. If a personal inspection of original papers becomes necessary in the supreme court, the party having them must produce them on reasonable notice. *Pingry v. Watkins*, 16 Vt. 518.

41. **Ex parte hearing.** Where the defendant excepted and the plaintiff failed to appear in the supreme court;—*Held*, as matter of practice, that the plaintiff should not be treated as having become non-suit, but the defendant should be heard *ex parte* on his exceptions. *Winn v. Sprague*, 35 Vt. 248.

42. **Order of argument.** Where a case is before the supreme court on demurrer, the demurring party will open the argument, whichever party may have excepted and brought the case up. *State Treasurer v. Merrill*, 14 Vt. 557.

43. Upon a memorial to the court, after verdict against a corporation upon a *scire facias* to vacate its charter, showing reasons why, in equity and good conscience, the charter should not be declared vacated;—*Held*, that the memorialist was entitled to open the argument. *State v. Bank of Windsor*, 14 Vt. 562.

44. Where exceptions are taken on both sides, the plaintiff is generally entitled to open and close the argument. *Lampson v. Hobart*, 27 Vt. 784.

45. Where exceptions are taken on both sides, and the plaintiff's exceptions are to a decision which affects his right to recover some portion of his demands, the practice of the supreme court is to allow him to open the argu-

ment on his own exceptions, and then to have a general reply; but where his exceptions are only to the rule of damages adopted, and the defendant's exceptions go to the entire right of recovery, the defendant is allowed to open on his own exceptions, and to have a general reply. *Peters v. Farnsworth*, 15 Vt. 786. *McFarland v. Stone*, 16 Vt. 145.

**46. Reading of authorities.** It is not considered regular to read authorities in the closing argument, unless it be to explain those read upon the opposite side. The party who merely refers to cases in his opening argument, without reading, is understood to acquiesce in such authorities not being read; and unless they are read by the opposite side, he is not strictly entitled to take them up again. *Cutter v. Thomas*, 24 Vt. 647.

**47. Making points.** It is the practice of the supreme court to require counsel in the opening argument to make the points on which they rely, so that the opposing counsel can have an opportunity to reply. Where some new points were started in the close, the court declined to consider them. *Edwards v. Leavitt*, 46 Vt. 126.

**48. Question not raised below.** The practice of raising objections in the supreme court which were undiscovered and unheeded in the trial below,—censured, as “a deviation from professional propriety and duty,” by *Redfield, J. Sequin v. Peterson*, 45 Vt. 255.

**49.** Such questions not specified and shown by the record to have been raised below, will not be revised, nor noticed. *Sargeant v. Butts*, 21 Vt. 99. *Dana v. Lull*, *Id.*, 388. *Bingham v. Hutchins*, 27 Vt. 569. *State v. Preston*, 48 Vt. 12. *Hathaway v. Nat. Life Ins. Co.*, *Id.* 335. See VARIANCE.

**50.** In a case of partition, *Royce, J.*, says: Some of the points now made in the defense have no connection with the question on which the case turned in the court below. We are at liberty, nevertheless, to notice these additional grounds, because, if it appears upon any view of the case that the plaintiff cannot legally sustain his petition, it will follow that the result of the trial was right, and the judgment should not be disturbed. *Hawley v. Soper*, 18 Vt. 320.

**51. Instances.** Where a declaration in offset, clearly bad on demurrer and, perhaps, on motion in arrest, was not objected to below, but the general issue was pleaded thereto, and a trial had;—*Held*, that any objection thereto was not properly before the supreme court. *Keyes v. Waters*, 18 Vt. 479.

**52.** A plea in set-off had the common counts only, under which a recovery was had for the use of a carriage hired, and damages sustained to it by negligence in the use. No objection having been raised, in the county court, to a recovery for such damages on the ground that

the count therefor should have been special;—*Held*, that the objection could not be raised in the supreme court. *Thompson v. Congdon*, 43 Vt. 396.

**53.** Where an action of general assumpsit has been tried upon its merits, the supreme court will not entertain an objection that the declaration should have been special, where the judgment, if affirmed, will protect the party in reference to the matter actually litigated, unless the objection was raised in the county court. *Lamphere v. Cowen*, 42 Vt. 175.

**54.** During the pendency of a suit in the county court, the plaintiff died, and the suit was further prosecuted by his administrator to judgment, and the cause passed to the supreme court upon exceptions by the defendant. The defendant then, for the first time, filed a motion to dismiss the suit, on the ground that the cause of action did not survive. *Held*, that this was not like the case of a want of jurisdiction in the court; that as the question was not raised and decided in the county court, the supreme court would not entertain the motion, as there was nothing to revise. *Dana v. Lull*, 21 Vt. 388.

**55.** If the certificate of “willful and malicious” is made in a proper case in the county court, an affirmance of the judgment by the supreme court extends to the certificate also. But where no such adjudication was made below, an original motion for such adjudication and certificate can not be entertained in the supreme court. *Nichols v. Packard*, 16 Vt. 147. *Dodge v. Carpenter*, 18 Vt. 509.

**56. Death of party.** Where a party dies between the judgment in the county court and the hearing in the supreme court, the practice is to affirm or reverse the judgment, *nunc pro tunc*. *Adams v. Newell*, 8 Vt. 190.

**57. Former decision in same case.** A decision once made by the supreme court is to be held conclusive and final upon the point decided, and to be the law of that case; and no re-argument of the question can be had in the same case. *Herrick v. Belknap*, 27 Vt. 673, 699. *Ross v. Bank of Burlington*, 1 Aik. 48. *Dana v. Nelson*, 1 Aik. 252.

**58.** The supreme court will not revise a former decision of the same court, made in the same cause, upon substantially the same state of facts. *Stacy v. Vt. Cent. R. Co.*, 33 Vt. 551. *Burker v. Belknap*, 39 Vt. 168.

**59. Whether case shall be remanded, or be finally disposed of.** All cases once brought into the supreme court on exceptions are finally disposed of there, unless a jury trial becomes necessary, or unless, by the decision, the case is placed in such a state that either party has a right to a trial by jury. In that event, only, is the cause remanded. *Peach v. Mills*, 13 Vt. 501.

60. A case is never remanded from the supreme to the county court, but is finished in the supreme court, unless some issue to the jury stands closed upon the record, which is to be tried before the case can be further proceeded with. *Porter v. Smith*, 20 Vt. 344. 24 Vt. 646.

61. Whenever a judgment of the county court has been found to be erroneous, and it could be ascertained by computation what the judgment ought to have been, the practice of the supreme court has been to make the correction, without sending the case back for a new trial. *Chandler v. Spear*, 23 Vt. 388, citing *Sutton v. Burnett*, 1 Aik. 209. *Paris v. Vail*, 18 Vt. 284-6.

62. Where judgment was rendered in the county court under a rule that, in case of reversal by the supreme court, it should enter judgment for the other party;—*Held*, that such rule, though binding upon the parties, was not necessarily imperative upon the court; and that, if the case turns upon points not anticipated when the rule was made, and, in the opinion of the court, requires the further action of the jury, it will be remanded for a new trial;—and it was so done. *Foster v. Collamer*, 10 Vt. 466.

63. **As to final judgment on reversal.** Where the judgment below is found erroneous and is reversed, it is then the settled practice of the supreme court to look into all the issues standing upon the record, and to render such a judgment as the county court should have rendered. *Wires v. Farr*, 24 Vt. 645. G. S. c. 42, s. 4.

64. Where all the facts are found and reported, the supreme court, after a reversal, renders such judgment as the law requires upon the facts. *Bank of Newbury v. Richards*, 35 Vt. 281.

65. Where the judgment below is reversed on exceptions taken by one side, it is then the duty of the court to examine the whole case, and render such judgment as the county court ought to have rendered, and thus correct the errors made against the other party, though no exception was taken thereto. But where the judgment is not reversed upon the exceptions so taken, the court cannot revise a decision against the other party to which he took no exception. *Wheelock v. Moulton*, 18 Vt. 430. *Cummings v. Fullam*, *Id.* 434. *Clark v. Clark*, 21 Vt. 490.

66. Where the supreme court reverses a judgment upon exceptions taken by one party only, and is then required to render such judgment as the county court ought to have rendered, the whole case is open to render the proper judgment; and an error against the right of the non-excepting party may be corrected, so far, at least, as relates to any ques-

tion raised in the county court. But where the judgment below is not reversed, any decision not excepted to is not open to revision. *Wakefield v. Merrick*, 38 Vt. 82.

67. Rulings of the county court, not excepted to, are not open for consideration in the supreme court, in the first instance. But where the whole case is before the court—as, on the report of auditors—inasmuch as, in case of a reversal upon the exceptions taken, the court will render such judgment as the county court should have rendered, the party not excepting is entitled to argue provisionally the points decided against him in the county court. But unless the excepting party prevails on his exceptions, the judgment will be affirmed of course. *Davis v. Partridge*, 19 Vt. 481.

68. Upon an auditor's report, the county court allowed some items and disallowed others of the plaintiff's account. The defendant excepted as to some of the items allowed, and prevailed as to these in the supreme court. The supreme court, on reversing the judgment below, proceeded to render such judgment as the county court ought to have rendered, by allowing to the plaintiff some of the disallowed items, although he had not excepted. *Burton v. Norwich*, 34 Vt. 345.

69. Where a judgment is more favorable to a party than he is entitled to have it, he cannot have it reversed on his own exceptions; and, it not being opened on his exceptions, the other party, unless he excepted, is not entitled to have it corrected in his favor. *Erwin v. Stafford*, 45 Vt. 390.

70. A judgment was reversed on the plaintiff's exceptions, although he recovered one dollar damages and his exceptions were not to the ruling upon the question of damages. *Wood v. Shurtleff*, 46 Vt. 325.

71. The supreme court will not look into the record to discover an error not excepted to, nor correct such suggested error, unless the judgment below is reversed upon the exceptions taken and a new judgment rendered upon the whole record. *Yates v. Pelton*, 48 Vt. 314.

72. **Retaining case after reversal.** The reversal of a judgment of the county court opens such issues only as were affected by the errors for which the judgment is reversed. If these were issues of law, upon demurrer, and the judgment below is reversed and a repleader awarded, strictly speaking the case should be retained in the supreme court until, by the new pleadings, some issue of fact is joined, when it should be remanded. *Kinsman v. Paige*, 24 Vt. 656.

73. A repleader was awarded in the supreme court, after a reversal of the judgment, in *Parkhurst v. Sumner*, 28 Vt. 538.

74. On exceptions to a judgment for the penalty of a probate bond, rendered on

demurrer to the declaration, the supreme court reversed the judgment, and rendered judgment that the prosecutor become non-suit. *Probate Court v. Brainard*, 48 Vt. 620.

75. The supreme court reversed a judgment rendered on the report of an auditor to the county court, and, because the facts were too indefinitely found and stated, referred the case to auditors appointed by the supreme court. *West v. Cutting*, 19 Vt. 536.

76. In an action of book account, after reversing a judgment of the county court that the writ abate, the supreme court rendered judgment that the defendant account, and appointed auditors. *Peach v. Mills*, 18 Vt. 501. *Vanderburg v. Clark*, 22 Vt. 185.

77. **Remanding after reversal.** It is the common practice of the supreme court, where they reverse a judgment upon the facts as found and reported by the county court, to proceed and render final judgment, such as the facts found warrant; but in this case, the court, on reversing the judgment, granted a new trial. *Smith v. Hill*, 45 Vt. 90.

78. Instance of reversing a judgment upon a referee's report, and remanding the case to the county court for recommitment to find further facts. *Davis v. Davis*, 48 Vt. 502.

79. Instance of correcting the judgment below, on reversal, by reference to the trial judge's minutes. *Sherman v. Champlain Transportation Co.*, 81 Vt. 162.

80. **Reversal pro forma.** Judgment (for plaintiff) reversed *pro forma*;—it appearing that an affirmance might embarrass the plaintiff in pursuing a just claim, but in a different form of action; but costs were allowed as in case of an affirmance. *Lassell v. Burton*, 16 Vt. 188.

81. The supreme court refused to reverse a judgment *pro forma* and allow the plaintiff to amend his declaration, where such amendment had been suggested in the county court and the plaintiff declined it. *Denison v. Tyson*, 17 Vt. 549.

82. **Report direct to supreme court.** In a case referred in the supreme court, the court refused to hear any exceptions to the report except such as showed partial and corrupt conduct of the referees. *Koeler v. Beers*, Brayt. 215. *Webber v. Ives*, 1 Tyl. 441.

83. A party was allowed the usual time, under the rule, for filing exceptions to a report of auditors made to the supreme court, in a cause there referred, after his motion to recommit had been disposed of. *Cummings v. Fullam*, 15 Vt. 787.

84. **Testimony—Special rules.** Where petitions for new trials, entering appeals, &c., are continued, it is customary to make rules, if desired, for taking the testimony in vacation, upon notice. *Blowens v. Hyde*, 16 Vt. 188.

85. **Affidavits.** *Ex parte* affidavits ought

not to be received in the supreme court, as to loss of papers, &c.; certainly not, unless filed in time to allow the opposite party to take counter affidavits. *Fish v. Field*, 19 Vt. 141.

86. Simple affidavits, taken on notice to the adverse party, are admissible on the trial of matters of fact in the supreme court. The provisions of the statute relative to the taking of depositions in civil causes, do not apply in such cases. *Briggs v. Green*, 83 Vt. 565.

### PREScription — PRESUMPTIVE GRANTS.

1. Twenty years' quiet enjoyment of flowing adjoining lands by the waters of a mill-pond secures the right by prescription, or rather affords the presumption of a grant of the easement. *Hulburt v. Leonard*, Brayt. 201. Fifteen years is sufficient. *S. C.*, *Id.* 202. *Mitchell v. Walker*, 2 Aik. 266.

2. In analogy to the statute of limitations, a prescriptive right to an incorporeal hereditament arises from fifteen years' possession and use adverse to the owner—that is, under a claim of right—the right acquired being absolute, or qualified, according to the use and claim. *Id.* 19 Vt. 161.

3. If a party prescribing for a right has, within the fifteen years of use, acknowledged the superior right of the other party, although under a mistake of facts and of their relative rights, the presumption of a grant is rebutted. *Mitchell v. Walker*. 2 Aik. 266.

4. The doctrine of presumption arising from use, as of a grant of a right, or easement in land, is founded in analogy to the statute of limitations, and is applicable to cases for which the statute has not provided; and the evidence in support of such presumptive right must at least be sufficient to have established the legal right, provided the statute had extended to the case in judgment;—that is, the use must be adverse, uninterrupted, and for the period limited by the statute. *Shumway v. Simons*, 1 Vt. 58.

5. The doctrine of presumptive grants applies only to those cases which are not strictly within the statute of limitations. *McFarland v. Stone*, 17 Vt. 165.

6. Indeed, I hold it not competent for the court to raise a presumption, from mere lapse of time, against one who, by positive provision of the statute of limitations, is exempted from its operation. *Phelps, J.*, in *Wells v. Morse*, 11 Vt. 9. 32 Vt. 191.

7. No principle is better settled, than that the extent of the presumed right is determined by the use upon which the presumed grant is founded, the right granted being only co-exten-

sive with the right enjoyed; and if the enjoyment [as of the use of water] has been limited as to times of use, or of quantity, the right is thus limited. *Shrewsbury v. Brown*, 25 Vt. 197.

8. The extent of a right which is acquired in the land of another by a use of it for 15 years, is to be determined by the claim of the party using it, and the acquiescence of the other party. *Arbuckle v. Ward*, 29 Vt. 43.

9. If the use originated in a contract, and has been consistent therewith, reference should be had to the contract for determining the extent of the right claimed and acquiesced in. *Id.*

10. Where no contract is shown, and the use was known to the adverse party, or was so open and notorious that such knowledge would be presumed, the use will be presumed to have been under a claim of right, unless the contrary is shown. *Id.*

11. That a use began by permission of the land owner is not alone sufficient to defeat a prescription. For, if the permission was a perpetual or unlimited gift, or permission to use, and has been continued for 15 years, this is not a "precarious enjoyment," and the right is perfected. *Id.*

12. In cases not within the statute of limitations, grants are presumed or proved by mere length of possession and without auxiliary circumstances. *University of Vt. v. Reynolds*, 8 Vt. 542. *Townsend v. Downer*, 82 Vt. 205. *Tracy v. Atherton*, 86 Vt. 508. *Victory v. Wells*, 89 Vt. 488.

13. Adverse possession alone, unaccompanied by other circumstances, for any period less than the time required by the statute to bar the adverse party's right, is no ground for presuming a grant, or for supplying by presumption a deficiency in a title. *Townsend v. Downer*, 82 Vt. 188. *Wells v. Morse*, 11 Vt. 9.

14. Where a conveyance or release is presumed from lapse of time, this presumption is made in favor of the legal estate, and to quiet, always, but never to disturb a possession. Such presumption is never made in favor of a stranger, or of a vacant possession, or against the legal title—as, in behalf of a stranger and where there had been a vacant possession, against a mortgagee, that the mortgage debt had been paid. *Appleton v. Edson*, 8 Vt. 239. 82 Vt. 202. 88 Vt. 201.

15. A deed is sometimes presumed to quiet a possession, but not to extend title; possession being the indispensable basis upon which all such presumptions must rest. *Brown v. Edson*, 28 Vt. 485. 82 Vt. 214; citing *Appleton v. Edson*, 8 Vt. 239. *Williams v. Bass*, 22 Vt. 852.

16. In cases within the statute of limitations, mere length of possession, unaccompanied by other circumstances, is not sufficient to raise the presumption of a grant. But where

there has been a long and uninterrupted possession consistent with the grant to be presumed, and there are other circumstances which make it reasonable to believe that such grant was actually made, but through great lapse of time, or other causes, the proper evidence of such grant cannot be found and is probably lost or destroyed, the jury may, upon such evidence, find that a grant has in fact been made. *Townsend v. Downer*, 82 Vt. 188.

17. This presumption, in such case, is one of fact and not of law. *Id.* *Hazard v. Martin*, 2 Vt. 77. *Doolittle v. Holton*, 28 Vt. 819.

18. The circumstances relied upon in aid of a long possession must be consistent with such possession, and with the fact to be presumed. *Townsend v. Downer*. *Wells v. Morse*, 11 Vt. 9. *Sellick v. Starr*, 5 Vt. 255.

19. If a deed conveying an entire tract or several different parcels is sought to be proved by presumptive evidence, possession by the grantee of a part of the tract, or of some of the parcels, claiming under the deed, is evidence to prove its existence in a suit in which the title to a portion of the tract, or to a separate parcel, comes in question, although there has been no actual possession of the portion or separate parcels sued for. *Townsend v. Downer*, 82 Vt. 188; citing *Hazard v. Martin*, 2 Vt. 77. *Doolittle v. Holton*, 28 Vt. 831. *Coicester v. Culver*, 29 Vt. 115.

20. A lease for the life of the lessee may be presumed from long possession [18 years], and other circumstances, as well as any other estate. *Sellick v. Starr*, 5 Vt. 255.

21. Where there was a surrender of a New Hampshire charter and a confirmatory grant taken from the Royal Governor of New York;—*Held*, that acceptance and long acquiescence alone of the New Hampshire proprietors would be construed as a waiver of the former grant, and confirmation of the latter. *Paine v. Smead*, 1 D. Chip. 56. 8 Vt. 560.

22. In the year 1781, a charter was obtained from the State granting to certain persons a township of land, reserving one-seventieth part for the use of a seminary, or college. The proprietors under the charter made no division, nor successfully asserted their claim, but the whole town was settled and occupied by other persons, none of whom held or claimed under the charter grantees. The University of Vermont, which became entitled to the part so reserved, brought ejectment against the defendant who had been in possession for thirty-eight years, holding adversely. *Held*, that although the statute of limitations, by force of the exception therein, did not apply to the case, yet the long continued possession of the defendant afforded evidence that his possession commenced under a lawful title, and that the jury might and ought to presume, in favor of such

possession, an antecedent grant to the inhabitants of the town, or an abandonment and extinguishment of the charter title, or a surrender of the same and a subsequent grant to the persons in possession. *University of Vt. v. Reynolds*, 8 Vt. 542.

23. In the charter of the town of Victory, granted by the State in 1781, one share or right was specified "to be and remain for the purpose of settlement of a minister and ministers of the gospel in said township forever;" and this "minister right," with two others named, were, "with their improvements, rights, rents and profits to remain inalienably appropriated for the uses and purposes for which they were assigned, and to be under the charge, direction and disposal of the inhabitants of said township forever." The lot in question was drawn to this right as "first minister's right," but had never been appropriated, accepted, or any right to its use acquired under the terms of the charter, by the settlement of any minister of the gospel. It did not appear when the town was organized. It was unorganized as late as 1842. The defendants purchased the lot, in 1825, from a former occupant, paying a full consideration therefor, and taking a deed in which the lot was described as drawn to the right of the first settled minister, and had held possession and occupancy thereof as a home stead farm continuously and adversely to all the world down to the commencement of this action of ejectment brought in 1865, without any pretence of countervailing claim interposed earlier than 1858. *Held*, that this right was not granted to the proprietors, nor to any one else, but was reserved from the grant for the use named; that the trusteeship contemplated by the words, "the inhabitants of said township," was in the organized municipal corporation; and until such organization, or settlement of a minister, it was competent for the State to assume the control and disposition of the right so reserved, and, through the legislature, to grant it to any person or purpose it might deem fit; and hence, it was proper to leave to the jury, in favor of so long a possession under the circumstances, to find as matter of fact, and the jury were fully warranted in finding, that the defendants and their grantors were holding under some valid grant from the State, although there were some circumstances tending to show that such grant was not made; and the ruling below to this effect, and that such possession was *prima facie* evidence that it was originally under legal title by grant from the legislature, was sustained. *Victory v. Wells*, 39 Vt. 488. See *University of Vt. v. Reynolds*, 8 Vt. 542. *Townsend v. Downer*, 32 Vt. 188. *Tracy v. Atherton*, 86 Vt. 503. *Bush v. Whitney*, 1 D. Chip. 369. *Williams v. Goddard*, 8 Vt. 492.

See POSSESSION; HIGHWAY, I., 1.; and 232; PRIVATE WAY.

## PRINCIPAL AND SURETY.

### I. THE RELATION—HOW CONSTITUTED AND EVIDENCED.

#### II. RIGHTS AND LIABILITIES OF SURETIES.

1. *As respects the creditor.*
2. *As respects the principal.*
3. *As between the sureties.*

### I. THE RELATION—HOW CONSTITUTED AND EVIDENCED.

#### 1. Mode of signing—Form and effect.

The legal presumption arising upon an instrument signed by one, and then by others with the word surety added to their names, is, that, as between themselves, the first is principal, and the others sureties for him. *Lathrop v. Wilson*, 30 Vt. 604.

2. But such presumption is not conclusive, and the real relations of the signers may be shown, notwithstanding the form and manner of the signatures. *Id.* *Keith v. Goodwin*, 31 Vt. 268. *Adams v. Flanagan*, 36 Vt. 400.

3. Where several signers of a note, "each as principal," promised to pay;—*Held*, that, as to the payee, they must be treated as principals, and though one was in fact a surety and this was known to the payee, yet he was not released by a contract for delay of payment made by the payee with the other signers. *Claremont Bank v. Wood*, 10 Vt. 582. 26 Vt. 34. 30 Vt. 717. 31 Vt. 258.

4. *Held* otherwise, in like case, except that the word surety was added to his signature. *People's Bank v. Pearsons*, 30 Vt. 711.

5. Where there are several signers to a promissory note, the true relations of the signers and the real nature of the contract, as between themselves, may be shown by parol evidence. Though all appear to be joint principals, it may be shown that some are principals and some sureties. An apparent principal may be shown to be a surety; an apparent surety, a principal; and an apparent co-surety, to be surety for the other sureties. *Adams v. Flanagan*, 36 Vt. 400. *Lapham v. Barnes*, 2 Vt. 220. *Keith v. Goodwin*, 31 Vt. 268. *Lathrop v. Wilson*, 30 Vt. 604. *Pitkin v. Flanagan*, 23 Vt. 160. *Harrington v. Wright*, 48 Vt. 427.

6. Where the plaintiff by a separate writing guaranteed the payment of a note signed by the defendant and others, all apparently principals, but the defendant in fact a surety;—*Held*, that, *prima facie* and without proof that the plaintiff expected to stand as a general surety, the



undertaking was for the other signers jointly, and not jointly with them, and that he was entitled to recover of the defendant the whole sum paid by him upon the guaranty. *Keith v. Goodwin*, 81 Vt. 268.

7. Where different persons successively indorse accommodation paper before it goes into circulation, for the mere purpose of obtaining a discount for one of the parties, they should, *prima facie*, be held to have undertaken for the same thing; that is, that the party obtaining the discount shall repay it, and, if not, that, upon proper demand and notice, they undertake, either jointly or severally, to pay it. In either case, as among themselves, they will be held as co-sureties only. And the order of the indorsement, in such case, raises no presumption of any obligation among themselves different from what grows out of the other facts in the case, and is of no importance either way. *Pitkin v. Flanagan*, 28 Vt. 160.

8. Sureties signed with their principal a note drawn to raise money upon, and made payable to H, or order, at a certain bank. H indorsed the note for the accommodation of the principal, and he afterwards got it discounted elsewhere. *Held*, that H, upon the face of the contract, was an indorser and not a co-surety; and, there being nothing in the case to show that the real relation of the parties was different, that he was not liable to the sureties for contribution. *Briggs v. Boyd*, 87 Vt. 584.

9. One not in fact a joint or sole principal in a contract, but a surety merely, may so stipulate at the time of entering into the obligation as not to be liable to contribution with the other sureties, who have signed before him. The form of doing this is not important, nor that this should appear upon the contract; nor is it important, where he has signed without privity with such sureties as have signed before him, that they should know the terms upon which he signed. *Keith v. Goodwin*, 81 Vt. 268. *Adams v. Flanagan*, 86 Vt. 400.

10. The plaintiff signed a note as surety, upon the erroneous supposition, springing from the deceit of the principal and in no way imputable to the defendant, that the defendant would sign as a co-surety with him. The principal then took the note to the defendant, with the name of the principal, and of the plaintiff as "surety," signed to it, when the defendant, in good faith, and without any knowledge of what the plaintiff supposed as to his signing, signed the note, adding to his signature the word "surety," upon the distinct and express understanding with the principal and the payee that he signed as surety for the plaintiff, and not as co-surety with him. *Held*, that the defendant did not become a joint surety, and therefore was not liable for contribution. *Adams v. Flanagan*.

11. **Consent.** One cannot make himself surety for another, as between themselves, without the latter's request or knowledge. *Lathrop v. Wilson*, 80 Vt. 604. *Peake v. Dorwin*, 25 Vt. 81.

12. After the execution of a note by A, B signed it as surety without the request or knowledge of A. *Held*, that A's subsequent assent and recognition of the act was equivalent to a contemporaneous request, and made B his surety. *Little v. Keyes*, 24 Vt. 118.

13. **Implied authority.** If one signs a note as surety and intrusts it to his principal, he thereby gives an implied authority to obtain either additional sureties, or joint makers, or guarantors, indefinitely, until the note is fairly launched in market as a security having two distinct parties. *Keith v. Goodwin*, 81 Vt. 268.

## II. RIGHTS AND LIABILITIES OF SURETIES.

### 1. As respects the creditor.

14. **How paper may be used.** It is no defense for a surety upon a promissory note drawn for the purpose of raising money upon it, that the principal got it discounted by a party other than the one to whom it was drawn payable, and different from the party agreed upon with the surety. *Briggs v. Boyd*, 87 Vt. 584. *Bank of Burlington v. Beach*, 1 Aik. 62. *Keith v. Goodwin*, 81 Vt. 268. *Bank of Montpelier v. Joyner*, 88 Vt. 481. *Bank of Middlebury v. Bingham*, 88 Vt. 621. *Bank of Newbury v. Richards*, 95 Vt. 281. *Farm. & Mech. Bank v. Humphrey*, 86 Vt. 554.

15. It is no defense for a surety upon a promissory note, against a holder for value taking it before due, that he signed and delivered it to his principal upon the condition and agreement that it should not be used until a certain other person should also sign it, and that it was put in circulation without the procuring of such signature, unless the holder had knowledge of such condition and agreement when he received the note, although he knew that the defendant was a surety. *Pass. Bank v. Goss*, 81 Vt. 815. *Dixon v. Dixon*, 1b. 450. *Farm. & Mech. Bank v. Humphrey*. See *Farm. & Mech. Bank v. Hathaway*, 86 Vt. 539.

16. Where a bank advanced its money in reliance upon notes and drafts on which the defendant was a known surety, and relying upon his liability;—*Held*, in the absence of all fraud and concealment on the part of the bank, that it was no defense, that the bank used the paper in a different way from what the defendant supposed when he signed. *Farmers' Bank v. Burchard*, 88 Vt. 846.

17. The defendant signed a note of \$150 as surety for O, the principal, payable to the

plaintiff bank in common form for discount, and not negotiable, under an agreement with O that O should get it discounted and bring him \$125 of it to apply on O's indebtedness to him, and retain the balance. O offered the note for discount at the bank, which was declined, and thereupon, meeting A, he informed A of his having the note and of his inability to get it discounted, saying that he had tried to get the money on the note in order to pay a certain note of \$150 at another bank on which A was surety for O, and which was past due. Thereupon A proposed to take the note, indorse it himself, get it discounted and apply the proceeds upon a debt that O was owing him. O assented to this, and A took the note, wrote his name on the back of it, got it discounted at the plaintiff's bank, and applied the proceeds on his debt against O, as agreed. When the note fell due it was protested as against him, and he paid it and took it up, and then brought this suit upon the note in the name of the bank, but for his own benefit, against the defendant. *Held*, that the plaintiff could not recover of the defendant, a surety. *Farm. & Mech. Bank v. Hathaway*, 86 Vt. 589.

18. The defendant signed a note with and as surety for S, made payable to a bank, ten days from date. S passed it to the bank to hold as collateral security for not only his present indebtedness, but for any future advances. This arrangement was unknown to the defendant, and the bank knew him to be a surety. *Held*, that it was a perversion of the defendant's obligation to turn it into a continuing guaranty, and that he was not liable on the note to meet advances to S made long after the maturity of the note. *Bank of St. Albans v. Smith*, 80 Vt. 148. See *Harrington v. Wright*, 48 Vt. 427.

19. J gave P his note with sureties, made payable to a bank, for P to get discounted and to apply the proceeds upon J's indebtedness to him; and if not discounted, to return the note to J. The sureties knew nothing of this agreement. P, being unable to get the note discounted, left it with the bank as collateral security for a debt he owed the bank, and so informed J. *Held*, that this was not a misappropriation of the note, and that P, having paid the bank, could recover upon the note, in the name of the bank, against both J and the sureties. *Bank of Montpelier v. Joyner*, 33 Vt. 481; distinguished from *Bank of St. Albans v. Smith*.

20. The defendants executed a negotiable promissory note to A, a manufacturing corporation, for \$1000, part of the signers being in fact sureties for the others, but this not indicated by the note. The note was made to enable the principals to obtain cloth of A, on credit, to the amount of the note. The general

purpose of making the note, and the suretyship of the sureties were known to A. The principals obtained of A upon the note, to part of its amount, as much cloth as he was able to furnish, and then, by understanding with A, they procured other cloth of the plaintiffs upon the credit of the note and of its remaining with A for their benefit, A agreeing to pay the plaintiffs the balance if the note should be paid to A at its maturity. The defendants paid A the amount advanced by A, and after the note had fallen due A indorsed the note for the balance to the plaintiffs. *Held*, that the plaintiffs could recover the balance, as indorsees of the note, against the sureties as well as against the principals. *Lyman v. Sherwood*, 20 Vt. 42.

21. Where the defendant signed a note as surety, under an agreement with his principal that it was given as a general security for a particular unliquidated debt of the principal to the plaintiff, but the principal delivered the note to the plaintiff and assented to its standing as a security for that and also for a further indebtedness to the plaintiff;—*Held*, that unless the plaintiff knew of such agreement, or understood that the defendant so understood it, the note stood as a security for both debts. *Burton v. Blin*, 23 Vt. 151.

22. Force of surety's obligation. A surety to a promissory note is an original maker, and is primarily and absolutely liable, as much so as the principal, to any party lawfully holding the paper; and where the holder is not chargeable with want of good faith and fair dealing, the surety has no advantage over the principal in respect to immunity from liability, except in the instance of a contract with the principal for delay of payment. *Bank of Newbury v. Richards*, 35 Vt. 281.

23. Where principal and surety are bound by the same instrument for the performance of an act of the principal, the same act, or neglect, which charges the principal charges the surety. *Seaver v. Young*, 16 Vt. 858.

24. Agency. The payee of a promissory note may make the surety thereon his agent to collect it of the principal. In such case, a payment of it by the principal to the surety discharges the principal. *Williams v. Baldwin*, 7 Vt. 508.

25. Action. A recovery cannot be had against a surety upon a promissory note, under the count for money had and received, if he prove that he was a mere surety, and did not have the money. *Redfield, C. J.*, in *Lapham v. Briggs*, 27 Vt. 26.

26. In equity. Parties at a receiver's sale of the assets of an insolvent bank, purchased, at a reduced price, a claim for indemnity which the bank held against a surety. *Quære*, whether, under the circumstances, the surety should not be relieved in equity, on the payment of such

sum as would reimburse and indemnify the purchasers. *Loomis v. Fay*, 24 Vt. 240.

27. A mortgage of indemnity given by a debtor to his surety, creates an equitable lien and trust for the benefit of the creditor, to which he is entitled in equity; and *held*, that where the surety had voluntarily assigned such security to the creditor, the creditor took the same benefit therefrom, as if the assignment had been made under a decree in chancery. *Paris v. Hulett*, 26 Vt. 308.

28. **Matters of defense.** The sureties upon a State treasurer's bond were *held* not relieved by the mere fact that they signed the bond, relying upon the report of the State auditor that the treasurer had fully accounted for all moneys received by him, as treasurer, in previous years, whereas in fact he had embezzled such monies. *State v. Bates*, 36 Vt. 887.

29. Where the defense of the principal in a promissory note is altogether of a personal character, as infancy, or coverture, this is not a defense for the surety. So *held*, where the principal was a married woman. *St. Albans Bank v. Dillon*, 30 Vt. 122.

30. **Discharge.** A discharge, by the creditor, of the known principal, discharges also the known surety on the same debt. *Ellis v. Allen*, 48 Vt. 545. *Paddleford v. Thacher*, 48 Vt. 574.

31. **Payment.** C gave the plaintiff his note for interest due upon other notes, agreeing to secure such note by mortgage. The plaintiff, relying upon such promise, indorsed upon the other notes the interest as paid. C failed to give the mortgage, and the plaintiff gave up to him the interest note. In an action against a surety upon the original notes;—*Held*, that the indorsement was prematurely made, and that the transaction did not amount to payment of the interest. *Hayward v. Billings*, 48 Vt. 355.

32. The plaintiff and H signed a note with K, as his sureties, at which time K gave the plaintiff, as his indemnity, a note against the defendant payable to K, or bearer. This last note was mere accommodation paper as between K and the defendant, but the plaintiff had no knowledge of that fact. K paid part of the first note, and the sureties paid the balance. For the part paid by the plaintiff, K gave him a new note payable in six months. *Held*, that this transaction did not operate to release the defendant, but that he remained liable upon his note to the extent of the payment made by the plaintiff on the first note. *Pinney v. Kimpton*, 46 Vt. 80.

33. Where the principal debtor tenders payment of the debt for which a surety is obligated, and the creditor declines to receive it, he thereby discharges the surety. *Joslyn v. Eastman*, 46 Vt. 258.

34. **Effect of release.** The release of the principal cuts off all collateral remedies for the

principal thing released. The release of the principal by the creditor releases the surety; and the release of the principal by a surety cuts off his claim against a co-surety for contribution. *Fletcher v. Jackson*, 23 Vt. 581.

35. **As to securities.** An act of the creditor impairing the securities of a surety, done without his consent and operating to his prejudice, discharges the surety. *Smith v. Day*, 23 Vt. 656.

36. Where a creditor has security placed in his hands by the principal on account of the debt, on which security the surety has a right to rely, the creditor has no right to part with it or appropriate it to any other purpose, without consent of the surety. If he does so, he thereby discharges the surety to the amount of the value of such security. *Hurd v. Spencer*, 40 Vt. 581.

37. The plaintiff having in his hands property of his debtor as security for two demands, for one of which the defendant was surety, promised the defendant to retain from the proceeds of the sale enough to satisfy such demand; but, after the sale, he paid over to the debtor what he had so promised to retain. *Held*, that the defendant was discharged. *Strong v. Wooster*, 6 Vt. 536.

38. If, by any positive and willful act, the creditor releases, or renders unavailing any of his securities against the principal debtor, to that extent he thereby relieves the surety;—as, where he refused on the request of the surety to present his claim to the commissioners on the estate of the principal, and took active measures to prevent its being presented, whereby it became barred as against the estate. *Clark v. Hill*, cited in *McCollum v. Hinckley*, 9 Vt. 143. *Bank of Manchester v. Bartlett*, 13 Vt. 315.

39. Where a creditor merely neglects to present his claim against the estate of the principal debtor, whereby his debt, as against the estate of the principal, is released or barred, we think sound policy would require that the surety should be released to the amount which might have been realized out of the estate of the principal; and, where there is actual fraud, that at law he should be wholly released. *Redfield, J. McCollum v. Hinckley*. But *quære* as to the first statement. See *Bank of Manchester v. Bartlett*.

40. Where the payee of a promissory note, with sureties, surrendered it to the principal for him to exhibit in a trustee suit as evidence that it had been paid, and the principal exhibited it to his sureties as evidence that he had taken it up and paid it, believing which the sureties had omitted to secure themselves and would so suffer loss;—*Held*, that the sureties would be thereby discharged. If one supply another with the means of perpetrating a fraud in his name against one person, and the

fraud be perpetrated by the same means, but against other parties, he is to be held liable. *Wilson v. Green*, 25 Vt. 450. 85 Vt. 486.

41. Where the goods of the principal had been seized and sold on execution, and the creditor had obtained judgment against the sheriff for not paying over the avails;—*Held*, that this was no bar to a recovery against the surety, for that the creditor was entitled to pursue his several remedies until he obtained actual satisfaction. *Bank of Rutland v. Thrall*, 6 Vt. 237.

42. One of several principals in a promissory note, who had agreed with the others to indemnify them against it, delivered to the payee notes against other persons to apply upon this note when collected; but afterwards, by agreement with the payee, they were differently applied,—the payee not knowing of the agreement to indemnify. *Held*, that this was no defense to an action against the other makers. *Pinney v. Bugbee*, 13 Vt. 638.

43. Where a creditor, upon his own motion, brought suit and secured his debt by attachment of the property of the principal debtor, and afterwards released the attachment, and the principal became insolvent;—*Held*, that this did not discharge the surety where he had not requested such attachment to be made, nor that the property attached should be applied on the debt, and where the creditor acted in good faith and with a view to his own interest, and there was no evidence that the attachment was given up in fraud of the rights of the surety. *Baker v. Marshall*, 16 Vt. 522. *Montpelier Bank v. Dixon*, 4 Vt. 587.

44. A creditor may give up such security as he may have obtained of the principal at his own suggestion and without any assistance from the surety, and not thereby release the surety; provided he acts in good faith, and only with reference to his own interests. *Hebard, J.*, in *Crane v. Stickles*, 15 Vt. 252.

45. Where one of several judgment debtors was surety only upon the original debt, and the property of his principals, attached upon the writ, had become discharged of the lien by neglect of the creditor to take it in execution, and the principals had since become insolvent;—*Held*, that these facts afforded no ground for relief at law; as, to set aside on *audita querela* an execution and levy upon the surety's property. *Herrick v. Orange Co. Bank*, 27 Vt. 584.

46. Where a fictitious or forged bond, held by a creditor as a supposed security, was surrendered by the creditor to the principal debtor;—*Held*, that as the paper was worthless and of no possible use to the surety except as a matter in *terrorem*, this did not furnish a ground in equity for the release of the surety. *Loomis v. Fay*, 24 Vt. 240.

47. Where a note was by mistake of facts

given up to be cancelled, but before it fell due the payee notified the makers of the mistake and that he still looked to them for payment;—*Held*, that he could recover thereon, as well against the surety as the principal,—it not appearing that the condition of the surety had been affected by the surrender of the note, or by the delay in giving notice of the mistake. *Blodgett v. Bickford*, 30 Vt. 781.

48. It is no defence to a surety upon a note, that when he signed it the principal was actually insolvent and was afterwards adjudged a bankrupt, and the security he took to indemnify him was taken from him by the assignee in bankruptcy, though the principal procured him to sign upon the suggestion of the payee, but without fraud on his part. *Noble v. Scofield*, 44 Vt. 281.

49. Surety indemnified. A surety who signs a note with his principal for his accommodation, where the principal has placed funds in his hands to indemnify him, stands on no more favorable ground for defence against the note, than the principal himself. *Thrall v. Benedict*, 18 Vt. 248.

50. Judgment as a merger. A judgment upon a note operates as a merger of the note, and, at law, is so far conclusive upon the parties to it, as to exclude a defense [thereafter arising], growing out of the relation of principal and surety which existed between the defendants in the judgment, prior to its recovery. *Marshall v. Aiken*, 25 Vt. 827. 27 Vt. 586. *Dunham v. Downer*, 31 Vt. 249. Questioned by *Poland, J.* 31 Vt. 287.

51. Relief in equity. It is otherwise, in equity. *Dunham v. Downer*.

52. The orators gave a note with and for A, as his sureties, to M, upon which M obtained a judgment against all the signers, and assigned the judgment to D, who knew that the orators were only sureties upon the note. D then made a parol agreement with A, upon good consideration, to extend the time of payment of the judgment, and did so extend it. D afterwards brought suit on that judgment in the name of M, and it was held in that suit (*Marshall v. Aiken*, 25 Vt. 827) that the judgment was conclusive, and at law excluded the defense offered; and judgment passed against all the parties to the first judgment. The orators then brought their bill in equity, and, upon these facts, obtained a decree perpetually enjoining the enforcement of the judgment. *Id.*

53. The orator alleged that he signed a note to the defendant as surety for C, upon the condition and assurance of the defendant that if not paid at maturity he would immediately collect the note out of C's property; that the orator relied upon such assurance, and therefore took no measures to secure himself; that the defendant neglected to take measures to

collect the note for a year or more after it matured, during all which time it might have been collected of C; and that the orator had no notice of such neglect until C had failed and the orator could obtain no security—the orator being out of the State and not in circumstances to keep himself informed of C's pecuniary condition. *Held*, that such facts would be an equitable estoppel to a collection of the note from the orator. *Hickok v. Farm. & Mech. Bank*, 85 Vt. 476.

**54. Delay—Agreement to give time.** A creditor is not bound, on the request of a surety, to secure his demand by attachment of the property of the principal. *Crane v. Stickle*, 15 Vt. 252.

**55.** A creditor is not obliged, on the request of a surety, under any circumstances of urgency, to sue and collect the debt of the principal, nor to make good to the surety any loss by a refusal so to do. *Hickok v. Farm. & Mech. Bank*, 85 Vt. 476. *Hogaboom v. Herrick*, 4 Vt. 181. *Hubbard v. Davis*, 1 Aik. 296.

**56.** A surety who has ample collateral security in money or property from his principal, is precluded from taking advantage of any enlargement of the time of payment, by arrangement between the creditor and the principal. *Smith v. Steele*, 25 Vt. 427. See *Wilson v. Wheeler*, 29 Vt. 484.

**57.** A change made in the contract of suretyship between the creditor and the debtor, without the assent of the surety, whether prejudicial to him or not, discharges the surety. *Bennett, J., in Bank of St. Albans v. Smith*, 80 Vt. 151.

**58.** If the creditor, without the assent of the surety, makes a binding contract with the principal to extend the time of payment of the debt, the surety is thereby discharged. It is not necessary, that the contract should be such as would prevent the creditor from sustaining an action at law on the debt, until the enlarged time of payment; but it is sufficient, if the contract be such as to give the principal a legal remedy upon it. *Austin v. Dorwin*, 21 Vt. 88.

**59.** Such is the effect of the contract, although made after the debt is overdue. *Turrill v. Boynton*, 23 Vt. 142.

**60.** An agreement to delay that shall release a surety, must be such a contract as the principal can enforce against the creditor by action, or in the way of defense. *Wheeler v. Washburn*, 24 Vt. 298.

**61.** The postponing of the payment of a debt by agreement between the creditor and the principal debtor, without consideration, though without the knowledge of the surety, does not release the surety. A void agreement will not have the effect to release him. *Joslyn v. Smith*, 13 Vt. 853. *Hogaboom v. Herrick*, 4 Vt. 181.

**62.** A valid agreement between the creditor and principal debtor for an extension of the time of payment, without the assent of the surety, will release the surety, although he may be secured, or be promised indemnity by another who is also surety. *Peake v. Dorwin*, 25 Vt. 28. *Wilson v. Wheeler*, 29 Vt. 484.

**63.** Where one becomes surety for another at the request of the creditor and without the knowledge of the principal debtor, the creditor is, nevertheless, bound by all the rules respecting sureties, although the principal is not bound to the surety for the want of a privity of contract between them; and the surety will, in such case, as in other cases, be released by a valid agreement between the creditor and the principal to give further time of payment without the assent of the surety. *Peake v. Dorwin*.

**64. Consideration for such agreement.** The payment in advance of interest, or of usurious interest, or the payment of part of a debt, before it falls due, is a sufficient consideration to sustain an agreement with the principal to give further time of payment, such as to discharge a surety, when done without his consent. *Austin v. Dorwin*, 21 Vt. 88. *Turrill v. Boynton*, 23 Vt. 142. *Whittle v. Skinner*, 23 Vt. 531. *Marshall v. Aiken*, 25 Vt. 332. 81 Vt. 255. *People's Bank v. Pearsons*, 80 Vt. 711.

**65.** A simple executory agreement to pay usury is not a sufficient consideration to support a promise to delay the payment of a debt, and will not discharge a surety, although, after the expiration of the time agreed upon for delay, such usurious agreement may have been performed. *Burgess v. Dewey*, 33 Vt. 618.

**66.** A separate promissory note given for the usury is treated as such executory agreement. *Smith v. Hyde*, 36 Vt. 303.

**67. Collateral security.** The mere receipt of a collateral security payable at a future day, given to secure the payment of an antecedent debt, but not given for and on account of the original debt, does not imply an agreement to give time upon the original debt, so as to release a surety thereon (overruling, on this point, *Atkinson v. Brooks*, 26 Vt. 569, and *Mich. St. Bank, v. Leavenworth*, 28 Vt. 209). *Austin v. Curtis*, 31 Vt. 64. *Redfield, C. J., dissenting. Ripley v. Greenleaf*, 2 Vt. 129.

**68. Reserving right to sue.** A surety on a note is not discharged by a contract giving time to the principal, where there is a reservation of the right to call for payment, or of proceeding against the surety. *Viele v. Hoag*, 24 Vt. 46. *Morse v. Huntington*, 40 Vt. 488.

**69. Statute.** Under G. S. c. 80, s. 80, the discharge of one or more of the principal obligors discharges the debt, in the proportion

that the number of principals discharged bears to the whole number of principals. The discharge of a surety does not discharge the principal, but, in an action against the other sureties, operates as a discharge of that portion of the debt which would belong to that surety to pay, as between him and the other sureties, according to the number of the sureties. *Alford v. Baxter*, 36 Vt. 158.

**70. Reinstating debt.** The liability of a surety, once discharged, cannot be reinstated by any reinstating of the debt against his principal, unless the surety assents thereto. *Gibson v. Rix*, 32 Vt. 824.

**71.** Where one, at the request of the principal upon a note, pays it, or furnishes him money to pay it, this furnishes no right of action against the surety upon the note for the money so paid. *Lapham v. Barnes*, 2 Vt. 218. *Rolfe v. Lamb*, 16 Vt. 514.

**72.** One principal debtor cannot set up an agreement with the creditor to throw the debt upon a surety, or the bail of the surety, in any form; as, by claiming and enforcing a security of the creditor. *Pierson v. Catlin*, 8 Vt. 272.

## 2. As respects the principal.

**73. How far alike chargeable.** In an action against principal and surety upon a promissory note;—*Held*, that the admissions of the principal were evidence against the surety, although made when the principal was in fact insolvent, and although he had afterwards obtained his discharge in bankruptcy, and had pleaded it in the action. *Brown v. Munger*, 16 Vt. 12.

**74.** The admission of the principal upon a promissory note that it is due and unpaid, is evidence against the surety. *Wilson v. Green*, 25 Vt. 450. (Changed by G. S. c. 63, s. 23, as respects the statute of limitations.)

**75.** That a party swore out of jail on an execution, is evidence against him of his insolvency, and is equally evidence against his surety. *Richardson v. Hitchcock*, 28 Vt. 757.

**76.** The plaintiff's wife, with his consent, sold her land to A, and executed to him her sole deed, for which A gave her his promissory note, payable to her or bearer, with B as his surety, all the parties supposing that she had conveyed a good title. The wife died and all her estate passed to the plaintiff. A became insolvent and after the note had fallen due, discovered the defect in the deed, and, without the knowledge of B, applied to the plaintiff to perfect the title, which he did by giving his quit-claim deed to A. In an action upon the note;—*Held*, that this was a ratification of the contract of sale and of the security, and that neither A nor B could thereafter question the

consideration of the note. *Campbell v. Moulton*, 80 Vt. 667.

**77.** A surety upon a guardian's bond, or one analogous, cannot become a party to the accounting of his principal, either in the original proceeding in the probate court, or by way of petition for revising such accounting and the judgment and orders of the court upon it. *In re Scott's account*, 36 Vt. 297.

**78. Surety's right of retainer.** A surety to whom his principal has given a counter security for his indemnity, is entitled to hold the same until he is fully indemnified, or relieved, though the original obligation may turn out to be usurious, unless the surety was privy to the usury. *Spaulding v. Austin*, 2 Vt. 555.

**79.** Where A conveyed to B real estate as security for having become surety for A's debts, and B had gone into possession;—*Held*, that the rents were not recoverable of B until he was discharged of his liability as surety. *Sellick v. Munson*, 2 Aik. 150.

**80.** Nor could A recover of B any balance, so long as B remained liable to be sued for A's debts, though B had promised A to pay them. *S. C.* 2 Vt. 13.

**81. —and of indemnity.** Where judgment by default had been rendered against A and B for a claim which, as between them, belonged to B to pay, and A had been compelled to pay a part thereof;—*Held*, that B was liable to A therefor, although the first suit might have been successfully defended. *Forbes v. Webster*, 2 Vt. 58.

**82.** A surety may recover of his principal the amount of the debt and costs paid for him, and all expenses incurred in good faith in litigating the claim. *Downer v. Baxter*, 30 Vt. 467. *Hulett v. Soullard*, 26 Vt. 295.

**83.** The rule of full indemnity is not confined to cases of covenants for title and for quiet enjoyment, or indeed to covenants or contracts of indemnity against suits, loss or damage, but extends to all cases of suretyship, where the claim was in its nature disputable, or unliquidated; and has generally been extended to costs recovered against a surety, in all cases, and to costs incurred by the surety in making defense, where such defense was *bona fide*, and with reasonable probability of success. *Redfield, C. J.*, in *Duxbury v. Vt. Central R. Co.*, 26 Vt. 751.

**84.** In an action by a surety against his principal in a promissory note, to recover for money paid within six years before suit brought, in satisfying the note;—*Held*, that the statute of limitations was not a bar, although the money was paid more than six years after the note fell due, where the legal liability of the surety was in good faith all the while maintained—as, by giving security where the rights

of the defendant were not prejudiced thereby—although this was done without the actual knowledge of the defendant; that the continued liability of the surety carried with it the relation of principal and surety, with the obligation to reimburse the surety. *Norton v. Hall*, 41 Vt. 471.

85. The plaintiff signed a note as surety for B and C. Before the note fell due B absconded. The plaintiff knowing that fact, but not disclosing it to C, called upon him and induced him to execute a second note to take up the first, agreeing to get B also to sign it. The plaintiff signed this last note and paid it at maturity. B did not sign it. *Held*, that by reason of the plaintiff's original suretyship he could recover of C the sum paid, although C was only a surety for B upon the first note. *Warner v. Hall*, 5 Vt. 156.

86. A principal and his surety were sued upon a disputed claim, and, pending the suit, the surety compromised, as to his own liability, by paying a certain sum which was to apply on the debt to that extent. *Held*, that the surety could recover that sum of the principal, the claim having passed into judgment against both, and the principal being entitled to application of the sum so paid. *Bancroft v. Pearce*, 27 Vt. 668.

87. The plaintiff and M, partners, agreed between themselves that M should pay the defendant for a yoke of oxen which they had purchased of him. M accordingly sent his note to the defendant in payment, but the defendant declined to accept it, and demanded and received payment of the plaintiff. The plaintiff and defendant at that time agreed that the defendant should hold M's note, and not let it be known that he had been paid for the oxen, and if M ever paid anything on the note the defendant would pay over to the plaintiff. M was then indebted to the plaintiff, and so remained. M afterwards paid \$85, on the note, not knowing that the plaintiff had paid for the oxen. *Held*, that such agreement made the plaintiff the surety of M, and that, as such, he became entitled to the \$85, paid upon the note, and that the defendant was liable to him therefor. *Field v. Hamilton*, 45 Vt. 35.

88. What is payment. If a surety in any way pays the debt of his principal, so as to extinguish it—as, by a set-off of his lands on execution—this is equivalent to the payment of money for the benefit of the principal and at his request, and a recovery can be had under the count for money paid. *Hulett v. Soullard*, 26 Vt. 295.

89. Joint principals. If one stands as surety for several joint principals, and one of them dies, the surety, having paid the debt, may claim a dividend from the estate of the deceased upon the whole debt, notwithstanding

he may hold collateral security. The security being merely collateral, equity will not compel its application for the purpose of reducing the dividend, unless the debtor stands in the relation of a co-surety. *West v. Bank of Rutland*, 19 Vt. 408.

90. Joint sureties. If two joint sureties pay the debt of their principal out of their joint funds—as, where they give their joint note in payment of such debt—they can maintain a joint action for reimbursement against their principal (*Whipple v. Briggs*, 28 Vt. 65); or for contribution against their co-surety, and this, although another of their co-sureties signed the new note with them, but only as a surety for them. *Prescott v. Newell*, 39 Vt. 82.

91. It is essential to this end that the payment be made out of their joint means. Where each paid from his own individual resources, and in unequal sums;—*Held*, that a joint action would not lie, although it was understood between them, that they would stand together, and share and discharge the burden equally. *Prescott v. Newell*.

92. Surety a creditor. A surety, by virtue of the implied undertaking of the principal to indemnify him, acquires such an equity, that a subsequent payment by him will be referred to the original undertaking of suretyship, so as to make him a creditor as of that date to the extent of overriding any counter equities of a subsequent date. *Barney v. Grover*, 28 Vt. 391; and see *Strong v. Mitchell*, 19 Vt. 644. *Beach v. Boynton*, 26 Vt. 725.

93. The plaintiffs were liable as sureties for the defendant, partly as joint sureties and partly as sureties severally with others, though these obligations had not matured; and the defendant was indebted to the plaintiffs severally. The defendant gave the plaintiffs jointly his promissory note, covering but not exceeding these several amounts, upon which the plaintiffs brought suit and attached his property, which suit was defended by a subsequent attaching creditor. *Held*, (1), that the note was upon good consideration, the law implying an agreement of the sureties to apply the avails of the note to those debts, and an assumption of them to the extent of the note; (2), that the transaction might be regarded as a mode of making an assignment of personal property through the intervention of an attachment—and was valid. *Haggood v. Polley*, 35 Vt. 649.

94. Relief in equity. After a debt has become due, the surety may resort to chancery to compel the principal to exonerate him from all liability by the payment of the debt. *Bishop v. Day*, 18 Vt. 81.

95. The orator gave his note to S. The defendants afterwards gave the orator their

bond, conditioned to pay the note to S and save the orator harmless therefrom. This they neglected, and S sued the orator upon the note and recovered judgment. *Held*, that by this arrangement the defendants had made the note their debt to pay, and, as between them and the orator, they stood as principals and the orator in the nature of a surety; and a decree was ordered for the orator, that the defendants pay the judgment. *Ib.*

96. **Subrogation.** In equity, a surety who pays a debt may be substituted to all the rights of the creditor which are collateral to the main contract, but cannot, as a general rule, be put in place of the creditor in the principal contract; for by payment, that is discharged. This cannot be done at law. *Redfield, J., in Pierson v. Catlin, 18 Vt. 77.*

### 3. As between the sureties.

97. **Contribution.** Where five sureties of an insolvent principal confessed a joint judgment, and four of them were committed on the execution and gave separate jail-bonds, and then procured the property of the fifth to be sold to satisfy the execution;—*Held*, that he could maintain a separate action against each of the four, and without demand, to recover the one-fifth part of the sum so paid by him. *Poster v. Johnson, 5 Vt. 60.*

98. The plaintiff, being co-surety with the defendant in a promissory note, took a lease from the principal containing no covenants on the lessor's part, and therein covenanted to pay the note. He was afterwards evicted by suit by the lessor's mortgagee under a paramount title, and at that time paid the note. In an action for contribution;—*Held*, that such eviction released him from his covenant to pay the note; that such payment must be presumed to have been made by reason of his original liability as surety; and that the defendant was liable for contribution. *Prindle v. Page, 21 Vt. 94.*

99. M, as principal, and A, F and P, as sureties, executed their promissory note payable to a third person for the purpose of raising money to pay a debt of M on which P was sole surety of M, and the note was delivered to P for him to get it discounted. Before getting the note discounted, and on the faith of it, P from his own funds paid the first debt. *Held*, that P was not afterwards bound to cancel or surrender to his co-sureties the note in question, but might use it for his indemnity. *Flanagan v. Post, 45 Vt. 246.*

100. **Measure of damages.** In an action for contribution, a surety may recover of a co-surety his proportionate share of the taxable costs paid by the former upon a judgment against him upon the contract, where such

co-surety was equally in fault in not paying the debt without suit. *Briggs v. Boyd, 37 Vt. 534.*

101. So, he may recover the proportionate share of the expenses incurred in defending a suit upon the contract, where the defense was made under such circumstances as to be regarded reasonable, hopeful and prudent. *Ib.* 541. *Marsh v. Harrington, 18 Vt. 150. Fletcher v. Jackson, 28 Vt. 593; and see Hulett v. Soullard, 26 Vt. 295. Doener v. Baxter, 30 Vt. 467.*

102. If a surety has no notice of a suit against his co-surety, he is not bound by the judgment rendered. *Briggs v. Boyd, 37 Vt. 534.*

103. **Sharing securities.** If one of two sureties receives property from the principal which he gives his co-surety to understand is security for their joint liability, and the co-surety relies upon this assurance, such surety cannot, even with the assent of the principal, afterwards apply the security to a separate liability, to the injury of his co-surety. *Hinsdill v. Murray, 6 Vt. 186.*

104. Persons subject to a common burden—as co-sureties—stand in their relation to each other upon a common ground of interest and of right, and whatever relief, by way of indemnity, is furnished to either by him for whom the burden is assumed, inures equally to the relief of all the common associates. *Miller v. Sawyer, 30 Vt. 412. Hinsdill v. Murray, 6 Vt. 186. Whipple et al. v. Briggs, 28 Vt. 65.*

105. And equity, in behalf of one surety, will follow such indemnity in the hands of the other, or in the hands of a third person where it can be done without injury to such person; and the surety receiving such indemnity cannot divert or appropriate it to his individual benefit. *Hinsdill v. Murray. Whipple et al. v. Briggs.*

106. Where one of several sureties takes from his principal a security for his own indemnity, this inures in equity to the benefit of all the sureties; and in a joint action by the sureties for money paid for the principal as such sureties, the sum realized from the security so given to one is applicable to the joint claim. *Whipple et al. v. Briggs.*

107. Where one was sole surety for another in some cases, and joint surety with others for the same party in other cases, and he received from his principal a security expressed to be "for his liability on notes and other matters";—*Held*, that the proceeds of such security, by the very fact of being received, became appropriated, by way of reimbursement, to the several claims paid by such surety, or by the joint sureties, in the order of time in which such payments had been made, the same as if the payment had been made by such surety alone. *Whipple v. Briggs, 30 Vt. 111.*



108. A security given by the principal to one of several, his joint sureties, inures to the benefit of all such sureties, like a payment, and cannot be controlled in its effect by the intent, or expressed purpose of the principal, that it shall go only for the benefit of one of the sureties. *Fuller v. Hapgood*, 39 Vt. 617.

109. Release. Where certain sureties released their principal "from all liabilities" to them resulting from their suretyship;—*Held*, that the effect was to discharge, both at law and in equity, all claim for contribution from their co-sureties; and this, although such release was executed before they had made any payment, and was given upon a nominal consideration, and only for the purpose of enabling the principal to become a witness in a suit against them as such sureties, and although the release was more broadly expressed than was necessary for that purpose, but not in ignorance of the facts. *Fletcher v. Jackson*, 23 Vt. 581.

See JUDGMENT, 57 *et seq.*

#### PRIVATE WAY.

1. A right of way in the land of another cannot arise from mere necessity, independently of the implication of a grant or reservation of such right; as, in case of some former unity of ownership of the two parcels. *Tracy v. Atherton*, 35 Vt. 52.

2. If a right of way be appurtenant to close A upon close B, and both closes become united in the same person, the right of way, as well as all other subordinate rights and easements, is extinguished by the unity of possession. *Plimpton v. Converse*, 43 Vt. 717.

3. The owner of a tract of land conveyed to A a strip running through it, reserving to himself, his heirs and assigns, the right of a road across such strip to his quarry lot, which was part of the whole tract. He afterwards conveyed all his right, title and interest in the quarry lot to B. It appearing that such right of way was not necessary to B's enjoyment of the quarry lot;—*Held*, that it was not an appurtenance to the quarry lot, nor right in it, and did not pass by the deed of the lot to B. *Smith v. Higbee*, 12 Vt. 118.

4. A deed conveyed a house, and a right to a pass-way to the rear of the premises "so as to give room to pass of the width of a common cartway for all necessary and ordinary household purposes." The pass-way was then in existence, having a turn in it nearly at a right angle, and requiring (perhaps) at that point more room to turn than twelve feet, which was proved to be the width of an ordinary cartway. *Held*, that to effect the object of the grant,

applying it to the subject matter, the way must be of such width as to be available, and capable of practical use for the purposes named, and was not limited to an absolute width of twelve feet. *Walker v. Pierce*, 38 Vt. 94.

5. Where a party grants a private way, he is not bound by implication to construct or keep in repair the way granted. *Id.*

6. A way must start from a fixed point and lie along a definite course to another fixed point; and, to acquire a right of way by adverse use, the party must have used the same within its defined limits, uninterruptedly, openly, notoriously, and adversely to the other party's rights and use, for fifteen years. *Plimpton v. Converse*, 44 Vt. 158.

7. Where an alley ran between several village lots, and the owner of a lot lying upon the alley claimed, by prescription and adverse use, a private right of way in the alley for access to his lot;—*Held*, that the fact that the proprietors of other lots upon the alley had so used it, could not be taken into the account in aid of his claim. *Dodge v. Stacy*, 39 Vt. 558.

8. Where one claimed, by long continued use, a right of way to his lot over an alley owned by another;—*Held*, that to maintain the right he must prove a continuous use for fifteen years under a claim of right, with the acquiescence of the owner of the alley; that the acts and declarations of such owner were evidence in his own favor, as well as against him, on these points, showing his understanding of the claim; and that such want of acquiescence could be indicated otherwise than by instituting legal proceedings against the use, or by placing any actual obstruction in the way, or actually preventing such use. *Id.*

9. All parties who create an obstruction to a private way by the ordinary occupation of premises, as well lessor, lessee, sub-lessee and assignee, are jointly liable for the obstruction. *Rogers v. Stewart*, 5 Vt. 215.

10. It is no defense to an action for obstructing the plaintiff's private way, that there were other obstructions not complained of; and the plaintiff may recover his full damages for the obstruction complained of, and this will be a bar to any other action for obstructing the same way during the same period. *Id.*

See POSSESSION.

#### PROBATE COURT.

##### I. JURISDICTION AND AUTHORITY.

1. *Generally—Special cases.*
2. *To correct its decrees.*
3. *Conclusiveness of decrees.*

## II. SETTLEMENT OF ESTATES.

1. *By the heirs.*2. *By regular administration.*(a.) *Commissioners of claims—Proceedings and effect.*(b.) *Ancillary administration.*(c.) *Sale of real estate.*(d.) *Assignment to widow.*(e.) *Division and distribution.*

## III. PROBATE BONDS; EMBEZZLEMENT.

## I. JURISDICTION AND AUTHORITY.

I. *Generally—Special cases.*

1. **Special and limited.** The probate court is a court having special and limited jurisdiction, deriving all its authority from the statute; and where it exceeds the authority given it by law, its decrees are not erroneous merely, but a nullity and void; as, where the court assigned to a widow, as dower, the one-half in fee of the real estate. *Hendrick v. Cleveland*, 2 Vt. 329. 31 Vt. 673.

2. The probate court in the matter of appointing guardian for insane persons, spendthrifts, &c., in cases not connected with the settlement of estates, is a court of special and limited jurisdiction; and in setting up the appointment in such cases, the pleading must state such facts as show that the court had jurisdiction to make the appointment. *Holden v. Scanlin*, 30 Vt. 177.

3. **Exclusive in the first instance.** Courts of probate in Vermont have the entire and exclusive jurisdiction of the settlement of estates, to the same extent that the jurisdiction of other matters of contract or tort, *inter vivos*, is given to the common law courts. *Adams v. Adams*, 22 Vt. 50. *Boyden v. Ward*, 38 Vt. 628.

4. The probate court has exclusive jurisdiction, in the first instance, of the settlement of the accounts of executors and administrators. *Probate Court v. Slason*, 23 Vt. 306. *Probate Court v. Vanduzer*, 13 Vt. 185. *Bank of Orange Co. v. Kidder*, 20 Vt. 519. *Probate Court v. Chapin*, 31 Vt. 373. 38 Vt. 638. 42 Vt. 323.

5. So, as to the settlement of a guardian's account. *Probate Court v. Slason*.

6. **Partition among devisees, &c.** By the probate act of 1821, the probate court was the proper court to order partition among devisees and not the supreme court, as under previous statutes, although the testator died in 1793. It was competent for the legislature to change the tribunal, or mode of remedy, not thereby affecting the right. *Bull v. Nichols*, 15 Vt. 329.

7. Under this act, although not so specially provided, it was no objection to the jurisdiction

of the probate court to make partition among heirs, or devisees, that some of them had alienated their interests before the commission was applied for. The practice was, in such case, to make the partition directly among the heirs or devisees, leaving the shares so set out, subject to the effect of the alienation. *Id.*

8. The probate court has no jurisdiction to make partition of lands where an estate is no longer in course of administration, and none of the original heirs retain their interest in the land. *Cox v. Ingleston*, 30 Vt. 258.

9. The jurisdiction of the probate court in the settlement of the estates of deceased persons exists and continues so long as there is any occasion for its exercise, and until there has been a full and complete settlement and distribution of the estate; as, to determine who are entitled under the provisions of any will, and to what they are entitled; also, who are the heirs at law, and the proportion to which they are respectively entitled. *Keeler v. Keeler*, 39 Vt. 550. See *McFarland v. Stone*, 17 Vt. 165. *Chamberlin v. Chamberlin*, 16 Vt. 532.

10. A testator devised lands to his daughter for her life, and after her decease "to my male heirs at law who may then live in South Hero." After the death of the daughter, the executor brought his petition to the probate court for a distribution of this part of the estate, according to the will. All the debts had been paid, and all other parts of the estate had been divided and passed over by the executor during the life of the daughter to the parties entitled under the will. *Held*, that this land was to be treated as part of the estate in the hands of the executor undistributed; and as it could not be determined, until the death of the daughter, who were the parties entitled to take under the will, the probate court had jurisdiction to determine this question, and to make distribution accordingly. *Keeler v. Keeler*.

11. **Power to imprison.** The probate court has no authority under G. S. c. 48, ss. 14, 15, or otherwise, to enforce by imprisonment a final decree for the mere payment of money; as, that an administrator shall pay over to his successor the balance found due from him on the settlement of his account. Such a warrant of imprisonment was *held* void, and the party imprisoned was discharged on *habeas corpus*. *In re Bingham*, 32 Vt. 329.

12. **Equitable powers.** The probate court necessarily possesses a portion of equitable powers. So far, at least, as the right of judging extends, it is not confined to the technical rules of common law in opposition to established chancery principles. *Robinson v. Swift*, 3 Vt. 283.

13. **Supreme court.** Since the revised statutes (1840), the supreme court has no general jurisdiction in probate matters to re-hear

and determine them upon their merits, but sits merely as a court of error, the same as in cases at common law. *Holmes v. Holmes*, 26 Vt. 536. *Boyden v. Ward*, 38 Vt. 628.

As to the *auxiliary jurisdiction* of Chancery, see CHANCERY, I., 8.

2. *To correct its decrees.*

14. **In general.** The court of probate, on petition for that purpose, may correct errors, irregularities and mistakes in former decrees, after any lapse of time short of twenty years. *Smith v. Rix*, 9 Vt. 240.

15. The probate court has power to re-open and revise a former decree, so far as to charge an administrator with advancements and assets not mentioned in the decree; and has power, and it is its duty, upon proof of fraud, accident or mistake, in the adjustment of any items in a former account, to alter and correct it in such manner as to make it what it ought to have been. *Adams v. Adams*, 31 Vt. 162. 24 Vt. 407.

16. It is now considered that the probate court, so long as the matter is pending either in that court, or in the common law courts, on the administrator's bond, has full power to re-examine any of its former decrees in the premises, and to correct all errors, irregularities and mistakes; and, possibly, this power of re-examination extends even beyond this. *Redfield, J.*, in *French v. Winsor*, 24 Vt. 407, citing *Rix v. Smith*, 8 Vt. 385. *S. C.*, 9 Vt. 240. *Adams v. Adams*, 21 Vt. 162. But see *infra*.

17. **Qualification.** The opening and modifying of former decrees of the probate court, so far as sanctioned by the supreme court, were all cases of decrees upon the settlement of administrator's accounts. They are based upon very questionable grounds of policy, and ought not to be extended beyond similar cases in all respects. *Redfield, C. J.*, in *Stone v. Peasley*, 28 Vt. 716.

18. **Limitation.** A decree of distribution of an estate when once executed, vests the property, and puts it out of the control and appropriate jurisdiction of the probate court; and *quære*, whether it is susceptible of modification thereafter. *Id.*

19. A decree of distribution of real estate exclusively to the heirs of full blood, not noticing those of the half blood who were equally entitled, was held not susceptible of modification, on petition of the excluded heirs, after possession had been taken by the others under the decree, so as to effect a new distribution. *Anon.* Cited by *Redfield, C. J.*, in *Stone v. Peasley*, 28 Vt. 720.

3. *Conclusiveness of decrees.*

20. **In general—Presumption.** A decree

of the probate court acting within the sphere of its jurisdiction, not appealed from, is conclusive upon those to whom the right of appeal is given; and where it has jurisdiction of the subject matter, the previous proceedings must be presumed to have been regular. *Collard v. Crane*, Brayt. 18. 15 Vt. 348. *Judge of Probate v. Fillmore*, 1 D. Chip. 420. *Lawrence v. Engleby*, 24 Vt. 42.

21. Decrees of the probate court will be presumed to have been made upon proper notice and formal proceedings, although such previous proceedings do not appear of record. *Sparhawk v. Buell*, 9 Vt. 41.

22. **To what extent conclusive.** A decree of the probate court is conclusive as to all matters which appear from the records to have been adjudicated upon, and binds that court itself, until by some proper application its action is called directly to annulling or correcting its decree. But such decree is not necessarily conclusive as to the result, or ultimate balance, of an accounting, but only of the items adjudicated. *Rix v. Smith*, 8 Vt. 385.

23. **Instances.** An administrator settled his account in 1820. In 1832 he settled a subsequently accruing account, from which last settlement and decree an appeal was taken. Held, that the correctness of the first decree was not involved, and it could not be overhauled in this proceeding. *Id.*

24. In an action upon a probate bond for the default of an executor in not having rendered a true account and fully administered;—Held, that nothing which had been passed upon and decided by the probate court on the settlement of his account could be contested, nor could such settlement be impeached as fraudulent, where the parties in interest had been notified; but that the settlement was not conclusive as to property received by the executor and belonging to the estate, for which he neglected, either through accident or design, to render an account. *Probate Court v. Merriam*, 8 Vt. 234.

25. Probate proceedings and the adjudications of probate courts are *in rem*, and bind all the world; but an adjudication is only conclusive upon matters directly passed upon by the court; not upon a matter which is only collaterally in issue. Thus, in the settlement of an executor's or administrator's account, the decree as to the proper distribution of the estate, is conclusive; but where the payment of legacies, or debts, is credited to his account, the legatees and creditors are not concluded as to the fact of payment. *Sparhawk v. Buell*, 9 Vt. 41. *Probate Court v. Vanduser*, 13 Vt. 135.

26. The jurisdiction of granting administration, assumed and exercised by the probate court, cannot be collaterally attacked. *Drippe v. Abbott*, 27 Vt. 580. *Abbott v. Coburn*, 28 Vt. 663.

27. An order of the probate court, not appealed from, assigning to the widow a certain sum for her support, which was paid by the administrator in his administration account, was held, on settlement of his account, to be conclusive, and not open to inquiry as to its reasonableness. *Richardson v. Merrill*, 82 Vt. 27.

28. A final decree of the probate court in the distribution of an estate is conclusive, both at law and in equity. *Robinson v. Swift*, 8 Vt. 283.

29. The final allowance of an administrator's account, in which he is credited for the payment of the debts, is equivalent to a decree of distribution to that extent, and is conclusive. It cannot be impeached collaterally, by alleging fraud even. The decree can be corrected only by application to that court to re-examine the account. *Probate Court v. Vanduser*, 18 Vt. 135.

30. Decree of distribution—Notice. In order to bind parties interested in the distribution of an estate by proceedings in the probate court ordering such distribution, or changing a former order of distribution, notice, actual or constructive, must be given. *Stone v. Peasley*, 28 Vt. 716.

31. Where division was ordered by the probate court of the lands of an estate held in common with a third person, under Slade's Stat. c. 44, s. 84 (see G. S. c. 57, ss. 7-14), and the committee gave him notice of their proceeding to make division, and they made division and their report was accepted by the court, and no appeal was taken;—Held, that he should be considered as having waived the want of notice required by the statute to be given before the issuing of the order of partition, and that he was bound by the decree,—the court holding, nevertheless, that this requirement of the statute was not merely directory. *Corliss v. Corliss*, 8 Vt. 373. (Wrongly stated in 9 Vt. 77 and 21 Vt. 113.) 85 Vt. 631.

32. Effect. A decree of the probate court, unappealed from, assigning the real estate to the devisees, or heirs, divests the executor or administrator of all title therein. *Stone v. Griffin*, 8 Vt. 400. *Tryon v. Tryon*, 16 Vt. 318.

33. A decree by the probate court of partition between heirs and devisees is conclusive as to the mode and matter of the division, but concludes nothing as to title. The question of estate and title is assumed—the court having no jurisdiction to determine that. If none exists, the proceeding goes for nothing. Hence, after and notwithstanding partition, an heir or devisee may set up paramount title in himself to the part set to the others. *Grios v. Randall*, 23 Vt. 239.

## II. SETTLEMENT OF ESTATES.

### 1. By the heirs.

34. Without administration. It is competent for all the heirs to an estate, if of age, to settle and pay the debts of the estate and divide the property among themselves, without any administration; and neither creditors nor debtors of the estate have a right to complain of this. *Taylor v. Phillips*, 30 Vt. 238. *Babbitt v. Bowen*, 32 Vt. 437.

35. Where the defendant, in settlement of his debt to an estate, gave his note therefor to the person primarily entitled to administration;—Held, that the appointment of such person administrator after the commencement of the suit and before trial, and his ratification of the settlement, removed all ground of defense to the note for want of authority in the payee, if any such defense existed before; and, *semble*, that without such appointment, and where the settlement of the estate had been assumed by all the heirs, such defense would not prevail where the circumstances of the estate were such that there could be no reasonable apprehension that the settlement would be called in question. *Taylor v. Phillips*.

36. Direct descent to heir. An heir of an intestate has, immediately on the death of his ancestor, a vested interest in the estates which he may convey by deed or which may be attached or taken on execution. *Hyde v. Barney*, 17 Vt. 280. *Hubbard v. Ricart*, 3 Vt. 207. *Austin v. Bailey*, 37 Vt. 219.

37. Lien of administrator. But his grantee holds, as the heir did, subject to the administrator's lien, for payment of debts, if any. *Austin v. Bailey*.

38. Statute of 1821. One son who, by a family arrangement, remained in possession of the real estate after his father's decease, without administration granted or division made by the probate court among the heirs, or conveyance by them, was held prohibited by s. 63 of the probate act of 1821 from bringing ejectment. *Boardman v. Bartlett*, 6 Vt. 631. Modified by R. S. c. 48, s. 11. (G. S. c. 52, s. 14.) See *Buck v. Squiers*, 22 Vt. 484.

39. Presumptive discharge of lien. The statute requiring an assignment by the probate court of lands among heirs and devisees before they can maintain trespass or ejectment (Slade's stat. p. 346. s. 63), applies only in cases where there must at some time be a division, and where the administrator has a lien upon the lands for the payment of debts. Such lien will be presumed satisfied after a lapse of time. *Hubbard v. Ricart*, 3 Vt. 207. *Abbott v. Pratt*, 16 Vt. 626. *Cushman v. Jordan*, 13 Vt. 597.

40. Such presumption was allowed in behalf

of one heir to whom the others had conveyed, after two years from the death of the intestate (*Hubbard v. Ricart*); as, against an administrator in his suit against a grantee of some of the heirs, after 60 years (*Cushman v. Jordan*); in favor of a grantee of a devisee against a stranger, after seven years (*Abbott v. Pratt*); in favor of the grantee of an heir in possession after nine years (*Austin v. Bailey*, 87 Vt. 219). After 30 years, the heirs being in possession, the probate court has no authority to make partition. *Cox v. Ingleston*, 30 Vt. 258. Fifteen years is an absolute statute bar against claims. *Roberts v. Morgan*, 30 Vt. 319.

2. *By regular administration.*

41. **Representation of insolvency.** The property of a deceased person is not subject to be taken in execution, though attached on the original writ, where the estate is represented insolvent. Such representation has relation back to the time of the death. *Smith v. Holmes*, Brayt. 188. (Note. All estates are now settled as insolvent estates, without representation of insolvency.)

(a.) *Commissioners of claims—Proceedings and effect.*

42. **Presentation—Absolute claims.** All absolute claims against an estate represented insolvent, whether due or to fall due, must be presented to the commissioners for allowance, or they will be barred; and such claims payable in future are to be allowed at their then present value. *Atherton v. Flagg*, 2 D. Chip. 61.

43. **Contingent claim.** Before R. S. (1840), claims against the estate of a decedent were to be settled as they existed on the day of the decease, and contingent claims could not be allowed by the commissioners; as, an annuity to fall due in future, dependent upon the life of the annuitant. *Blackmer v. Blackmer*, 5 Vt. 355.

44. A claim contingent and uncertain cannot be allowed by the commissioners, and hence is not barred by not presenting it, but may be prosecuted, where it becomes absolute, against the administrator or heirs, having assets. *Lowry v. Stevens*, 6 Vt. 118. Brayt. 118. *Jones v. Cooper*, 2 Aik. 54. (Since changed by statute.)

45. **What is.** A contingent claim, under G. S. c. 58, is where the liability depends upon some future event which may or may not happen, and therefore makes it now wholly uncertain whether there ever will be a liability. *Poland, C. J.*, in *Sargent v. Kimball*, 87 Vt. 321.

46. *Held*, that the bond of an administrator is not a contingent claim to be allowed as such

against his estate, the breach being the non-payment of debts under an order of distribution. This is an absolute claim. *Id.* 320. See *Sherman v. Abell*, 46 Vt. 547.

47. So, also, the bond of a guardian, a breach being claimed. *Waterman v. Wright*, 36 Vt. 164.

48. A claim in behalf of a surety against the estate of a deceased person, contingent at the time of such decease but become absolute by payment by the surety before presentment for allowance, must be presented to the commissioners for allowance as an absolute debt, and not to the probate court for allowance as a contingent claim. (G. S. c. 58, s. 45.) *Lytle v. Bond*, 89 Vt. 388.

49. A libel for divorce was continued at a term of the supreme court, and a decree for temporary alimony and to maintain the litigation was made, to be paid in installments. Before any payment became due the libellee deceased. *Held*, that this claim could not be allowed as a debt against his estate. *Nary v. Braley*, 41 Vt. 180.

50. **Claims in behalf of estate.** Commissioners have no jurisdiction of claims in behalf of an estate, except as offsets to adversary claims; and if such claims are abandoned by the claimant before final judgment, the offset cannot become the basis of a separate judgment. *Allen v. Rice*, 22 Vt. 338.

51. **Equitable claims.** Commissioners have no jurisdiction to adjust and allow claims of a purely equitable character. *Brown v. Sumner*, 31 Vt. 671. *Sparhawk v. Buell*, 9 Vt. 41. *Herrick v. Belknap*, 27 Vt. 674.

52. Hence, such are not barred by a neglect to present them. *Id.*

53. **Limitation of inquiry.** The jurisdiction of commissioners of claims against the estate of a deceased person extends only to the determination of the validity of the claims. They have nothing to do with the assets, nor their distribution, nor with any question arising out of the solvency, or insolvency, of the estate. *University of Vt., &c., v. Baxter*, 43 Vt. 645.

54. **Claims not presented, barred.** Claims *in esse* against the estate of a deceased person, not presented to the commissioners, are forever barred, whether the creditor resides within the jurisdiction, or not; nor can chancery grant relief from the statute bar. *McCollum v. Hinckley*, 9 Vt. 148. *Burgess v. Gates*, 20 Vt. 326. 41 Vt. 130-1.

55. In order to bar a claim against an estate because not presented to the commissioners, it must appear that the commissioners appointed times and places of meeting to examine claims and gave due notice thereof, as the statute prescribes. *Roberts v. Burton*, 27 Vt. 396.

56. A claim against the estate of a deceased person, not presented to the commissioners,

cannot be allowed as a set-off under G. S. c. 53, s. 17, in a suit brought by the administrator, unless such suit is brought *before* the commissioners have acted; but such claim, by section 14, is barred. *Ewing v. Grinwald*, 48 Vt. 400. *Soule v. Benton*, 44 Vt. 309.

57. In an action on an administrator's bond for non-payment of a claim allowed by the commissioners;—*Held*, that a claim in favor of the estate, not presented for allowance and adjudicated, could not be set off. *Probate Court v. Gale*, 47 Vt. 473.

58. **Report.** Commissioners of an estate certified a claim presented to be just, but did not ascertain the amount due. *Held*, not a legal allowance. *Lowry v. Stevens*, 6 Vt. 113.

59. Where there were three commissioners of claims, and only two acted in a particular case, the third not having reasonable notice of the meeting and not acting, the probate court rejected the report of the two. *Held* correct. *Hodges v. Thacher*, 23 Vt. 455.

60. *Semble*, a judgment rendered against an estate on appeal from the probate court, and certified back, may be treated as a claim allowed, and need not go before the commissioners. *Waterman v. Wright*, 36 Vt. 164.

61. **Statute exception.** G. S. c. 53, s. 57, providing that if the appointment of commissioners to allow claims shall be omitted, a creditor of the deceased shall not thereby be prevented from prosecuting his claim against the administrator, &c., does not authorize the prosecution of a claim barred by proceedings in the probate court, nor one against the executor or administrator who has fully administered, nor against the heirs, devisees or legatees who have received no part of the estate. *Boyden v. Ward*, 38 Vt. 628.

62. **The adjudication conclusive.** Claims allowed by the commissioners, when reported and approved by the probate court, are treated as judgment debts, and as merged therein. In an action on such allowance, the merits of the original claim cannot be inquired into, nor does the six years provision of the statute of limitations apply. *Doolittle v. Hunaden*, Brayt. 41. *Atherton v. Flagg*, 2 D. Chip. 61. *Lowry v. Stevens*, 6 Vt. 113.

63. The decision of commissioners of claims does not become an adjudication, in contemplation of law, until their report has been returned to the probate court, and has been accepted and recorded as such; and until such record made, the probate court has a judicial discretion to inquire as to the genuineness, identity and regularity of the report, and to accept, reject or re-commit it; and this discretion is not limited to matters apparent upon the report. *Hodges v. Thacher*, 23 Vt. 455. 32 Vt. 739. 33 Vt. 559.

64. The surety of an administrator having

deceased, his bond was presented to the commissioners and was allowed for the amount of the default of his principal. *Held*, that the judgment of the probate court thereon, not appealed from, was conclusive. *Sherman v. Abell*, 46 Vt. 547. See 37 Vt. 320.

65. A commissioner's report signed by but one commissioner, the other having deceased, was returned to the probate court, and the court, on consideration of the subject, found that the requirements of the law had in all respects been complied with by the commissioners, and therefore accepted the report and ordered it recorded. No appeal was taken from this order, nor from the allowance of any claim. Afterwards the administrator presented for allowance his account, in which he credited himself the whole amount of the claims so allowed, which account was allowed as presented, and was recorded, and no appeal was taken. The administrator paid all the claims so allowed, except the plaintiff's, and refused to pay that because only one commissioner signed the report. *Held*, that the objection came too late, and that it was foreclosed by the adjudication accepting the report, not appealed from. *Whitcomb v. Hutchinson*, 48 Vt. 310.

66. The plaintiff's intestate and the defendant entered into a joint enterprise of buying sheep, &c., on commission for one R, such commissions to be equally divided, and that the intestate's share should be applied on his debt due to a firm of which the defendant was a member. The whole commissions were received and detained by the defendant. Said firm presented to the commissioners their claim against the estate of the intestate, giving no credit for such commissions, and the claim was allowed in full. In an action of account by the plaintiff as administrator;—*Held*, that such proceedings before the commissioners were a waiver of the defendant's right to insist on that agreement as a defense to this action. *Newell v. Humphrey*, 37 Vt. 265.

67. **Void allowance.** The allowance of a claim by commissioners after the expiration of their commission, is wholly nugatory as a judgment. *Probate Court v. Gale*, 47 Vt. 473.

#### (b.) *Ancillary administration.*

68. **As to claims.** A debtor domiciled in New Hampshire there deceased, and his estate there was there administered. The plaintiff, a creditor there resident, failed to present his claim there for allowance, whereby, by the law of New Hampshire, as *held* (*Mattocks, J.*, dissenting), such claim became "forever barred," and extinguished. *Held*, that he was not entitled thereafter to have such claim allowed by commissioners in this State, under an administra-

tion here granted. *Hunt v. Fay*, 7 Vt. 170. 9 Vt. 146. 17 Vt. 321. 20 Vt. 280.

69. Where the principal administration is in another State, and an ancillary administration in this, it is only creditors resident in this State who are entitled to have their claims allowed here. *Churchill v. Boyden*, 17 Vt. 319. *Hunt v. Fay*. (Changed by G. S. c. 53, ss. 36, 37.)

70. In cases of ancillary administration upon the estate in this State of one who died domiciled elsewhere, foreign creditors may prove their debts here, and share *pro rata* with the domestic creditors in the distribution, unless it appear that the deceased left property out of this State. The proviso to G. S. c. 53, s. 37, does not apply to such case. *Prentiss v. Van Ness*, 31 Vt. 95. *Barrett, J.*, dissenting.

71. Where the principal administration is taken in another State, but administration is also taken in this State, the rights of parties living in this State to present and pursue their claims to allowance and satisfaction in our probate court, are the same as if the administration was only in this State; and *held*, that, in such case, the statute of limitations does not run between the death of the intestate and the appointment of the administrator in this State, according to G. S. c. 63, s. 16. *Hicks v. Clark*, 41 Vt. 183.

72. Place and mode of settlement. In case of an ancillary administration in this State, the probate court here has jurisdiction to require a settlement of the account of the administration in this State, although proceedings to this end have been previously commenced against the administrator, and are pending, in the State of principal administration. *Jennison v. Haggood*, 2 Aik. 31.

73. In case of a secondary administration, all expenses not incident thereto, and all estate not there received, should be adjusted in the court of principal administration. *Haggood v. Jennison*, 2 Vt. 294. 6 Vt. 275.

74. Where a principal administration is granted in another State, and an ancillary administration in this State, it appertains to the authority of our courts to settle and adjust the accounts of the administrator for effects received in this State; and it is discretionary with them to order distribution here, or to remit the effects to the place of the principal administration for that purpose. Although the latter is the usual course, still it will not be adopted where the rights of those entitled to the estate would be endangered by it. *Porter v. Heydock*, 6 Vt. 374. 17 Vt. 322.

75. *Barrett, J.*: Ordinarily, as matter of law, it is the duty of the probate court having in hand the ancillary administration, to remit the assets within its jurisdiction, not needed for debts and legacies within the State, to the prin-

cipal administration for distribution. It is competent for the probate court so to do, and unless, in the particular case, it be made to appear that loss or injustice will likely be suffered by parties not living within this State by so doing, the law requires that it should be so done. *Probate Court v. Kimball*, 42 Vt. 323.

76. Where the probate court, in case of an ancillary administration in this State, ordered the administrator to pay over to the administrator in the State of principal administration the balance found due in his hands;—*Held*, that a creditor of the estate in the State of principal administration, who had there proved his debt, had no such interest as entitled him to become prosecutor in an action on the probate bond. *Probate Court v. Brainard*, 48 Vt. 620.

(c.) Sale of real estate.

77. The probate court may order the sale of real estate to pay the debts of an estate, when enough appears on the record to show the necessity of a sale, although before a settlement of the administrator's account. *Maack v. Sinolear*, 10 Vt. 103.

78. A fell heir to one undivided third of the real estate of a decedent, after which B, a creditor of A, levied his execution upon such share. A then was appointed administrator of the decedent's estate, and procured a license from the probate court to sell the real estate of the decedent for the benefit of the heirs, without representation that the real estate was needed for the payment of the debts, and it was not needed nor was resorted to for such purpose. A sold the real estate in pursuance of the order, and received pay for the same. *Held*, that the sale of A's share in the land, not being for the purposes of administration, but upon his own application and consent as an heir, was substantially his own act, and that the land after the sale remained, as before, subject to the levy; and that, as B's rights were not prejudiced by the sale, he had no such interest in the avails of the sale as entitled him to be heard on the question of their distribution by the probate court. *Swift v. Kennison*, 39 Vt. 473.

79. By statute, the personal estate of the deceased is first made chargeable with the payment of debts and expenses of administration, and the heir has nothing therein except his right in the surplus. Until such personalty is exhausted, the purchaser of the heir's interest in the real estate cannot be compelled to contribute to the payment of the ancestor's debts. *Sherman v. Abell*, 46 Vt. 547.

(d.) Assignment to widow.

80. The probate court assigned to a widow

such portion of the personal estate of her late husband, to be selected by her from the inventory at the prices named in the inventory, as would amount to the sum of \$350. *Held*, that the decree was not illegal by reason of according this selection to the widow. *Phelps v. Phelps*, 16 Vt. 78. *Williams*, C. J., dissenting.

81. Under G. S. c. 51, s. 1, part 2, a widow is entitled to a reasonable allowance from the estate of her deceased husband for her maintenance during the settlement of the estate, although she has no children, and has other sufficient means of subsistence. The amount of the allowance only is left to the discretion of the probate court. *Sawyer v. Sawyer*, 28 Vt. 245.

82. It is not indispensable, nor usual, that an allowance to a widow and children should be made by the probate court in advance of the expenditure. If made by the administrator, a reasonable sum therefor may be afterwards allowed in his account. *Id.*

83. To entitle the widow of a person who left no issue, to the shares given her under G. S. c. 56, s. 1, and the 6th clause of c. 51, s. 1 (*i. e.*, \$1000, and one-half the residue of the estate), it is not necessary that she should waive the provisions of the law in her behalf under c. 55, s. 6; nor is her right to such shares affected by the first provision of c. 51, s. 1, unless, at her option, she claims an assignment under it. Such shares pass to her by descent, and not by appointment of law. *Sawyer v. Sawyer*, 28 Vt. 249.

84. *Held*, that of the articles left by a deceased officer of the U. S. Navy, the following passed to his widow under the term "wearing apparel of the deceased," viz.: a bosom pin and epaulets; but that the following did not pass, viz.: a regulation sword and belt, a finger ring, a watch and its chain, cord and seals, although these articles were usually worn by the deceased. (*Redfield*, C. J., dissenting as to these last, except as to the watch and its appendages.) *Id.*

85. Independent of G. S. c. 51, s. 1, the right of a widow to one-third of her intestate husband's estate is absolute, and vests in her subject to the charges of debts, funeral charges and expenses of administration, on the instant of her husband's decease. It is governed by the same rules as is the share which passes by law to the heir. It is her share; vests in her by law; does not depend upon the discretion of the probate court. *Johnson v. Johnson*, 41 Vt. 467. *Thayer v. Thayer*, 14 Vt. 120. *Holmes v. Bridgman*, 37 Vt. 38. *Frost v. Frost*, 40 Vt. 625.

86. This statute, directing an assignment by the probate court of not less than one-third, does not alter or prejudice this right, but confers a discretionary power to assign more than

the one-third. As to such excess, the right is personal to the widow herself, and if she dies before action upon it by the probate court, the right dies with her and does not pass to her representative. *Johnson v. Johnson*.

87. Under the 4th subdivision of s. 1, c. 51, of G. S., providing that the probate court *may* assign the whole estate to the use of the widow, &c., if it does not exceed \$300;—*Held*, that this is not imperative, but is left to the discretion of the probate court. *Frost v. Frost*, 40 Vt. 625.

See DOWER.

(c.) *Division and distribution.*

88. **Advancement, what.** *Held*, by a majority, that the expenses of a college education might be treated as an advancement, if the father thought proper so to charge it. *Robinson v. Robinson*, Brayt. 59.

89. **Receipt not a bar.** A receipt executed by a son to his father for a certain sum, expressed to be in full of his share in his father's estate, was *held* not to bar him as heir, but was only evidence of an advancement to that amount. *Id.* 3 Vt. 283. Approved in matter of *Kettell's estate*, Franklin Co., Jany. T. 1877.

90. **How evidenced.** No particular form of words is required to be used in a charge of advancement. An entry on the books of the intestate of property delivered to a child, made in such manner as to exclude the idea of a debt, is evidence that it was intended as an advancement; as, where the entry of a father was upon a book other than the one on which he charged his accounts of debt and credit, of "property delivered" to such child. *Brown v. Brown*, 16 Vt. 197.

91. And it was so *held*, under special circumstances, where the articles were charged under the head of "Dr." *Weatherhead v. Field*, 26 Vt. 665.

92. The statute prescribes the evidence of an advancement;—as where, in the gift or grant, it is expressed to be in advancement or for the consideration of love and affection; or where the estate is charged as such by the deceased in writing. In either case, the intent is to be gathered from the face of the papers, and parol testimony is not admissible; as, the declarations of the intestate. *Id.*

93. A deed of lands for a pecuniary consideration expressed, cannot be made an advancement by showing that it was in fact executed upon the consideration of love and affection. *Adams v. Adams*, 22 Vt. 50. *Newell v. Newell*, 13 Vt. 24. 26 Vt. 665.

94. **Changed to gift.** An advancement may be converted into an absolute gift by the



intestate, by surrendering the evidence thereof to be cancelled. *Wheeler v. Wheeler*, 47 Vt. 687.

95. **Excess of advancement.** Any excess of advancement to a child and heir above his share of the estate on a first distribution, should be carried forward and taken into account on a subsequent distribution. *French v. French*, 46 Vt. 357.

96. On a division of an estate between heirs, the probate court ascertained the amount of advancements, which was stated in the warrant of the commissioners. As to one of the heirs, that amount exceeded the value of his share, so that he took nothing on that division, and the commissioners so reported, but also undertook to report the amount of such excess, making it larger than it was. On a subsequent division of the reversion of the widow's dower;—*Held*, that the report was not binding in this respect, and that such excess should be reckoned at the true sum. *Id.*

97. **Rules of descent and distribution.** Under sec. 31 of the probate act of 1797 (1 Tol. St. 132), the estate, personal as well as real, of one dying intestate and without issue, passed to his brothers and sisters surviving, equally to those of each class, but so that a brother took a share double that of a sister. *Auger v. Taylor*, 2 Tyl. 260.

98. Under the statutes of inheritance and distribution, brothers and sisters of half blood are entitled as *next of kin*. *Brown v. Brown*, 1 D. Chip. 360.

99. By our statutes, no distinction whatever is made, in the descent or distribution of estates, in consequence of the manner in which the property was obtained, whether by purchase or inheritance; and kindred of the half blood, whether through a common father, or a common mother, inherit equally with those of the whole blood, in the same degree. *Hatch v. Hatch*, 21 Vt. 450.

100. Where one died leaving no widow, issue, father, mother, brother, or sister, living, but leaving surviving him children of his deceased brothers and sisters, and also grandchildren of deceased brothers and sisters, the parents of such grandchildren being dead;—*Held*, that the case came within the 4th and not the 5th rule of descents of G. S. c. 56, s. 1, and such grandchildren were *held* not entitled to share in the estate. *Id.*

101. S died intestate, Feby. 18, 1864, leaving no kindred in the direct line, either ascending or descending. There survived him one sister and several nephews and nieces, children of two other sisters who had died in his lifetime, and also several grandchildren of these deceased sisters, among whom were the appellants, the only children of a daughter of one of these deceased sisters. The mother of the

appellants survived her mother, but died in the lifetime of S. *Held*, that under the 4th canon of descent (G. S. c. 56, s. 1), the appellants were the *legal representatives* of their deceased grandmother, the sister of the intestate, and were entitled to inherit, in the distribution of the estate, the share which their mother would have received if she had survived the intestate. *Gaines v. Strong*, 40 Vt. 354.

102. At common law, there was no restriction or limitation upon representation in the collateral line, when called or admitted to the succession, but it ran on *ad infinitum*, as in the direct line. *Kellogg, J. Id.*

103. Representation and heirship, though they may produce the same result, are not the same thing; and one need not be the *heir* of another in order to be his *representative*. Heirship is the result, while representation is but a process through which that result is produced. Representation is not predicated of the person dying seized, but of the next line of takers from him; and they are the representatives of a deceased person, who would have inherited from him, if he had died seized of the estate at the time when the descent was cast. *Id.*

104. **Special act.** Under a special act of the legislature, A was made heir-at-law of S "in as full and perfect a manner as if she had been the daughter of S, born in lawful wedlock." S died, and afterwards M, a brother of S, died, from whom S would have inherited if S had survived him. *Held*, that the act did not make A an heir-at-law of M, and that A could not, by representation through S, share in the estate of M, as a lineal descendant of S might. *Moore v. Moore*, 35 Vt. 98; and see *Bacon v. McBride*, 32 Vt. 585.

105. **Mode of distribution.** Decree of distribution reversed for six causes named, viz.: For not ascertaining and declaring: (1), who were entitled as heirs; (2), the advancements and value; (3), what lands were held in common, or jointly—with whom and in what proportions; (4), the land by the committee to be divided; (5), the shares and proportions and value to be set to each person entitled; and (6), for want of proper notice before the order to the several persons interested. *In re Robinson's estate*, 1 D. Chip. 357.

106. A division of an estate made by a committee which was accepted and recorded by the probate judge, was long acquiesced in, and recently recognized, though quite informal and such as would have been set aside on appeal, was *held* sufficient on a plea that there was *no record* of such division. *Nichols v. Bates*, 6 Vt. 308.

107. **Partition.** In making partition among heirs or devisees under the probate act

of 1821, the land was to be appraised at its then present value, and division made accordingly, without allowing for betterments made by one of the share owners while the land was held in common. *Bull v. Nichols*, 15 Vt. 329.

108. Where a certain number of acres off the north side of a certain lot of land, without other designation, was devised to one person, and the residue of the lot to another, and one of the devisees died before any division in fact made;—*Held*, that it was a proper case for the appointment of a committee by the probate court to set off and divide the land; and that in making such division the terms of the devise should be followed, without regarding a previous agreement of the parties which had not matured into a right by lapse of time. *Chamberlin v. Chamberlin*, 16 Vt. 532.

109. In an action on a bond given on an appeal by the defendant, claiming under a dowress from the appointment by the probate court of commissioners to make partition of lands among heirs after the death of the dowress, where such appeal delayed the partition;—*Held*, that rents and profits, accruing after the appeal taken, were not recoverable as "intervening damages," named in the condition of the land; that the heirs were entitled to possession immediately on the death of the dowress, and could have recovered the rents and profits in ejectment without partition, and so their remedy therefor was not impaired nor suspended by the appeal. *Stockwell v. Sargent*, 37 Vt. 16.

### III. PROBATE BONDS; EMBEZZLEMENT.

110. **Probate bond.** G. S. c. 59, s. 2, providing that the bond of a trustee appointed in any will may be sued whenever the court of chancery upon proper application shall so order, is not exclusive, but a like power is vested in the probate court under G. S. c. 60, s. 2. *Robinson v. Stanley*, 38 Vt. 570.

111. The probate court cannot, *per se*, move in the prosecution of a probate bond. The prosecutor is the real plaintiff; and he must be one who bears such relation to the breaches complained of as to be injured thereby; and his right to prosecute must so appear in the declaration. *Probate Court v. Brainard*, 48 Vt. 620.

112. **Embezzlement.** Where the property claimed by an estate was taken away openly and without concealment, under a *bona fide* claim of right and without the intent of wrongfully abstracting it;—*Held*, that this was not a case of embezzlement under G. S. c. 51, s. 10. *Batchelder v. Tenney*, 27 Vt. 578.

113. In an action by an administrator under G. S. c. 51, s. 10, to recover double the value of property of the estate embezzled, where part of

the property had been restored before suit, and part after;—*Held*, that damages were recoverable only for the property restored after suit brought, and were limited to once that value. *Spaulding v. Cook*, 48 Vt. 145.

For other matters of *probate* jurisdiction, see EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; DOWER; WILLS; APPEAL, IV., &c.

## PROCESS.

### I. FORM.

1. *Signing of writ.*
2. *Minute of recognizance.*
3. *Direction.*
4. *Authorization.*

### II. SERVICE.

1. *Extent and limitations of authority to make service.*
2. *Mode of service.*
3. *Return.*

### III. JUSTIFICATION UNDER PROCESS.

### IV. PROCESS AGAINST THE BODY, UPON AFFIDAVIT.

#### I. FORM.

##### 1. *Signing of writ.*

1. A member of the executive council, being by the constitution a justice of the peace for the whole State, has authority to sign a county court writ which may run to any county in the State. *Sinclair v. Gadoomb*, 1 Vt. 32.

2. It is no objection to a writ returnable to the county court, that it is signed by a justice who is interested in the event of the suit. *Graham v. Todd*, 9 Vt. 166; or by the county clerk, who is but the mere instrument of the court, and may sign even his own writs. *Insurance Co. v. Cummings*, 11 Vt. 503.

3. An averment that a writ was signed by A B, the "clerk of Chittenden county," instead of Chittenden county court, was held good on general demurrer. *Briggs v. Mason*, 31 Vt. 438.

4. A signature only to the recognizance at the foot of a writ is not a signing of the writ. For such defect the writ was dismissed upon motion. *Andrus v. Carroll*, 35 Vt. 102.

##### 2. *Minute of recognizance.*

5. A minute of recognizance upon a writ which contains the name of the person recognized and the amount, and intelligibly expresses the object of its being taken, is sufficient. All other defects may well be supplied by the record

of the recognizance, when finally made up. *Corey v. Gale*, 18 Vt. 639. 10 Vt. 525. 11 Vt. 590.

6. The minute of recognizance upon a writ, "Needham & Dennis recognized," &c., was held sufficient on motion to dismiss. *Perkins v. Walker*, 16 Vt. 240.

7. A minute of recognizance in which no sum is stated, is of no force and does not answer the statute. *Sisco v. Hurlburt*, 17 Vt. 118.

8. For the purpose of issuing *mesne* process, the authority signing the writ is the sole judge of the sufficiency of the security he takes by way of recognizance, and this cannot be questioned under a plea in abatement. *Adams v. Davis*, 1 Tyl. 8. See 43 Vt. 159. *Chipman v. Pearl*, 2 Tyl. 267. *Start v. Robinson*, Brayt. 17.

9. A recognizance, or debt of record, acknowledged by an infant in court, or before a magistrate, is in no case to be adjudged void, but voidable only. Hence, it is no cause for the abatement of a writ, that the party recognized for costs is an infant. *Patchin v. Cromach*, 18 Vt. 330.

#### 8. Discretion.

10. A writ directed to the high bailiff, acting as sheriff, need not state the cause of its being so directed. *Buck v. Marsh*, Brayt. 125.

11. If a writ is directed to an officer who may and does serve it, it is no cause of abatement that it was not more broadly directed, according to a statute form, so as to embrace other officers. *Cooper v. Ingalls*, 5 Vt. 508.

12. The authority of an officer to serve a writ does not depend upon the direction. The writ may be served by a proper officer, though erroneously directed. *Stewart v. Martin*, 16 Vt. 397. *Chadwick v. Divol*, 12 Vt. 499.

#### 4. Authorization.

13. The authority issuing an execution may authorize some one specially to serve the same, as well against a town, as against a natural person. *Walter v. Denison*, 24 Vt. 551. See *INFANT*, 4, 5.

14. No person is authorized to serve process unless particularly named in such process. A direction "to any indifferent person," without naming him, is insufficient. *Moffat v. Moffat*, 10 Vt. 432. 27 Vt. 786. *Allyn v. Davis*, 10 Vt. 547. *Spafford v. Spafford*, 16 Vt. 511.

15. Otherwise, *nub modo*, as to a subpoena to a witness. *Smith v. Wilbur*, 35 Vt. 133. *West v. Walworth*, 33 Vt. 167. *Mattocks v. Wheaton*, 10 Vt. 498.

16. An authorization upon a justice writ was in this form: "I authorize A B to serve

and return this according to law"—omitting the word *writ*, after the word "this," as is in the statute formula. Held sufficient, on plea in abatement. *Fullerton v. Briggs*, 20 Vt. 542. *Davis, J.*, dissenting.

17. The authorization for service of a justice writ must be upon the back of the writ, as required by the statute. An address in the body of the writ to an indifferent person, named, following the form of a deputation in a county court writ, is not sufficient. *Edgerton v. Barrett*, 21 Vt. 196. 31 Vt. 621.

18. The justice form of authorizing one to serve a writ does not confer authority to serve a county court writ. *Washburn v. Hammond*, 25 Vt. 648. *Howard v. Walker*, 39 Vt. 163.

19. A county court summons directed to and served by a deputized person, was held good, although the general direction omitted to mention some of the officers who would regularly serve it, and the special direction was "for want of such officer seasonably to be had." *Bell v. Chipman*, 2 Tyl. 423.

20. An authorization in a county court writ, "to C. H. Harding, an indifferent person, to serve and return," was held sufficient. *Bliss v. Smith*, 42 Vt. 198. *Culver v. Balch*, 23 Vt. 618.

21. The appointment of a person to serve a writ, being a judicial act, cannot be done by proxy. If signed in blank upon a writ filled up, or made in full upon a blank writ, and such blanks are afterwards filled by a person other than the magistrate signing the writ, no authority is conferred, and service under it is void, and those acting under it are trespassers. *Kellogg, ex parte*, 6 Vt. 509. *Kelly v. Paris*, 10 Vt. 261. 19 Vt. 392. 21 Vt. 203. *Ross v. Fuller*, 12 Vt. 265. *Bebee v. Steele*, 2 Vt. 314.

22. Where an indifferent person is authorized by a justice to serve a writ, his authority cannot be extended by extending the return day of the writ, without the concurrence of the justice. The authorization is *functus officio* when the time for service expires according to the writ as it was when the authorization was made. *Carr v. Tyler*, 28 Vt. 783.

23. A writ returnable to the county court, signed by a justice, was directed to "E. K. Gladding, constable of Granville," and was served by Gladding out of the town of which he was constable. Held, that such service was void, and could not be cured by a subsequent amendment in the direction by the justice, describing Gladding as an indifferent person. *Dolbear v. Hancock*, 19 Vt. 388. 21 Vt. 203. 23 Vt. 620.

24. It is not matter of abatement, that the person specially authorized to serve a writ was related to the plaintiff; nor need the authorization state that such person was indifferent. *Miller v. Hayes*, Brayt. 21.

## II. SERVICE.

1. *Extent and limitations of authority to make service.*

25. A person specially authorized to serve a writ has all the powers of a sheriff in serving such writ, except that he is not to be recognized or obeyed as a sheriff, or known officer, but must show his authority and make known his business, if required by the party who is to obey the same. *Burton v. Wilkinson*, 18 Vt. 186.

26. Until he makes his authority known, or until it is known to those with whom he is dealing, he can claim no respect, consideration or obedience, but may be resisted as a trespasser in what he attempts to do under the writ. *Leach v. Francis*, 41 Vt. 670.

27. A writ in favor of a corporation, served by a constable who was a member of the corporation, was for this cause abated. *Dunmore Mfg. Co. v. Rockwell*, Brayt. 18.

28. Before the act of 1850 (G. S. c. 85, s. 6.), an officer could not serve a writ in favor of or against a town of which he was a rated inhabitant, or in which he was rated and taxable; nor, if the sheriff was so interested, could such writ be served by his deputy. Such service was not void, but only voidable by plea in abatement. *Essex v. Prentiss and Holmes v. Essex*, 6 Vt. 47. *Charlotte v. Webb*, 7 Vt. 38. *Fairfield v. Hall*, 8 Vt. 68. *Everts v. Georgia*, 18 Vt. 15. *Lyman v. Burlington*, 22 Vt. 181; and see *Shaw v. Baldwin*, 33 Vt. 447. *Huntley v. Henry*, 37 Vt. 165—overruling *Windsor v. Jacob*, 1 Tyl. 241.

29. G. S. c. 12, s. 26, providing that "no sheriff or deputy sheriff shall be allowed to make any writ, declaration, &c.," does not extend to a person, not a public officer, who is specially deputized to serve the writ by the authority signing it. *Watworth v. Farwell*, 41 Vt. 212.

30. But it does extend to constables; and a writ filled up by a constable is void, although so done at the request of the plaintiff's attorney and under his supervision; and will be dismissed on motion in the county court after an appeal, though no objection was made before the justice. *Winchell v. Pond*, 19 Vt. 198.

31. It does not extend to the erasure by the officer, at the request of the plaintiff, of the name of the place set for trial in a writ already perfect, and inserting the name of another place. This not the making of a writ. *Hunt v. Viall*, 20 Vt. 291.

32. A writ so made by a sheriff, &c., is good, unless avoided by plea or motion by the defendant in the process. *Sevell v. Harrington*, 11 Vt. 141.

33. Held, by a majority, that a person regu-

larly authorized by a justice to serve a writ might serve it in another county than the one to the sheriff of which it was directed. *Clark v. Washburn*, 9 Vt. 302.

34. Formal defects in the process or the return, unless objected to in abatement, are waived; but want of authority in the person serving the process is not so waived and may be otherwise taken advantage of by a party interested to defeat the process. *Kelly v. Paris*, 10 Vt. 261.

35. Where a lack of authority in the person who has undertaken to serve a writ appears upon the face of the process, the defect may be taken advantage of either by a motion to dismiss, or by a plea in abatement. *Howard v. Walker*, 39 Vt. 168. *Bliss v. Railroad Co.*, 24 Vt. 428. *Washburn v. Hammond*, 25 Vt. 648.

2. *Mode of service.*

36. A writ of summons cannot be served by reading without copy. *Chase v. Davis*, 7 Vt. 476.

37. A writ of attachment, served as a summons, will operate as a summons and be sufficient to hold the defendant to trial. *Brown v. Story*, 2 Vt. 281.

38. A writ improperly issued as an attachment against the body, but served as a summons, or by the attachment of property, is not for that cause abatable. *Langdon v. Dyer*, 13 Vt. 278. *Bowman v. Stowell*, 21 Vt. 309.

39. A citation, or order of notice to appear and show cause why a *certiorari* should not be granted in a highway case, is not required to be served as process. Such service of the notice is not regulated by statute, but by the rules and usages of the court. *Lyman v. Burlington*, 22 Vt. 181.

40. **Service upon absent party.** In order to bring one into court as a party defendant, the process must be served upon him according to the statute; publication, or notice, without previous service of the writ, is of no avail. *Propagation Society, &c., v. Ballard*, 4 Vt. 119. *Skinner v. McDaniel*, 4 Vt. 418.

41. The service of process by an officer of this State by leaving a copy thereof with the defendant in another State, without a special order of the court, gives no jurisdiction of the defendant, and is void. Notice so given may be safely disregarded. *Davis v. Richmond*, 35 Vt. 419.

42. A party is to be regarded as "being out of the State," with respect to notice of process served by copy at his last and usual place of abode, where he has commenced a journey leading out of the State, and has progressed so far, although not beyond the State limits, as that notice of the suit could not probably overtake him. *Marvin v. Wilkins*, 1 Aik. 107.

43. In the service of process against a defendant not residing in this State, where he has no known tenant, agent or attorney, and such service is made by the attachment of real estate by copy left in the town clerk's office, an additional copy, with the officer's return thereon, must be left for the defendant in such office, in order to complete the service of the writ (G. S. c. 83, s. 87), *Washburn v. N. Y., &c., Mining Co.*, 41 Vt. 50.

44. Where, in case of the service of process by copy left at the last usual place of abode of the defendant, notice of the pendency of the suit is required before the rendition of judgment, notice before service of the process, though the officer giving the notice has then the process in his hands for service, is of no avail; and where the statement in a justice's record is equivocal, and consistent with either hypothesis, viz.: that such notice was given before, or after the service, *held*, in an *audita querela* to set aside the judgment, that the question was for the jury upon the whole evidence. *Johnson v. Murphy*, 42 Vt. 645.

45. —as to time. If an officer serves a justice writ more than 60 days before the time therein appointed for trial (G. S. c. 81, s. 84), such service is void, and he acquires no right by such service—as, e. g., against a subsequent attachment. *Nelson v. Denison*, 17 Vt. 73. 25 Vt. 347. Questioned in *McKenzie v. Ransom*, 22 Vt. 324.

46. A writ dated April 22, 1855, was made returnable to the county court to be held "on the 4th Tuesday of June next," and was served Dec. 19, 1855, and entered at January term, 1856. *Held* irregular, and the suit was dismissed on motion. *Blodgett v. Brattleboro*, 28 Vt. 695.

47. —Sunday. A citation to a petition served after sunset of Saturday, was abated for this cause, but the court retained the petition and issued an order of notice returnable at the next term. *Cavendish v. Weathersfield T. Co.*, 2 Vt. 531.

48. If the service of process be begun before the setting of the sun on Saturday, it may be completed afterwards. *Fifield v. Wooster*, 21 Vt. 215. *Pearson v. French*, 9 Vt. 349.

49. Where an officer made an attachment on Thursday, which was relinquished on Friday, and on Saturday was agreed by the parties to be reinstated, and after sundown of that day the officer took possession again of the property, which was understood and intended, by consent of all the parties to the process, to be a resumption of his previous possession;—*Held*, that the service of the writ should not be treated as made after the setting of the sun on Saturday, and so void, but as a continuation of the service begun on Thursday. *Fifield v. Wooster*.

50. Process against town. A writ, process or citation against the overseers of the poor of a town is, in effect, against the town, within the meaning of the statute requiring 80 days for service. *Guilford v. Jamaica*, 2 D. Chip. 104.

51. G. S. c. 83, s. 19, prescribing the time of service of every writ against any town, &c., embraces every species of process returnable to the county or supreme court. *Peacham v Weeks*, 48 Vt. 73.

52. —against sheriff. The provision of the judiciary act of 1797 requiring 18 days for service of process against a sheriff, &c., for misfeasance, &c., in office, controls the justice act of 1797 requiring that every writ shall be served at least six days before the day appointed for trial. *Butler v. Lowry*, 3 Vt. 14.

53. In an action against a sheriff or other officer, unless the right arises out of the official neglect or misfeasance of the defendant, the statute requirement of service at least 18 days before court does not apply; as, in trespass or trover for taking the plaintiff's property upon process against another party. *Johnson v. Rice*, 14 Vt. 391.

54. So, for taking on process against the plaintiff, property which is exempt from such process. *Sanborn v. Hamilton*, 18 Vt. 590.

### 3. Return.

55. As the statute requires that the manner of the service of a writ shall be particularly expressed in the return, a plea in abatement for an insufficient return may be good without averring defect in service. *Sweetland v. Stevens*, 6 Vt. 577.

56. Where an officer's return of service of process was headed with the name of the State and county, it was *held*, that the various acts of service set forth, not mentioned as performed elsewhere, were set forth as performed in such county; and so as to base upon it an action for a false return, where the service was in fact made out of the State. *Davis v. Richmond*, 35 Vt. 419.

57. —non est. In a suit against two or more, a non est inoventus return of the process as to one or more of the defendants, is equivalent to the common law outlawry, and the cause may proceed against those upon whom the process has been served. *Cole v. Seeley*, 25 Vt. 220.

### III. JUSTIFICATION UNDER PROCESS.

58. In trespass *de bonis* against an officer who has attached property, he may justify by the writ without showing any return, where such writ is not made returnable until after the suit against him has been commenced. *Judd*

v. *Langdon*, 5 Vt. 281; and see *Briggs v. Mason*, 81 Vt. 438.

59. Where an officer acts and justifies under several processes, some of which are valid and some invalid, he is liable if it appears that, to the injury of the plaintiff, he has done more than he was justified in doing by the valid processes; otherwise he is not liable. *Wilson v. Seavey*, 88 Vt. 221.

60. A process good upon its face is a sufficient justification to the officer who executes it. Every reasonable intendment is to be made in favor of its legality, and the officer has the right to presume that it issued in a case where such process was proper, if there might be such a case; as, that an execution returnable in 60 days was issued in a case proper for such return. If it might be good for aught that appears upon its face, the officer is to be justified in its execution. *Gage v. Barnes*, 11 Vt. 195.

61. Process, regular in form, is a full justification for acts done according to its precept and to the extent of the authority apparent upon its face; and cannot be impeached collaterally, nor be resisted, upon the ground of an unlawful purpose in employing it. *State v. Buchanan*, 17 Vt. 573. *Wakefield v. Fairman*, 41 Vt. 339.

62. An execution issued upon a joint judgment against A and B was settled by B, and was surrendered to him by the creditor as evidence of payment. B then, by the advice and aid of C who knew the facts, returned the execution to the magistrate, and without the knowledge or consent of the creditor, sued out an alias, and caused A to be committed to jail thereon. *Held*, that B and C did not so connect themselves with the process as to be entitled to protection under it, and that they were liable to A in trespass for false imprisonment. *Pierson v. Gale*, 8 Vt. 509.

63. An officer is always protected when he serves a process issuing from competent authority, or, more properly, when from the face of the precept the officer cannot perceive a want of jurisdiction. *Churchill v. Churchill*, 12 Vt. 661.

64. Where an execution for a fine imposed by court-martial was regular upon its face, and the court had jurisdiction;—*Held*, that the officer executing it was protected, notwithstanding an irregularity in the previous proceedings. *Darling v. Bowen*, 10 Vt. 148. 15 Vt. 173.

#### IV. PROCESS AGAINST THE BODY UPON AFFIDAVIT.

65. **Preliminary affidavit.** Where a court has not jurisdiction of the process in the particular case, the process is void. Thus, where a writ issues against the body in a case not

authorized by law—as, without a preliminary affidavit duly filed, or upon an insufficient affidavit, where the law requires such preliminary affidavit—the writ is void, and an arrest under it is illegal. *Aikens v. Richardson*, 15 Vt. 500. *Whitcomb v. Cook*, 39 Vt. 585. *Adams v. Whitcomb*, 46 Vt. 708.

66. Under the statute authorizing process against the body upon filing an affidavit that the debtor was about to abscond from the State;—*Held*, where the affidavit was that the debtor “was about to leave” the State, that it did not warrant the issuing of a *capias*. *Aikens v. Richardson*.

67. The writ of *ne exeat*, as at present used in this country, is a *meane* process from the court of chancery, to hold a party to equitable bail that he may not depart from the jurisdiction of the court, but be present with his body to answer its decree against him, and can be properly issued only in those cases where the person of the defendant can be touched by the decree, either by attachment, or on execution. Hence, by G. S. c. 33, s. 75, such writ cannot issue against a female, in a case founded upon contract; but such process in such case is void, and the party procuring the writ and causing an arrest thereon is liable for false imprisonment. So *held*. *Adams v. Whitcomb*, 46 Vt. 708.

68. **Filing of affidavit.** Under G. S. c. 33, s. 76, requiring “the filing with the authority issuing” a *capias* on affidavit, &c., something more is required than the bare placing of the affidavit upon the premises of the magistrate, where it may or may not subsequently come to his knowledge; it must be left with the magistrate subject to his control, and be permanently deposited with him for the inspection of all concerned. *Parkhurst v. Pearsons*, 30 Vt. 705. *Phillips v. Wood*, 31 Vt. 322. *Whitcomb v. Cook*, 39 Vt. 585.

69. Where such affidavit was made and a writ, signed by a justice in blank, was filled as a *capias*, and the creditor's attorney, who had made the affidavit and writ, slipped the affidavit under the door of the office of the justice in his absence from town, and it was found by the justice only upon his return, and after the service of the writ;—*Held*, that the affidavit was not “filed,” within the meaning of the statute, and that the creditor was liable for false imprisonment for the arrest made upon the writ. *Whitcomb v. Cook*.

70. A knowledge of the affidavit must be brought home to the magistrate, before he issues such writ against the body. *Held*, that an arrest after such affidavit was made, but not filed with the justice nor brought to his knowledge until after the arrest, was irregular and void, and that the bail could avail himself of the defect on *scire facias*. *Muzzy v. Howard*, 42 Vt. 23.

71. **Form of affidavit.** Where an affidavit for an arrest on civil process was made by one as president of the plaintiff corporation;—*Held*, on *habeas corpus*, that this was sufficient *prima facie* evidence that he was such president. *Sargeant, ex parte*, 17 Vt. 425.

72. An affidavit for a *capias*, under G. S. c. 33, s. 76, which follows the language of the statute, is sufficient without stating more definitely that the defendant is indebted to the plaintiff, or the amount of the property secreted, except as being "sufficient to satisfy the plaintiff's demand." *Davis v. Dorr*, 30 Vt. 97.

73. *Held*, that an affidavit for a *capias* was sufficient, which was, that the affiant had "reason to believe, &c." instead of "good reason, &c.," and that the defendant had "goods, chattels or money, &c.," instead of "money, or other property, &c.," that it was not necessary to specify wherein the property consisted. *Phillips v. Wood*, 81 Vt. 322.

74. An affidavit was *held* sufficient to warrant a *capias* against a citizen of another State, temporarily and openly in this State, which alleged that he was to "abscond or remove" from this State, &c. *Bank of Vergennes v. Barker*, 27 Vt. 244. *Id.* 293.

75. So, in like case, where the allegation was that the debtor was about to "leave this State." *McLeran v. Shearer*, 33 Vt. 290. (Acts of 1851 and 1852.)

76. Where the writ in an action on contract issued as a *capias*, and the defendant was arrested;—*Held*, that a plea in abatement on account of the writ having been so issued and served, is insufficient, which does not negative the filing of the affidavit prescribed by statute. *Bank of Rutland v. Barker*, 27 Vt. 293. See *Sawyer v. Vilas*, 19 Vt. 43.

## PROPRIETARY DIVISION.

1. A proprietary division under the statute can be proved only by the proprietors' records. *McKenzie v. Putney*, N. Chip. 11.

2. It is the better way for the proprietors' clerk to insert the warning of a meeting in his records, and that the same was published according to law; in which case it will be presumed to be so, *prima facie*; but if omitted, the publication may be proved by parol. *Id.*

3. Proprietary divisions are valid so far only as they are made in conformity to the statute. *Britton v. Lawrence*, 1 D. Chip. 108.

4. Proprietors cannot under the statute divide the lands of the town unequally, as to quantity, among the proprietors; and no length of acquiescence will cure such irregularity. *Hodges v. Parker*, Brayt. 54.

5. The doings of a former proprietors' meet-

ing, and divisions made in consequence thereof, cannot be legalized by a subsequent vote. *Pomeroy v. Taylor*, Brayt. 169.

6. A proprietary division of the lands of a town into severalty, and the vote or allotment of them to particular individuals, do not create or confer a title thereto in behalf of one, not an original proprietor, or who has no conveyance of the right of such proprietor; nor is acquiescence in such division and allotment any evidence of his title. *Smith v. Meacham*, 1 D. Chip. 424.

7. Where both parties claim the same land under the same proprietary division, the legality of the division cannot be disputed; but where a certain lot in a certain division is claimed, a division in fact must be shown; otherwise it cannot appear that there is any such lot. *Bown v. Bean*, 1 D. Chip. 176. *Bush v. Whitney*, *Id.* 369.

8. Where the plaintiff in ejectment shows title to a proprietary right in the town, the defendant, if a stranger, cannot object to the division shown; and he does not become entitled to question the division, or the plaintiff's title, by taking a conveyance of a proprietary right after the commencement of the suit, where he conveys it away before trial. *Hodges v. Parker*, Brayt. 52.

9. No stranger can call in question the legality of a proprietary division; nor can a proprietor, unless his rights have been violated thereby, nor, even in that case, if he has submitted to and acquiesced in the division made. *Wells v. Brewster*, 1 D. Chip. 147. *Sumner v. Conant*, 10 Vt. 9.

10. In the allotment and survey of a town, the boundary lines of lots 28 and 29, adjoining and of equal size, were actually surveyed out and marked by the proper surveyor, except the divisional line between them; and, as to this, the surveyor made survey bills of the lots describing a divisional line, but not running it, which bills were recorded. The land thus embraced in the outside boundaries of the two lots fell short of the quantity allotted to both. *Held*, that the line must be so run as to divide the lots equally, and that the divisional line described in the survey bills, but not actually run, was not controlling. *Doolittle v. Peck*, Brayt. 51.

11. An ancient charter of a township which contained no description of any land, but referred to a survey thereafter to be made, was *held* admissible in ejectment, without production of the original survey, with evidence of an actual location and division among the proprietors long acquiesced in. *Robinson v. Gullman*, 3 Vt. 163.

12. The division of a town into lots, though without actual survey, and though not in other respects made conformably to law, was *held*

made good by long acquiescence. *Stevens v. Griffith*, 8 Vt. 448.

13. A division in fact, though imperfect, evidenced by a plan, or even by parol, acquiesced in by the proprietors, is always held as a good division binding on them, and clearly is good against strangers. *Sawyer v. Newland*, 9 Vt. 883.

14. A division in fact made by the proprietors of a town, although before the date of the charter, where it had been subsequently treated and acted on as the division of the lands of the town, and no proprietor had ever questioned its legality, was held good, and that the book of records of such division was evidence thereof. *Hubbard v. Austin*, 11 Vt. 129.

15. A division of common land among the proprietors, however informal, if acquiesced in for 15 years, has always been considered in this State equivalent to a legal division. But this must be a division of the land in fact, either by visible lines and monuments, or by possession, under claim, of distinct and clearly defined parcels. *Booth v. Adams*, 11 Vt. 156.

16. Infants and married women owning proprietary rights in townships, are bound by the acts of the proprietors at legal meetings in making a division, or by subsequent acquiescence in a division. *Townsend v. Downer*, 32 Vt. 188.

17. A field-book of a division of lands among proprietors, long recognized as such, is pregnant evidence of two necessary facts—survey

in fact, and an acquiescence under it. *Hart v. Gage*, 6 Vt. 170.

18. It appeared from the proprietors' records, that the proprietors voted to divide their land into lots of 100 acres each, and that the committee appointed for that purpose made and reported their survey according to the vote, and that this report was accepted and recorded. Held, that the presumption was, that the survey and division were in fact made as stated in the report; and that the burden of proving that the actual survey and division were different from those so reported, was upon the party claiming it. *Beach v. Fay*, 46 Vt. 387.

19. A pitch made by an original proprietor of the town in 1839, was held not referable to a vote of the proprietors in 1795, considering the lapse of time, and that the pitch did not purport to have been made in pursuance of such vote, &c. *House v. Fuller*, 12 Vt. 172.

### PROPRIETORS.

Proprietors of common and undivided lands cannot appoint an agent to prosecute suits, or employ counsel, unless by vote at a meeting duly warned for that purpose; but the doings of such agent, through irregularly appointed, may become binding upon the proprietors, as a corporation, by acquiescence. *Woodbridge v. Addison*, 6 Vt. 204.

## Q.

### QUO WARRANTO.

1. The writ of *quo warranto* is the appropriate mode in which to try any alleged usurpation of offices or franchises, inconsistent with the State sovereignty. *State v. Boston, &c., R. Co.*, 25 Vt. 433.

2. *Quo warranto* proceedings, though criminal in form, are but civil in their nature, and are addressed to the judicial discretion of the court. *State ex rel. Page v. Smith*, 48 Vt. 266.

3. The court dismissed a petition for a *quo warranto* to remove a justice of the peace, who was a postmaster when elected justice, on these grounds: (1), because the office is of very small importance; (2), because of the shortness of his term of office, which had then partly run; (3) because no other person claimed the office; (4), because the objection was of no considerable practical importance. *State v. Fisher*, 28 Vt. 714.

4. Motion by State's attorney for leave to file an information, and for a writ of *quo warranto* against a village corporation *de facto*, and its officers, was granted, on proof that the act of incorporation was not accepted by a legal majority vote, as required by the act; and judgment was rendered dissolving the corporation, and of ouster against the officers. *State v. Bradford*, 32 Vt. 50.

5. Proceedings of *quo warranto* are brought in the name of the State by the State's attorney, but the name of a relator is always brought upon the record in the English practice, and should be here, probably. In such case, costs might be awarded against the relator. *State v. Bradford*, 32 Vt. 50; qualifying *State v. Boston, &c., R. Co.*, 25 Vt. 445.

6. Upon an information in the nature of a *quo warranto*, and rule to show cause why the defendants had exercised an office;—Held, notwithstanding the form of the issue (the



defendants being in possession, and so presumed rightfully), that the prosecutor should go forward in the proof and argument. *State v. Hunton*, 28 Vt. 594. (Ruled *contra* on hearing of *State ex rel. Page v. Smith*, 48 Vt. 266.)

7. In this State, the proceeding for a writ of *quo warranto* is commenced by an application in behalf of the relator to the supreme court, wherever in session, for an order upon the adverse party to show cause at some subsequent stated term of that court in the county of lawful venue, which is the county where one of the parties resides, why an information praying for such writ should not be filed, and for an order as to the manner of making up the evidence to be used upon such showing of cause. This application may be made without notice, and is granted, as matter of course, if proper ground and reason are shown by the application. The granting of these orders does not

determine nor affect any question of legal right either as to subject matter, or procedure. All such questions stand without prejudice, to be raised, heard and determined by the court before which the order for showing cause is returnable. *State ex rel. Page v. Smith*, 48 Vt. 14.

8. Where leave is granted to file an information in the nature of a *quo warranto*, it is the duty of the court to fix some time, ordinarily during the same term, for the respondents to appear and plead; and if they do not voluntarily do so, their appearance will be compelled by due process of law. A judgment of *ouster* will not be awarded as a matter of right, or as of course, upon leave granted to file the information on failure to show sufficient cause why it should not be filed. *S. C.* 48 Vt. 266. [Proceedings by *quo warranto*, *prohibition* and *mandamus* are now regulated by Stat. 1876, No. 74.]

## R.

### RAILROAD COMPANY.

- I. GENERAL POWERS UNDER CHARTER.
- II. STOCK AND SUBSCRIPTIONS.
- III. OFFICERS, AGENTS AND SERVANTS.
- IV. MORTGAGES AND LEASES.
- V. TAKING LANDS AND MATERIALS, AND RIGHT IN LANDS TAKEN.
- VI. CONSTRUCTION OF ROAD.
- VII. RIGHTS, DUTIES AND LIABILITIES IN MANAGEMENT OF ROAD.
  1. *As carriers.*
  2. *For negligence.*
- VIII. SUITS BY AND AGAINST.

#### I. GENERAL POWERS UNDER CHARTER.

1. **Public use.** It is well settled, that there is no implied contract by the State, in the charter of a turnpike or other private corporation, that their property, or even their franchise itself, shall be exempt from the common liability of the property of individuals to be taken for the public use; that it may be taken on proper compensation being made; that a railroad is an improved highway, and that property taken for its use, by authority of the legislature, is property taken for the public use, as much as if taken for any other highway; and that the legislature may delegate such power to a railroad corporation. *White River T. Co. v. Vt. Central R. Co.*, 21 Vt. 590. 27 Vt. 879.

2. **Extending road beyond terminus.** A

corporation chartered for the purpose of constructing a railroad between certain termini, was, on the application of a stockholder, enjoined from applying its present funds or income of the road, and from pledging its credit, for extending the road beyond its terminus. By *Bennett*, chancellor. *Stevens v. Rutland & Burlington R. Co.*, 29 Vt. 545.

3. The Rutland & Burlington R. Co. was incorporated by an act of the legislature (1848), for the purpose of constructing and operating a railroad from some point at Burlington southwardly, &c., to Connecticut River. This road the company constructed under their charter, and the legislature then (1850) passed an additional act authorizing them to extend their road "from their present terminus in Burlington, northwardly, &c., to any point or points in the town of Swanton, in the county of Franklin." This act was accepted by the directors and by vote of the corporation as an amendment to the charter, and they were proceeding to carry out its purpose by extending their road. The orator, a stockholder, dissented from such vote and action of the company, and brought his bill in chancery to enjoin the company from building the proposed extension. *Held*, that the proposed extension was a fundamental change from the original purpose and scope of the incorporation and organization of the company, to a participation in which the orator could not be bound, against his consent, by the additional act of the legislature and the accept-

ance of it by the directors and a majority of the stockholders; and that he was entitled to an injunction, which was granted in the terms above stated; but leaving the company at liberty to build the extension with any new funds which they might obtain for that specific object. *Ib.*

4. **Special case.** A railroad corporation of New York was authorized by its charter and articles "to contract for the transportation and delivery of, and to transport and deliver, persons and property conveyed over its road, at any place beyond the *termini* of the road, within or without the State, &c." *Held*, that its purchase of a steamboat, designed for the transportation of freight and passengers from its *terminus* in Plattsburgh, N. Y., to Burlington, Vt., to connect with another railroad there, was not *ultra vires*, and that a promissory note given by the corporation on such purchase was binding. *Shawmut Bank v. Plattsburgh, &c., R. Co., 31 Vt. 491.*

5. **Enlarged powers and acceptance.** Where a general law was passed authorizing railroad corporations to make certain contracts, which they were not in fact authorized by their original charters to make;—*Held*, that the subsequent making of such contracts by the direct action of a stockholders' meeting should be regarded as an acceptance of such enlarged powers, as a part of the organic law of the corporation. *Vt. & Can. R. Co. v. Vt. Cent. R. Co., 34 Vt. 2.*

6. **Forfeiture.** Under an act providing that if a certain railroad corporation should not complete and put in operation a certain connecting line by a time named, "then this corporation cease, and the charter thereof be void";—*Held*, that this was only prescribing a cause of forfeiture, and that, to effect a forfeiture, it must be declared such by competent authority in some form of proceeding in behalf of the public. *Ib.*

7. **Exemption from taxes.** By the charter of the Vt. Central R. Co. it was provided, that "the stock, property and effects of the company shall be exempt from all taxes, &c." *Held*, that only such lands as were taken or used for railroad purposes and such as the company would have been authorized to take by proceedings *in invitum*, were so exempt. All others are subject to taxation. *Vt. Central R. Co. v. Burlington, 28 Vt. 193.*

8. And to levy of execution. *Eldridge v. Smith, 34 Vt. 484.*

See CONSTITUTIONAL LAW, I.

## II. STOCK AND SUBSCRIPTIONS.

9. A railroad corporation may properly stipulate for the payment of interest on sums paid on stock subscriptions until the road is completed and put in operation, payable when-

ever the surplus earnings shall enable it properly to do so. *Richardson v. Vt. & Mass. R. Co., 44 Vt. 613. Rutland & Bur. R. Co. v. Thrall, 35 Vt. 536.*

10. Subscriptions to the stock of a railroad corporation were made under a corporate vote, that all subscribers be allowed interest "on all sums paid by them" up to the time when the road shall be completed and put in operation. These were \$100 shares and were fully paid. Afterwards stock was authorized, issued and sold at \$75, and, again, at \$50 per share, to be of equal rank and value with the other stock. The corporation afterwards issued certificates for interest unpaid upon all the shares alike, at the nominal par of \$100. *Held*, that the 75 dollar and the 50 dollar shares were not entitled to interest equally with the first, but that the certificates should be reduced to the sums actually paid. *Richardson v. Vt. & Mass. R. Co.*

11. A railroad subscription was conditioned upon the extension of the road to *Derby Line*. Whether by this term, as used, was intended the north line of the town of Derby, or a village known as "Derby Line," situate on such town line, was in fact ambiguous. The company's agent procured the defendant's subscription by representing that the *terminus* intended was Derby Line village. *Held*, that the company was bound by such representation, whether or not made fraudulently. *Conn. & Pass. R. R. Co. v. Baxter, 32 Vt. 805.*

12. A contract for the future delivery of stock of a railroad corporation is not affected by the subsequent exercise of the right, under the charter, to mortgage the road, property and franchise, or to issue new or additional stock at a less nominal value, or to unite with another corporation. *Noyes v. Spaulding, 27 Vt. 420. Woody v. Rut. & Bur. R. Co., 24 Vt. 660.*

13. Jany. 19, 1869, the defendant, a resident of Montpelier and one of the commissioners for receiving subscriptions to the stock of the plaintiff corporation, subscribed for \$10,000 of its stock. Dec. 20, 1869, at a legal meeting of the commissioners, the defendant, in the presence of the commissioners and with their consent, annexed to his subscription the following written condition: "Condition that good and responsible individuals in Montpelier subscribe \$50,000 within one year from above date, and a list of subscribers, and amount of each, given me Jany. 19, 1870." *Held*, that the defendant's subscription should be reckoned towards the \$50,000 named in the condition. *Montpelier & Wells River R. Co. v. Langdon, 45 Vt. 137.*

14. The charter of a railroad corporation required that the directors should give notice of assessments upon subscriptions to the capital stock, and of the time and place of payment, in

certain newspapers. In an action for such assessments;—*Held*, that without proof of search and inability to find such newspapers, it was error to admit the testimony of a witness that he had examined such newspapers and that they contained the notices, and to state the contents of the notices. *Seemle*, that where several publications are required, the production of one copy of the paper, with parol evidence that the same was published the requisite number of times, would be sufficient. *Rut. & Bur. R. Co. v. Thrall*, 35 Vt. 536.

See CORPORATION, I.

### III. OFFICERS, AGENTS AND SERVANTS.

**15. Directors.** By vote of the directors of a railroad company, their general services were to be performed without pay; but for special services required of them which should call them from home, they were to be allowed not exceeding \$2.00 per day, and expenses. *Held*, that this limitation applied only to that class of services which could be rendered only in the capacity of a director, and did not apply to the superintendence of the construction of a part of the road, making purchases therefor, settling land damages, &c., by a director as a special agent, *Henry v. Rut. & Bur. R. Co.*, 27 Vt. 435.

**16.** But *held*, that this limitation did apply to all services as one of an executive committee of the directors, and in negotiating the bonds of the company;—all such services being performed as a director. *Hodges v. Rut. & Bur. R. Co.*, 29 Vt. 220.

**17.** By G. S. c. 65, s. 3, a corporation is empowered to convey its real estate "by an agent appointed by vote for that purpose." *Held* to apply to our public municipal corporations which have no public officer, or officers, clothed by law with a sufficient authority to act for them; but as to our ordinary business corporations, like banks and railroad companies, whose charters provide for a board of directors in whom the entire management and control of all the business and affairs of the corporation are vested, the statute is satisfied by a vote of the directors merely, without a vote of the stockholders, or corporation itself. *Arms v. Conant*, 36 Vt. 744, citing *Conant v. Rut. & Bur. R. Co. Id.* 748.

**18.** A mortgage of the property of a railroad corporation, to secure a debt of the corporation, which was executed by an agent appointed by vote of the directors for that purpose, without any vote of the stockholders, was *held* good, though such vote was passed at a meeting of the directors held without this State;—this not being properly a corporate act, the directors not acting as the corporation, but as the agents and on behalf of the corporation. *Id.*

**19. Lessee.** Under the statute making a railroad "corporation and its agents" liable for all damages occasioned by want of fences and cattle guards;—*Held*, that a lessee, operating the road, was liable as such "agent." *Clement v. Canfield*, 28 Vt. 302.

**20.** The corporation is also liable for such damage, though the road is operated by a lessee. *Nelson v. Vt. & Canada R. Co.*, 26 Vt. 717.

**21. Receiver.** In an action against the defendants who were managers of a long line of railroad and held themselves out as common carriers, for the loss of goods delivered to them as such for transportation;—*Held*, that it was no defense at law, that they were running and managing the line of railroad as receivers under an appointment of the court of chancery. *Blumenthal v. Brainerd*, 38 Vt. 402.

**22. Operator.** Any person in possession of a railroad and employing the franchisees of the railroad corporation in operating it, either as a trustee, lessee, receiver in chancery, or an intruder even, is liable to passengers and the owners of freight, who may employ him, to the same extent precisely as the corporation would be, while conducting the same business. *Sprague v. Smith*, 29 Vt. 421.

**23. Conductor.** Under C. S. c. 26, s. 52, authorizing the conductor of a railroad train to put a passenger refusing to pay his fare "out of the cars at any usual stopping place the conductor may elect";—*Held*, that this impliedly negated the exercise of such right at any other place. *Stephen v. Smith*, 29 Vt. 160.

**24. Servants.** The servants of a railroad company are its mere instruments, and their acts are regarded as the acts of the corporation, and trespass lies therefor against the corporation. *Sabin v. Vt. Central R. Co.*, 25 Vt. 363. 23 Vt. 372.

**25.** A declaration against individuals in the possession, use and occupation of a railroad, that they by their servants so carelessly, negligently and improperly drove their locomotive along the railroad that through such carelessness, &c., the locomotive ran against and killed the plaintiff's cattle, shows a good cause of action at common law, and was *held* sufficient. *Cooley v. Brainerd*, 38 Vt. 394.

**26. —of contractors.** A railroad company was *held* not liable for the acts and negligence of the servants of the contractors in building the road. *Clark v. Vt. & Canada R. Co.*, 23 Vt. 103.

**27.** Where the plaintiff forbade the hands engaged in the construction of a railroad upon his land from working on the same until his damages were settled;—*Held*, that this was not notice to the corporation. *McAuley v. West, Vt. R. Co.*, 33 Vt. 311.

## IV. MORTGAGES AND LEASES.

**28. Power to mortgage.** In order to uphold a lease or mortgage of a railroad, it is not necessary to hold that the franchise of the railroad company to be a corporation is a subject of sale or transfer. The right to build, own, manage and run a railroad and take the tolls thereon, is not of necessity of a corporate character, or dependent upon corporate rights. It may belong to and be enjoyed by natural persons, and there is nothing in its nature inconsistent with its being assignable. *Bennett, J., in Bank of Middlebury v. Edgerton*, 30 Vt. 190. 86 Vt. 494.

**29.** A railroad corporation may mortgage its "road and its franchise." These terms embrace only such rights and privileges as are involved in the owning, maintaining and operating of the railroad, and in the receipt and enjoyment of the income and emoluments of so doing. This does not touch the franchise of being a corporation. *Miller v. Rut. & Wash. R. Co.*, 86 Vt. 452. *Eldridge v. Smith*, 84 Vt. 484.

**30.** A railroad corporation has legal competency to pledge its credit for the procuring of rails for its road, and to secure payment by a mortgage of its road, franchises and property, provided it be not restricted by statute in this respect. *Miller v. Rut. & Wash. R. Co.*

**31. Interpretation.** The Vt. Central R. Co., for the purpose of securing payment of its bonds, conveyed in trust and mortgage its "railroad and franchise and also its station houses, engine houses (&c., &c.), and other appendages, with all the lands thereto belonging, and intended for the use and accommodation of said road, &c." Held, that only such land of the corporation passed under the mortgage, as was intended for the use and accommodation of the railroad at the date of the mortgage, and such as was so connected with and used by the corporation for the railroad, as that the corporation would have been authorized to take it compulsorily; but whether so taken, or by purchase, was not material. *Eldridge v. Smith*, 84 Vt. 484.

**32.** A railroad mortgage conveyed, among other things, "all other personal property belonging to said company as the same is now in use by said company, or as the same may be hereafter changed or renewed by said company." Held, not to embrace machinery afterwards added for "burnetizing" timber and ties, where nothing of the kind existed when the mortgage was given, and the articles took the place of nothing which was covered by the mortgage. *Brainard v. Peck*, 84 Vt. 496.

**33.** A railroad had been located between the two general termini and put under contract for construction and was in process of con-

struction, but was in no part completed as a railroad ready for use, and the corporation had not acquired the right of way to a considerable part of the line. Being in this condition, the corporation made a mortgage of its "road and franchise." Held, as against the corporation and subsequent mortgagees, that the mortgage was designed to take effect upon the road as it should exist, under the rights of the corporation, at the time the mortgagees should succeed to the rights of the corporation by virtue of the due enforcement of the mortgage; and such effect was given to it upon the completed railroad, including changes of location at different points, and an addition of two miles beyond the terminus as located when the mortgage was given. *Miller v. Rut. & Wash. R. Co.*, 86 Vt. 452.

**34.** The road then in the process of construction, with the rights and privileges of the corporation in it as a road completed, was the thing mortgaged. The accessions to it, by way of completing it, are not susceptible of being regarded as *after acquired property*, in the sense of the cases upon that subject. *Barrett, J. Id.* 496.

**35. Equitable mortgage.** A deed intended to be executed as the mortgage of a railroad corporation by the president of the corporation, who had full authority so to do, but by mistake of form executed as his own deed, was held to be the equitable mortgage of the corporation, and a decree of foreclosure was rendered thereon, without a preliminary decree for reformation of the deed—all the facts having been set forth in the bill. *Id.*

**36. Notice to trustees.** Actual notice of a prior existing equitable mortgage, to the trustees of bondholders under a subsequent railroad mortgage, at the time of taking it, will bind such bondholders where such trustees are clothed with the trust of holding the title as security, and of enforcing and administering such security according to the provisions of the trust, both express and by law implied. *Id.*

**37. Confirmation by receipt of proceeds.** Where a railroad corporation receives the benefit of money borrowed, it cannot avoid liability upon the mortgage given to secure its payment by denying the authority of those who contracted the loan on its behalf. *Id.*

**38. Mortgage executed before act authorizing it.** Where a statute authorized railroad corporations to secure their loans or debts by mortgage;—Held, that such mortgage made and recorded before the act and delivered to the trustees to secure bonds in their hands, but which bonds were not so issued as to become operative and obligatory as contracts until after the passage of the act, would fall within the act. *Id.*

**39. Coupons.** A railroad company issued its bonds payable to bearer, with interest payable on presentation of the interest coupons attached, which coupons were payable to bearer, and the bonds were secured by a mortgage. On the question of the distribution of certain net income of the road, as between the bondholders and the holders of detached coupons;—*Held*, that the coupons, though detached, were part of the mortgage debt in the hands of the holder; and, this not being a final distribution and it not appearing that there will be any final deficit, that it must be presumed to have been the intention of the bondholders separating and negotiating the coupons, that these should be first paid and in the order in which they should fall due; and it was so decreed. *Sewell v. Brainerd*, 88 Vt. 364.

**40.** In such case, on the final distribution of the proceeds of the whole mortgage property, the holder of the coupon is entitled to share *pro rata*. *Miller v. Rut. & Wash. R. Co.*, 40 Vt. 399.

**41. Substitution.** A holder of railroad bonds under a first mortgage signed, with many others, a compromise agreement to give up his bonds and take therefor bonds under a consolidated third mortgage of \$955,000 proposed to be issued. Such third mortgage was issued, but for the amount of \$1,200,000. *Held*, that this was a substantial departure from the agreement, and that he was not obliged to any exchange of his bonds, but could hold his security under the first mortgage. *Ib.*

**42. Unauthorized lease — Subsequent assent.** The contracts of lease between the Vt. & Canada R. Co., and the Vt. Central R. Co., of Aug. 24, 1849, and July 9, 1850, not provided for in the charters nor yet prohibited, were not unlawful in the sense of being in violation of some public law, or contrary to public policy; and the validity of those contracts having been assented to by these corporations;—*Held*, that a bondholder under a mortgage made in express subjection to those contracts, could not object to their validity on the ground of a want of legal capacity to make them. *Vt. & Can. R. Co. v. Vt. Cent. R. Co.*, 84 Vt. 2.

**43. Trustees.** *Held*, as to trustees for the bondholders under a railroad mortgage after a forfeiture and strict foreclosure, that their trust was not a mere nominal, naked, dry trust for the benefit of the *cestui que trust*, but that they were still clothed with active powers and duties, and had, under the circumstances stated in the case, power to lease the road for ten years, terminable at the end of one year upon request of the majority of the bondholders made within 90 days; and such lease was sustained against the bill of such majority to set it aside, it being held to be judicious under the

circumstances. *Sturges v. Knapp*, 81 Vt. 1. *Barrett, J.*, dissenting, and *Bennett, J.*, in part.

**44.** The trustees of a railroad mortgage leased the railroad after foreclosure. Certain of the bondholders, against the will of the others, brought a bill against the trustees and the lessees to set aside the lease, and procured an injunction and a receiver, upon giving an injunction bond. The bill was afterwards dismissed and the lease established, and the injunction damages assessed at a certain sum to the trustees, and a certain other sum to the lessees, both sums largely exceeding the sum actually recoverable, which was only the penalty of the injunction bond. The damages of the trustees were only the loss of the rent of which the lessees were relieved while kept out of possession. *Held*, that the true rule of apportionment of the injunction damages was a *pro rata* distribution upon the sum assessed to the lessees, on the one hand, and the share of the rent assessed to the trustees, on the other hand, which would have belonged to and been received by those innocent bondholders who did not participate in the prosecution of the suit on the part of the orators, if no injunction had been granted. *Sturges v. Knapp*, 86 Vt. 489.

**45. Act unconstitutional.** The act of 1857, No. 16, providing for an annual meeting of the mortgage bondholders of a railroad in the hands of the trustees under a mortgage, the election of trustees, and their confirmation by a chancellor on summary proceedings, and the transfer of the property to the trustees so elected, and forming the new trustees into a corporation with powers of management, &c., was *held* unconstitutional, as impairing the obligation of the contract under which the trustees of the second mortgage bondholders of the Rut. & Bur. R. Co. held said road—changing it, and affecting the interests under it of the parties not consenting to the proceedings; as, the corporation; the bondholders under the several mortgages; and the trustees personally. *Fletcher v. Rut. & Bur. R. Co.*, 39 Vt. 633, *in chancery*. *Bennett, Ch.*

#### V. TAKING LANDS AND MATERIALS; AND RIGHT IN LANDS TAKEN.

**46. What may be taken.** A railroad company chartered in New Hampshire may purchase and hold lands in this State connecting with their road at the State line, and necessary for the accommodation of the road. *State v. Boston, &c., R. Co.*, 25 Vt. 488.

**47.** So also a bridge company. *Claremont Bridge v. Royce*, 42 Vt. 730.

**48.** An establishment for the manufacture of railroad cars is not to such extent a legitimate railroad necessity, as that the corporation

could properly condemn land on which to erect one. *Eldridge v. Smith*, 84 Vt. 484.

49. So, as to dwelling houses to be rented to the employees of the corporation. *Ib.*

50. Otherwise, as to land necessary for the piling of wood. *Ib.*

51. Under the charter of the Vt. Central R. Co.;—*Held*, that the right of the corporation to take outside materials for constructing its road could be exercised by a contractor for building it; that the commissioners had jurisdiction to assess damages for all acts which the corporation might lawfully do by its "engineers, agents or workmen," including such contractor; and that for such materials taken the commissioners need not assess the damages until after taken. *Vt. Central R. Co. v. Baxter*, 22 Vt. 865. 25 Vt. 871. 28 Vt. 805.

52. Where lands are lawfully taken by a railroad corporation for a legitimate railroad use, the judgment of the proper officers of the corporation, acting *bona fide*, as to the necessity for such appropriation and the extent of the land needed, unless clearly beyond any just necessity, is regarded as conclusive. *Eldridge v. Smith*, 84 Vt. 484. *Hill v. West. Vt. R. Co.*, 82 Vt. 66.

53. **Mode of taking.** The charter of the Vt. Central R. Co. provided for the taking of lands by the company upon the appraisal of damages by commissioners, and that upon payment of the awarded damages, or depositing the same in bank, &c., "said company shall be deemed to be seized and possessed of all such lands, &c.;" and provided that the company might change the location of such parts of their road as they should deem proper. The company had surveyed and located the route of their road across the plaintiff's land, and had caused his damages to be appraised, and the survey and the award of the commissioners to be recorded; but afterwards, and before paying or depositing the sum awarded, the company changed their line, thereby wholly avoiding the plaintiff's land. In an action of debt on the award;—*Held*, that the plaintiff could not recover; that the payment or deposit of the award was a condition precedent, not only to the acquisition of the legal title to the land, but also to the right to enter upon the land to construct the road or exercise any act of ownership over the land; that the change of location operated as an abandonment of the former survey and of all rights under it; and that, as the company had acquired no rights, the plaintiff was not entitled to the damages awarded. *Stacey v. Vt. Central R. Co.*, 27 Vt. 89.

54. According to our general railroad statutes and the special statutes in this State, the payment or deposit of the land damages, assessed or agreed, is a condition precedent to the vesting of the title, or of any right in the

company to construct their road, and that if they proceed in such construction without this, they are trespassers; and this has been repeatedly so held by this court. *Redfield, C. J.*, in *McAuley v. West. Vt. R. Co.*, 88 Vt. 811.

55. But payment is a fact resting *in pais*, and being so, although a condition precedent, it may be waived by the party in whose favor it exists, and this by parol merely. *Ib.* 828.

56. In these great public works, the shortest period of clear acquiescence, so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of the road. *Ib.* 821.

57. We adopt and reassert the doctrine propounded in the case of *McAuley v. West. Vt. R. Co.*, 88 Vt. 811, that if the land owner foregoes his right to have his damages ascertained and paid before the making of the railroad over his land is commenced, and, under some arrangement as to the subsequent ascertainment and payment of his damages, consents that the work may proceed before the damages are to be ascertained and paid, he cannot thereafter interpose and prevent the work in progress, nor prevent the use of the road; nor unless, at least, there is some special and binding contract to that effect, can he assert a lien on the land taken and occupied for the road, in the nature of a mortgage for the purchase money, or value of the land. *Knapp v. McAuley*, 89 Vt. 275.

58. The survey and location of a railroad is what constitutes the taking of the land over which it is laid, and when so taken it is the duty of the company to cause a certificate of the survey to be recorded in the town clerk's office, and to pay the damages to the land owner before they take possession. But if the land owner agrees upon the compensation, and permits the company to take possession and construct their road, it is too late for him to take advantage of the omission to record. *Troy & Boston R. Co. v. Potter*, 42 Vt. 272.

59. **Assessment of damages.** Commissioners for assessing damages for lands taken by a railroad company, are to assess such damages "as are as likely to arise,"—that is, from a proper construction of the road; and are not presumed to have taken into account damages otherwise occasioned;—as, by negligence. *Clark v. Vt. and Canada R. Co.*, 28 Vt. 108. 25 Vt. 69.

60. Railroad corporations, under the statutes of this State, are not liable for consequential damages to lands not taken, arising from a prudent construction and operation of their road; but are liable for such damages only by reason of negligence or want of care.

*Hatch v. Vt. Central R. Co.*, 25 Vt. 49. *S. C.* 28 Vt. 142. *Richardson v. Vt. Central R. Co.*, 25 Vt. 465.

61. In the award of commissioners for the appraisal of damages for land taken by a railway company, "and for all damages that may occur to the land owner by reason of the location of the railroad over his premises," everything must be regarded as having been considered and included, which the land owner would suffer by the construction of the road in a prudent and reasonable manner, and all the damages that would be likely to accrue to him by the continuance of the road, managed and taken care of with reasonable care and prudence. *Waterman v. Conn. & Pass. R. R. Co.*, 80 Vt. 610.

62. Where railroad commissioners were required to appraise to the land owner all damages which he should be likely to sustain by the occupation of his land for a railway;—*Held*, that the appraisal included the damage done to the land adjoining that taken for the road, by fragments of rock thrown upon it in blasting rocks in the proper construction of the road way, and the damage done the land by going upon it to remove such fragments; but that the appraisal did not include damage for a cart way upon the adjoining land, used during the construction of the road. *Sabin v. Vt. Central R. Co.*, 25 Vt. 368.

63. Where lands are conveyed to a railroad company for the purposes of constructing their road, their rights are co-extensive with what they would have been if the lands had been taken by compulsory process; and the estimate of damages likely to arise from the contemplated use of the land must be presumed to have been taken into account in the price, in the one case, as well as in the appraisal in the other. *Norris v. Vt. Central R. Co.*, 28 Vt. 99.

64. Where railroad commissioners awarded land damages upon the basis that the road was to be constructed in a particular way, as represented by the agent of the company, but without fraud, and the road was constructed differently;—*Held*, that an action at law did not lie to recover increased damages occasioned by the alteration, since the award stood in force, not appealed from, or otherwise vacated. *Butman v. Vt. Central R. Co.*, 27 Vt. 500.

65. Where a railroad was laid over and along a plank road and the road destroyed, and the franchise of the plank road company was sequestered, and the company disorganized;—*Held*, (1), that the land did not thereby revert to the owner so as to entitle him to damages beyond the increased burden imposed by taking it for a railroad; (2), that the loss of the use of the plank road, being a loss in common with the whole public, was not an element of damages;

but (3), that for the construction of a private way from his buildings to the public highway, made necessary by the substitution of the railroad for the plank road, the land owner was entitled to damages. *Brainard v. Missisquoi R. Co.*, 48 Vt. 107.

66. **Appeal.** On an appeal to the county court from the appraisal of damages for land taken by a railroad company under its charter;—*Held*, that neither party was entitled to have the damages assessed by a jury; that such mode of assessment was not implied in the provision, that "the decision of the county court shall be final." *Gold v. Vt. Central R. Co.*, 19 Vt. 478.

67. In the assessment of land damages on the laying of a railroad, the commissioners act judicially, and the claim for damages becomes *res adjudicata*, and, if not appealed from, the award is conclusive upon the parties, like a judgment, and cannot be collaterally impeached. *Butman v. Vt. Central R. Co.*, 27 Vt. 500.

68. Where there were conflicting claims to lands taken by the Vt. Central R. Co., and the company by order of the Chancellor, on petition under G. S. c. 28, s. 21, had deposited the appraised damages in bank subject to the future order of the Chancellor, and afterwards, on petition of a claimant with notice to the company, the money was ordered to be paid to him;—*Held*, that no appeal from such order lay in behalf of the company. *Haswell v. Vt. Central R. Co.*, 23 Vt. 228. 26 Vt. 100.

69. **Supreme court.** Proceedings to assess land damages, where land is taken for a railroad, are in the nature of sessions proceedings, not according to the course of the common law, and cannot be brought before the supreme court by exceptions. *Courser v. Vt. Central R. Co.*, 25 Vt. 476.

70. **Notice to owner.** In proceedings to condemn real estate to the use of a railroad, notice, appraisal, and payment of damages to the occupant, avail nothing as against the rights of the true owner. *Hagar v. Brainerd*, 44 Vt. 294.

71. **Right in land taken.** A railway company must, from the very nature of their operations, in order to the security of their passengers, workmen, and the enjoyment of the road, have at all times the right to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by former owners, in any mode and for any purpose. The right of the company to the exclusive occupancy must be, for all the purposes of the road, much the same as that of an owner in fee. *Redfield, C. J.*, in *Jackson v. Rut. & Bur. R. Co.*, 25 Vt. 159. *Isham, J.*, in *Hurd v. Rut. & Bur. R. Co.*, 25 Vt. 121. *Aldis, J.*, in *Conn. & Pass. R. R. Co. v. Holton*, 83 Vt. 47. *Troy & Boston R. Co. v. Potter*, 42 Vt. 265.

72. The company may maintain trespass for all entries and acts of the adjoining land owner upon the land taken, which may in the least degree embarrass the use of the road for the purposes for which it was built—as, for cutting and carrying away turf from between the fences; for building a new farm crossing; and for crossing the track with teams at another point than the established crossing. *Conn. & Pass. R. R. Co. v. Holton*, 32 Vt. 43; and for cutting and carrying off the herbage. *Troy & Boston R. Co. v. Potter*.

73. Where a railroad company has taken land by survey and location, under and according to the power and authority conferred by its charter, a parol reservation by the land owner of the herbage which should grow outside of the track of the road, which was taken into account in the fixing of the land damages, cannot be claimed against another company which has purchased the entire rights of the first company and taken a lease of the road without knowledge of, or anything to indicate the existence of such reservation. 42 Vt. 265

74. A railroad company, owning one undivided moiety of land in fee and the life estate of A in the other moiety, and being in exclusive possession, duly located their road thereon and appropriated the whole land to the ordinary, necessary and legitimate purposes of the road, and continued to use and possess the same after the termination of the said life estate, to the exclusion of the remainder-man, and without the appraisal or payment of land damages under the statute, or otherwise. *Held*, that the remainder-man could not maintain ejectment against the railroad company to be let into a joint possession of the premises, but must resort to the statute to recover his damages for his interest so appropriated. *Austin v. Rutland R. Co.*, 45 Vt. 215.

75. When subject to execution. A railroad company acquires only an easement in the lands taken, or conveyed to it, for the purposes of road bed and depot accommodations. This is not such an estate as is subject to levy of execution. *Hill v. West. Vt. R. Co.*, 32 Vt. 68.

76. Under the Vermont Central Railroad charter, provision was made for the condemnation of lands for the use of the road, and also that the corporation "may take and hold all such grants and donations of land and real estate as may be made to the company." Certain lands were conveyed to the corporation in common form as in fee, which were occupied by it for road bed and depot purposes, and afterwards such use was permanently abandoned, the location being changed. *Held*, that the lands did not revert, but were held by the corporation in fee, and were subject to levy of execution against the corporation.

*Page v. Heineberg*, 40 Vt. 81. *Benedict v. Heineberg*, 43 Vt. 281.

77. Station house. A railroad company, by erecting and opening their station houses to the public, impliedly license all to enter. Still, such license is revocable as to all except those who have legitimate business there growing out of the road, or with the officers, or employees of the company. As to persons having no business at the stations, the company have the right to direct them to depart, and, on their refusal to do so, may remove them. *Harris v. Stevens*, 31 Vt. 79.

78. Any person desiring to go upon the cars has the right, within a reasonable time before the expected departure of his intended train, to enter the station house for the purpose of procuring a ticket and getting on board, and to remain there until the departure of the train, then soon to leave, which he intends to take; and this, whether he has purchased a ticket, or not, unless the rules of the company require the purchase of a ticket before entering the cars. What is such reasonable time of coming and stay depends upon the circumstances of the particular case. *Id.*

79. This right may be forfeited by improper conduct, or by the violation of the rules and regulations of the company. *Id.*

80. If, after being requested to leave, he intends to rely upon his right to stay, it is but reasonable that he should make known his intent, if not otherwise known, to the person making the request. *Id.*

## VI. CONSTRUCTION OF ROAD.

81. Rights and duties as to adjoining lands. A railroad company in constructing their railroad made an excavation upon their own land, but so near the line of the plaintiff's land adjoining, that the soil of the plaintiff's land, without any artificial weight being placed thereon, slid into the excavation. *Held*, that the company was liable in an action therefor. *Richardson v. Vt. Central R. Co.*, 25 Vt. 465; and see *Beard v. Murphy*, 37 Vt. 99. 25 Vt. 63.

82. —stream of water. A railroad company is liable for stopping or diverting a stream of water, to the injury of a neighboring proprietor. *Hatch v. Vt. Central R. Co.* 25 Vt. 49.

83. —surface water. A railroad company may, as a question of care and prudence, as well be required to have regard to the prevention of damage to a land owner by the accumulation of surface water merely, as by a running stream, where the geographical formation and surrounding circumstances are such as to make it apparent to reasonable men that such precautions are necessary; and, ordinarily, what is a



reasonable performance of duty in this respect, under a given state of circumstances, is a question of fact, and not of law. *Waterman v. Conn. & Pass. R. R. Co.*, 80 Vt. 610.

84. —**dam.** A railroad company was held liable for damages occasioned by the breaking away of an embankment and dam across a stream, by reason of its imperfect construction by the company, which was designed and built for the track of the road, although at the same time, by arrangement with the land proprietors, designed for the purpose of creating a reservoir for the use of mills upon the stream;—the work being primarily for the purpose of making a road way, and at the same time cheaper for the company, and the stockholders not objecting. *Jones v. West. Vt. R. Co.*, 27 Vt. 399.

85. —**highway.** A railroad company, in the prudent and reasonable mode of constructing their railroad, raised a high embankment crossing a highway and made a cut upon their own land, all near to and in front of the plaintiff's house, so as to obstruct and render difficult any passage between the house and the highway. In an action to recover for such consequential damage;—*Held*, that under a charter requiring compensation to be made for lands *taken*, the company was not liable for damage to lands merely *injuriously affected*; and, there being no evidence that the plaintiff was in fact owner of the fee of the highway, *held*, that the plaintiff could not recover. *Richardson v. Vt. Central R. Co.*, 25 Vt. 465; and see *Hatch v. same*, 25 Vt. 49.

86. A requirement in a railroad charter, that the company shall, in crossing a highway, restore the highway to its former state of usefulness, as near as may be, and to the acceptance of the selectmen, is not a condition precedent to the right to cross. *Richardson v. Vt. Central R. Co.*

87. *Held*, that a declaration against a railroad corporation alleging that the defendant in constructing its railway across a highway made a deep cut across the same, and had neglected and refused to build any bridge or construct any crossing whatever for the accommodation of said highway and the persons wishing to travel over the same, whereby the plaintiff is wholly cut off from all approach to and from his farm and farm buildings, over and by means of said highway, discloses no cause of action; shows no positive injury to the plaintiff, but a *non-feasance* merely. *Buck v. Conn. & Pass. R. R. Co.*, 42 Vt. 370.

88. The liability of the railroad company for such default is, under the statute, to the town. *Ib.*

89. Railroad companies, under the right of crossing a highway, acquire no right to build their station houses in the highway. *State v. Vt. Central R. Co.*, 27 Vt. 103.

90. —**fences.** Under the charter of the Vt. Central R. Co., which contained no provision as to the obligation to fence the road;—*Held*, that such obligation rested primarily upon the company, both as part of the compensation to land owners and as a necessary precaution to running the trains with safety; and that an action lay for a neglect to fence the road, by means whereof the plaintiff's cattle straying upon the road were injured. *Quimby v. Vt. Central R. Co.*, 28 Vt. 387. 27 Vt. 148. *Trow v. Vt. Central R. Co.*, 24 Vt. 487.

91. A railroad company, after they have opened the fields of an adjoining landholder for work and have begun constructing their road, are bound to use all reasonable and prudent means to restrain the cattle of the land owner from straying from his land upon the railroad track, and to prevent the irruption of other cattle into his lands from their line of road. (Whether they are bound to fence their track, before or as soon as they begin constructing their road, was not decided.) *Holden v. Rutland & Burlington R. Co.*, 30 Vt. 297.

92. Under the statute requiring railroad companies to fence their tracks, they are bound so to do, at least, as soon as they commence running their road. *Clark v. Vt. & Can. R. Co.*, 28 Vt. 103. 30 Vt. 306.

93. The duty of a railroad company, under the statute requiring them to build and maintain a sufficient fence upon each side of their road, is satisfied by their putting up and maintaining bars at a farm crossing; and where the land owner refused to have bars put up, insisting that there should be gates, and so the crossing remained unfenced, whereby his cattle passed upon the track and were killed;—*Held*, that the escape of the cattle was his fault, and not that of the company; and *held*, that if, as he insisted, there was an agreement that the company should put up gates instead of bars, his action should be upon the contract to recover his damages. *Hurd v. Rut. & Bur. R. Co.*, 25 Vt. 116.

94. The obligation of a railroad company to fence the margins of their railroad track, extends only to the owner or rightful occupier of the adjoining fields, and to cattle rightfully in such adjoining fields, and not to mere trespassers there. *Jackson v. Rut. & Bur. R. Co.*, 25 Vt. 150. *Morse v. same*, 27 Vt. 49. *Bemis v. Conn. & Pass. R. R. Co.*, 42 Vt. 375.

95. The plaintiff's horses escaped from his pasture, situate a mile or a mile and a half distant, and got upon the defendant's railroad near the depot where the railroad was not fenced, and were there run over by the defendant's train, without negligence in the running of the train. By the defendant's charter, it was required "to build and maintain a sufficient fence upon each side of its railroad, through

the whole route thereof." *Held*, that the plaintiff could not recover. *Jackson v. Rut. & Bur. R. Co.* 25 Vt. 150.

96. A railroad company was properly enjoined from planting willow trees along the margins of their railroad line, for the purpose of a fence, which would by their roots and shade injure the adjoining land—no strong and controlling necessity being shown for such mode of fencing the road. *Brock v. Conn. & Pass. R. R. Co.*, 35 Vt. 373.

97. **Contracts for construction—Constitutional question.** G. S. c. 28, s. 72, making railroad companies liable to day laborers, employed by the contractors for building it, for labor actually performed, upon giving a specified notice, is not unconstitutional as to contracts thereafter made, though there was no such provision in the special charter previously granted, and no reservation therein of power to control, alter or amend;—and such provision extends to laborers under *sub*-contractors, and covers the use of the laborer's horse and cart used by him. *Brannin v. Conn. & Pass. R. R. Co.*, 31 Vt. 214.

98. **Reference to engineer.** A contract for work in constructing a railroad had a provision authorizing the company to retain in their hands, for the payment of the laborers, such an amount of the monthly estimates as the engineer might deem proper for that purpose, and to adopt measures for its disbursement, such as he might consider judicious;—*Held*, that the contractor could enforce no claim against the corporation except for the balance due after sufficient had been retained to pay the laborers, under the decision of the engineer; and that the money so retained was not the property of the contractor, nor subject to be taken by trustee process, but was held by the corporation in trust for the laborers;—and so *held* as to a sub-contract made subject to the provisions of the principal contract with the corporation. *Joslyn v. Merrow*, 25 Vt. 185.

99. The provisions of a contract between a railroad company and a contractor for building the railroad, that "the engineer shall be the sole judge of the quantity and quality of the work specified, and from his decision there shall be no appeal," and that, in case of alterations, "such allowances or deductions shall be made therefor as the engineer may deem fair and equitable to both parties," constitute the engineer the sole umpire; and, unless the company fail to furnish a suitable engineer, no recovery can be had for work done under such a contract, without or beyond his estimates, unless upon the most irrefragable proof of mistake in fact, corruption in the engineer, or positive fraud in the company in procuring an under estimate. *Vanderwerker v. Vt. Central*

*R. Co.*, 27 Vt. 130. *Herrick v. Belknap*, *Ib.* 673. *Ib.* 700.

100. A provision in a contract for constructing a railroad, that estimates should be made by "the engineer," was *held* to apply to other engineers—as, the resident engineer—and not exclusively to the chief engineer. *Herrick v. Belknap*.

101. The provision in a contract for the construction of a railroad was, that it should be done to the acceptance of the engineer. *Held*, that this referred, as to a final acceptance, to the chief engineer of the company; and, when the company had no such officer, that payment for the work done could be claimed without an award of acceptance. *Barker v. Troy & Rut. R. Co.*, 27 Vt. 766.

102. A contract providing for monthly estimates of the contractor's work done, to be made by the engineer, according to which estimates the contractor is to be paid, imports an accurate measurement and final estimate for each month, and not a mere proximate and conjectural estimate. *Herrick v. Belknap*, 27 Vt. 673. *Barker v. Belknap*, 27 Vt. 700.

103. Where the defendants, a railroad company, had made a contract in writing with B for the construction of their railroad, and B had sub-let to the plaintiff a part of the work, and the plaintiff, under the direction of the defendant's engineer, had done some extra work beneficial to the defendants;—*Held*, that the plaintiff could not recover therefor against the defendants—the engineer having no authority under his general duties as engineer, or otherwise, to bind them by any contract, and there being no evidence that the defendants consented to have the work done on their credit, and the defendants' contract being with B, and not the plaintiff; that the plaintiff's remedy, if any, was against B. *Thayer v. Vt. Central R. Co.*, 24 Vt. 440. *Vanderwerker v. same*, 27 Vt. 125, 139. *Herrick v. Belknap*, 27 Vt. 673. *Ib.* 777.

104. A court of equity has jurisdiction of a claim for work done above the estimates of an engineer under a contract which makes the award of the engineer final, if the award was fraudulent, or procured by undue influence. *Herrick v. Belknap*, *Ib.* 700.

105. **"Per mile."** A contract to construct a railroad between certain *termini* at so much *per mile*, was *held* to include side tracks and turn outs, so that the contractor could not charge *extra* therefor. *Barker v. Troy & R. R. Co.*, 27 Vt. 766.

106. **Measure of damages.** Where the plaintiffs sued a railroad corporation to recover for the building of its railroad, but the road was not completed by the time stipulated in the contract, but was finally accepted;—*Held*, that the defendant could not claim against the plain-

tiff the interest paid or allowed to its stockholders, agreeably to its by-laws, upon their assessments, between the time set in the contract for the completion of the road, and the time when it was actually completed. *Ib.*

107. The plaintiff, by his contract with a railroad corporation for building its railroad, was to receive a certain part of his compensation in the stock of the corporation. Upon finishing the work, the plaintiff demanded payment, which the defendant refused, because, as the fact was, the contract had not been fully performed according to its terms, and because the plaintiff demanded more than was due him. The stock was then worth but 33 per cent of its par value. It being determined that the plaintiff, upon equitable grounds, was entitled to recover, though a less price than that stipulated;—*Held*, that, on like equitable grounds, the recovery for that portion of the claim payable in stock should be only for the value of the stock at the highest market price between the commencement of the suit and the judgment; *or*, the plaintiff could take a present delivery of the stock, at his election. *Ib.*

## VII. RIGHTS, DUTIES AND LIABILITIES IN MANAGEMENT OF ROAD.

### 1. As carriers.

108. —*of merchandise.* A railroad company, chartered with power to transport both "persons and property," are liable as common carriers in the transportation of cattle and live stock, where they have undertaken such transportation for hire for such persons as choose to employ them, although this is not their principal employment, but only incidental and subordinate. *Kimball v. Rut. & Bur. R. Co.*, 26 Vt. 247.

109. *Special agreement.* Common carriers may, by express agreement, change their relations and become private carriers, *pro hac vice*. The defendant, a railroad company, for a given reasonable reward or hire, proffered to transport cattle as common carriers; and for a less sum, to supply the necessary means of transportation, using all reasonable care and diligence, the owner assuming all other risks of the transportation. An express contract of this latter kind was upheld and the company *held* not liable as common carriers for injury to the cattle during transportation. *Ib.*

110. In an action against a railroad company for not delivering the plaintiff's goods by the time fixed by a special parol agreement, the defendant set up, against proof of the agreement, a written receipt enumerating the articles, price of freight and that it was prepaid; which receipt the plaintiff took on delivering the goods and paying the freight. To this receipt was

added a stipulation to forward the goods, but subject to a printed condition indorsed that the company would not guaranty any special dispatch, "unless made the subject of express stipulation in writing." *Held*, that if the plaintiff, not reading the paper before the departure of his goods nor knowing of this provision, understood the paper to be merely a receipt or voucher to show that the freight had been prepaid, and in the exercise of reasonable and ordinary judgment and understanding in the transaction of business, had a right, from what was said and done at the time, so to understand it, then the taking and keeping of the paper was not conclusive evidence of the contract, but the true contract could be shown by parol; that there was one element lacking to make the paper operative as a binding contract, viz.: a mutual understanding that the paper was delivered and *accepted* as a contract. *King v. Woodbridge*, 34 Vt. 565.

111. *Notices, &c.* The general liability of a common carrier can be restricted or diminished by an express or special contract; but a general notice by a carrier to the public, limiting his obligations as a common carrier, affords no evidence of such contract, even if the existence and contents of the notice are brought to the actual knowledge of the party; for the implication is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. *Kimball v. Rut. & Bur. R. Co.*, 26 Vt. 247. *Blumenthal v. Brainerd*, 38 Vt. 402. *Farm. & Mech. Bank v. Champlain Tr. Co.*, 23 Vt. 186.

112. But such notice, when its terms are reasonable and just and are assented to by the owner, may limit the liability as carrier, but not to exempt the carrier from liability for negligence. *Kellogg*, J. 38 Vt. 410. 23 Vt. 206. 40 Vt. 326.

113. A railway company cannot, by their printed notices, receipts and regulations, even when brought to the notice of the shipper, so limit their responsibility that they can carry freights for a reward, and at the same time not be liable for a failure to exercise ordinary care in carrying them. *Mann v. Birchard*, 40 Vt. 326.

114. *Delivery to connecting road.* A box of goods marked and directed to B at Boston, was delivered to a railroad company at Saratoga Springs for transportation over their road on its way to Boston. The company gave a receipt as follows: "Received, Saratoga Springs, Sept. 17, from B, &c., one box, to forward to Castleton for B, Boston, Mass., &c." Castleton was the terminus of this road, which there connected with another road, and that with others, forming a line from Saratoga Springs to Boston. *Held*, (1), that the legal

duty of the company, as carrier, was not only to carry safely to Castleton, but there to deliver the box to the next connecting road in the line; (2), that the non-arrival of the box in Boston, and its loss, were sufficient *prima facie* evidence of negligence to throw upon the company the burden of proving the delivery to the next carrier at Castleton. *Brintnall v. Sar. & Whitehall R. Co.*, 82 Vt. 665.

**115. Where liability as carrier ends.** The responsibility of the carrier of goods, as a common carrier, continues after the arrival of the goods at the place of destination, until they are ready to be delivered at the usual place of delivery, and the owner or consignee has had a reasonable opportunity, during the hours when such goods are usually delivered there, of examining them so far as to judge from their outward appearance of their identity and whether they are in a proper condition, and to take them away; and it is the duty of the owner, or consignee, under the contract of carriage, to take notice of the course of business at the station of delivery, and of the time of the arrival of the train when his goods may be expected at the place of delivery, and to be ready to receive them in a reasonable time after their arrival and when in the common course of business they may be fairly expected to be ready for delivery. *Blumenthal v. Brainerd*, 38 Vt. 402. 42 Vt. 705.

**116.** This reasonable opportunity is not to have reference to the peculiar situation and circumstances of the consignee, but is to be such as would give to a person residing in the vicinity of the place of delivery, and informed of the usual course of business in the matter of the unloading and delivery of goods of that character, and also informed of the time when the goods may be expected to arrive, suitable opportunity, within the usual business hours for delivering such goods after they had been placed in readiness for such delivery, to come to the place of delivery, inspect the goods, and take them away. *Id.*

**117.** After the goods are ready for delivery, and the owner or consignee has had a reasonable opportunity, during the hours when such goods are usually delivered, to examine and remove them, it then becomes the duty of the carrier, if the goods are not called for, to store and preserve them safely and in readiness for delivery when duly called for; and then the carrier is released from his responsibility as a common carrier, and becomes liable as a warehouse-man. *Id.*

**118.** Where the goods arriving by railroad had remained in store ready for delivery to the consignee for seven days, and were then stolen;—*Held*, that the responsibility of the railroad company, as common carrier, had ceased before the theft. *Id.*

**119. Negligence—Burden of proof.** In an action against a railway company for neglect to carry goods through to their destination with proper dispatch, the case rested upon the question of the exercise by the defendant of ordinary care and diligence. *Held*, that the burden was upon the plaintiff to prove the want of such care and diligence; but that an unusual and unexplained delay and failure to deliver the goods according to the general course of business were sufficient *prima facie* evidence of such want of ordinary care. *Mann v. Birchard*, 40 Vt. 326; and see *Day v. Ridley*, 16 Vt. 48. *Brintnall v. Sar. & W. R. Co.* 82 Vt. 665.

**120. Carriage beyond their own road.** Railroad companies, as common carriers, may make valid contracts to receive freight at, or to convey it to, points beyond the limits of their own road, either by land or water, and thus become liable for the acts and neglects of other carriers, not under their control. *Noyes v. Rut. & Bur. R. Co.*, 27 Vt. 110. *Form. & Mech. Bank v. Champlain Tr. Co.*, 28 Vt. 186. *Morse v. Brainerd*, 41 Vt. 550.

**121.** Such contract may be express or implied. Vermont courts have not gone to the extent of holding, with the English courts, that the receipt of goods destined and directed to a point beyond the line of their own road, imports an obligation of the company to deliver at the place of destination; but only to transport and deliver to the next connecting road; unless there is a stipulation express or implied to deliver at a point beyond. *Morse v. Brainerd*.

**122.** A contract so to transport safely and deliver was implied from the circumstances of this case, viz.: That the several connecting railroads had a business arrangement by which they constituted one line of transportation; that property was sent through without change of cars, and at a single through price, fixed at the place of departure and paid in gross at either end of the route; and that the property was billed through as "from Swanton, Vt., to Medford, Mass.," and was so upon the way-bill, &c. *Id.*

**123.** The station agent at Ludlow on the defendant's railroad billed the plaintiff's goods through to Charlestown, Mass., a point upon a connecting railroad, and gave a receipt of payment for "transporting the goods from Ludlow to Charlestown." This was the usual course of business upon the defendant's road. *Held*, that these facts were properly submitted to the jury as tending to prove a contract to transport the goods through to Charlestown. *Mann v. Birchard*, 40 Vt. 326.

**124.** A railroad company received for transportation a box of goods directed to a place beyond the terminus of its own road, and gave and signed a receipt therefor, as follows: "Vermont

Central Railroad Co., Burlington, Sept. 13, 1866. (Mark and Numbers, W. R. Lewis, Brooklyn, Iowa.) Received from W. R. Lewis 1 Box, weight 850, numbered and marked as above, which the company promises to forward by its railroad, and deliver to ——— or order, at its depot in ——— he or they first paying freight for the same, at the rate customary per ton of 2,000 pounds. N. B. If merchandise be not called for on its arrival, it will be stored at the expense and risk of the owner." *Held*, by a majority, that the receipt constituted a contract to carry the box to its ultimate destination, Brooklyn, Iowa; but *Barrett, J.*, contending, that the contract would be performed by transporting the box to the terminus of the defendant's railroad, and that the duty of the defendant would then be to deliver the box for further transit according to the established rules and usages of the business. *Cutts v. Brainerd*, 42 Vt. 566.

125. A carrier of passengers by railroad rightfully running his cars over the railroad of another, but over which he has no control beyond that of running his own cars upon it, is not liable for an injury to a passenger upon that road, occasioned without his fault or that of his own servants, but caused by the misconduct or negligence of the servants of that road over whom he had no control. *Sprague v. Smith*, 29 Vt. 421.

126. Different rules of liability of railroad companies as carriers of freight, and of passengers, beyond the line of their own road, considered. *Id.*

127. **Through ticket.** Where the plaintiff at Boston called for and purchased a through railroad ticket from Boston to Troy, which route passed over several connecting railroads, and, by a common arrangement, through tickets were sold at a less price (which the plaintiff knew) than separate tickets for the same distance, and the ticket was stamped "Boston to Troy—Good for this day and train only," and the plaintiff had used it for a part of that distance only;—*Held*, that one of such connecting roads could lawfully refuse to carry the plaintiff upon said ticket, offered on a subsequent day and occasion, over the remainder of the route to Troy. *Shedd v. Troy & Boston R. Co.*, 40 Vt. 88.

128. The plaintiff bought a ticket over (among others) the defendant's railroad, with checks attached, reading: "Good for one first-class passage only on presentation of this ticket with checks attached." On his route over defendant's road the conductor detached and retained one of the checks, and gave him instead a conductor's check, which was equivalent. Before arriving at the point where the conductor's check would take him, another conductor took the train, and called for his

fare, or the production of the check. The plaintiff had lost the conductor's check, and could not produce it, and so informed the conductor, and refused to pay his fare, whereupon the conductor ejected him from the cars. *Held*, that he was lawfully ejected. *Jerome v. Smith*, 48 Vt. 280.

129. **Arrival of baggage.** In regard to passengers' baggage which has reached its final destination by railroad, it is the duty of the company, upon its arrival, to have it ready for delivery upon the platform at the usual place of delivery until the owner can, in the use of due diligence, call for and receive it; and the owner must call for it within a reasonable time. If he does not within a reasonable time call for it, the liability of the company as carrier ceases. The company should then put it in their baggage room and keep it for the owner, and their custody of it then is only that of warehouseman. *Ouimit v. Henshaw*, 85 Vt. 605. (See *Blumenthal v. Brainerd*, 88 Vt. 402).

130. The usual course of business and practice of a railroad company as to the delivery, transfer or storage of baggage, is a most important element in determining when the transit ends. *Ouimit v. Henshaw*.

131. A passenger arriving with baggage by cars at a railroad station, is justified in regarding the man who handles and takes charge of the baggage on the arrival of that train, as the agent of the company which has brought the passenger there, the baggage master of the station; and notice by the passenger to him while handling the baggage, in regard to the destination of the baggage, is notice to the company. *Id.*

132. **What is baggage.** A box containing a bed, pillows, bolster and bedquilts, all of small value, belonging to a poor man, and which accompany him while moving with his wife and family by railroad conveyance, may properly be called baggage. *Id.*

## 2. For negligence.

133. **Negligence of fellow servant.** The plaintiff's intestate, who was an engine driver on the defendant's railroad, was killed by an explosion of the locomotive which he was running, such explosion occurring in consequence of the neglect of the defendant's master mechanic to keep the locomotive in proper repair, it being his duty to inspect, superintend and direct all such repairs. The defendant's directors were not guilty of any neglect in furnishing the road with suitable machinery and men and means for repairs, and were ignorant of any defect in the locomotive, and the master mechanic was skilful and competent. In an action by the administrator to recover

damages, under the statute, for the death;—*Held*, that the defendant was not liable. *Hard v. Vt. & Canada R. Co.*, 82 Vt. 478.

134. It is the duty of a railroad company to see to it that the road is equipped with sufficient, suitable and safe engines, all requisite machinery and materials, and of the necessary quality, and men of the knowledge, skill, care and capacity necessary for the full, perfect and faithful discharge of all the duties that appertain to the positions they severally occupy. For the faithful discharge of this obligation, the company is holden to each and every person whom it employs in the business of running the road. Having done this, there is no implied warranty, towards its servants, that each shall faithfully discharge his duty—as, to keep the machinery in its original safe condition;—and the company is not, in such case, liable to one of its servants for injuries occasioned to him by the carelessness or unfaithfulness of a co-servant, where both are engaged in the same general business—as, in running the trains upon the road—although the servant in fault is superior in employment to the one injured. *Ib.*

135. The defendants, a railroad company, had an agreement with the R. & W. R. Co., for their mutual interest and convenience, that the R. & W. R. Co. might run their engines and trains over a section of the defendants' road, upon which there was a side track leading into a gravel pit, and a switch, of which the defendants had the exclusive management and control. The plaintiff, an engineer of the R. & W. R. Co., in running his engine over this road, was turned upon the side track and thrown off and injured, by reason of a misplacement of the switch through the negligence of the defendants' servants. *Held*, that the plaintiff was lawfully upon and in use of the defendants' road, and that the defendants' owed towards him, as such, the duty of protection from their negligence; and that he was entitled to recover. *Sawyer v. Rutland & Burlington R. Co.*, 27 Vt. 370.

136. *Held*, also, that the plaintiff and the defendants' switch tender were not fellow servants. *Ib.* (2 Law Rep. Ex. 30.)

137. **Cattle, &c., wrongfully on road.** A railroad company is responsible for recklessness, want of common care, or wanton injury to persons or property, though unlawfully upon the railroad. *Jackson v. Rut. & Bur. R. Co.*, 25 Vt. 150. *Bemis v. Conn. & Pass. R. Co.*, 42 Vt. 375. *Trow v. Vt. Central R. Co.*, 24 Vt. 487. *Morse v. Rut. & Bur. R. Co.*, 27 Vt. 49.

138. In an action against a railroad company for negligently running their engine whereby the plaintiff's horse was injured upon the track;—*Held*, that it was not incum-

bent on the plaintiff, in opening his case, to prove that according to the ordinary rules and customary management of railroads, the defendants were guilty of want of ordinary care, but if the defendants desired the benefit of the rules of engineering for their exculpation, they might show the custom; and if not unreasonable, of which the jury must judge, it would avail them. *Quimby v. Vt. Central R. Co.*, 23 Vt. 387.

139. In an action against a railroad company for injury to the plaintiff's horse by the running of a locomotive engine, the court charged that the defendants were bound to the exercise of ordinary care and prudence, "such, for instance, as a man of ordinary prudence would use who was the owner of both the road and the horse." This illustration is in most cases just, but not entirely applicable to such a case. The defendant, however, has no reason to complain of it, but only the plaintiff. *Ib.*

140. The plaintiff's oxen lying upon a railroad track which ran through the plaintiff's farm, were run over and killed by a passing train. Upon these facts alone,—*Held*, that there was no evidence of negligence to charge the railroad company, and this could not be presumed. *Lyndsay v. Conn. & Pass. R. R. Co.* 27 Vt. 643.

141. Where an animal is wrongfully on a railroad track as a train is approaching, the first and paramount duty of the company and its servants, when danger is apprehended from such obstruction, is towards the safety of persons and property on the train, or otherwise lawfully on the track; and as to such, the law demands the highest degree of care and diligence. The next object of attention is the safety of their own property. While discharging these higher obligations and duties, they are to exercise ordinary care to avoid injury to the trespasser; but such ordinary care does not require nor allow them to run any risk to life or property on the train, but must be consistent with such higher obligations. *Bemis v. Conn. & Pass. R. R. Co.*, 42 Vt. 375.

142. Railroad companies are not bound to regulate the general speed of their trains on the assumption that the track will be unlawfully obstructed. *Ib.* 379.

143. If an engineer uses such means as are usually sufficient to drive cattle from the track without unnecessary injury, the company should not be held liable for injury to cattle unlawfully upon the track, though he misjudged as to the best means to be used. *Ib.* 381.

144. If the train is running at its usual speed, the mere fact that its speed is not checked while approaching the animal, or the mere fact that the engineer does not see it until so near that he cannot avoid the accident, does not

tend to prove want of care as to the animal; and whether the engineer should stop the train, check its speed, or even increase the speed, depends upon what the safety of the passengers and train requires, and whatever this requires, is allowable as to property wrongfully on the track. *Ib.*

145. In an action for running over and killing the plaintiff's bull by the defendants' engine, the court charged the jury that the defendants were bound to exercise due care in the speed of their train, to use due vigilance while running the train in looking out for obstacles on the track, and due diligence in checking the speed if animals were seen wrongfully on the track; and that if, by the exercise of such degree of diligence, the engineer would have perceived the animal in a position where danger should reasonably have been apprehended, he should have so checked his speed as to avoid the accident, if in his power. *Held*, that the charge was calculated to mislead the jury and was erroneous, and judgment for the plaintiff was reversed. *Ib.*

146. **Mutual negligence.** Where the plaintiff suffered his horse to run in the highway near a railroad crossing, and the horse getting upon the track was killed by a passing train, and there was no evidence of negligence in the manner of running the train at the time;—*Held*, as matter of law, that the plaintiff was guilty of such negligence that he could not recover, although the defendant company was guilty of negligence in not having fenced its road—this being a case of mutual negligence of equally remote degree. *Trou v. Vt. Central R. Co.*, 24 Vt. 487.

147. **Remote cause.** In an action against a railroad company for neglect to keep a fence along their track, whereby the plaintiff's horse escaped from his pasture upon the track, and thence into a rocky pasture where he got hurt and lamed upon a rock, the court charged, that "if the jury were satisfied that there was a clear connection between the escape of the horse and the injury received, then the plaintiff could recover," &c. *Held* erroneous, for not distinguishing between a direct and a remote connection between the defendants' neglect and the injury; that the defendants were liable only for the natural and direct consequences of their neglect, and whether the consequence in this case was a natural and direct, or a remote and accidental consequence, was a question of fact for the jury upon the circumstances of the case. *Holden v. Rutland & Burlington R. Co.*, 30 Vt. 297.

148. In such case, if the defendants, in the exercise of such care and judgment as a prudent owner of the horse would have used, ought to have foreseen that the horse escaping might reasonably be expected to get into such a pas-

ture and so get injured, this would be the direct and immediate consequence of the defendants' neglect, and they would be liable; but if the probability of an injury from such causes was so remote as not to be reasonably expected by any one in the exercise of such prudence, then the result would be properly attributable to chance and accident, and they would not be liable. *Ib.* 304; and see *Saxton v. Bacon*, 31 Vt. 540.

149. **Ringling bell.** G. S. c. 28, ss. 55, 56, requiring the ringing of the bell or blowing of the whistle of locomotive engines for at least 80 rods from road crossings, imposes a duty towards all persons who, being lawfully at or in the vicinity of the crossing, may be subjected to accident and injury by the passing of the engine at that place, though such persons be not approaching, or in the act of passing, the crossing;—as, where the traveler had passed the crossing and was driving his team on the highway near to and parallel with the railroad track and 85 rods distant from the crossing, and his horses took fright from an approaching train, whose approach was not duly signaled, and ran and were injured. *Wakefield v. Conn. & Pass. R. Co.*, 37 Vt. 380.

150. There may be cases where, under this statute, the railroad company would be justified in omitting to ring, or to blow, as where to do so would increase the peril to the traveler. In order to excuse the omission, it would not be enough to show that the engineer exercised an honest good faith and intention, but, as matter of defense, the company must show that the omission in the given case, in view of the actual condition of things at the time, was in fact reasonable and prudent. *Ib.*

151. **Communicating fires.** In an action against a railroad company for damage from fire communicated by their locomotive engine, the plaintiff put in evidence "that engines of proper construction and suitable repair would not scatter fire so as to endanger property;" and the defendant had put in evidence "that an engine [of theirs] was never suffered to go on a trip when not in good condition, or when defective in the ash or fire-pan and dampers, or in the screen or smoke-stack, which are the only places where the fire can escape." *Held*, that it was competent for the plaintiff then to prove "that on or about the time of the fire the engines used by the defendant, running past the buildings which were burned, generally and habitually scattered fire from the ash pans and smoke-stacks." *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449.

152. In an action on the case against railway managers for setting fire to the plaintiff's timber lands in the running of the trains, it is no objection to the declaration, on special demurrer, that it sets forth a deed, under which,

as claimed, the managers assumed the risk of all such fires, the declaration averring that the defendants so negligently and carelessly managed their engines that said timber lands were thereby set on fire. *Sargent v. Birchard*, 48 Vt. 570.

**153. A quære.** Whether any different rule of law applies to cases of injuries upon railroads from those applicable to injuries upon highways, viz.: as to affirmative proof of due care by the plaintiff; and as to whether the question of negligence is one of law, or one of fact, in the particular case—*quære*. See *Swift v. Newbury*, 36 Vt. 359. *Hill v. New Haven*, 37 Vt. 509.

**154. Platform.** The plaintiff was rightfully at a railroad depot in the evening for the purpose of taking passage on the cars. Beside other approaches to the platform, there were stairs at the north end leading to the street, which were open at the top as if for use. These stairs and a platform at the bottom of them, about four feet from the ground, had been constructed by the express company for its sole use, but were on the premises of the railroad company and under its control. The plaintiff, in attempting to pass down these stairs in the dark to the street, without fault on her part, fell from this lower platform to the ground, but striking beyond the limits of the railroad premises, and was injured. *Held*, that the railroad company was liable. *Beard v. Conn. & Pass. R. R. Co.*, 48 Vt. 101.

#### VIII. SUITS BY AND AGAINST.

**155. Residence.** The residence of a railway corporation, for the purpose of its bringing suits, is the county and town upon the line of its road where its principal office is situated, as the centre of its business operations. *Conn. & Pass. R. R. Co. v. Cooper*, 30 Vt. 476.

**156. Agent for service of process.** *Held*, that an agent appointed by non-resident railroad trustees for the receiving of service of process, under G. S. c. 28, s. 118, continued such where his appointment had not been revoked, although his certificate had not been annually renewed as required by the statute. *Hamilton v. Wilder*, 31 Vt. 695.

**157. Jurisdiction.** The courts of Vermont, as well as of Massachusetts, have jurisdiction of a railroad corporation which exists and operates its railroad under and by virtue of acts of the legislature of each State, and where the road is a continuous line located wholly within the two States, being partly in each. *Richardson v. Vt. & Mass. R. Co.*, 44 Vt. 613.

**158. Indictment.** An indictment cannot be sustained against a railroad corporation for the obstructing of a highway by its cars, while the railroad is under the sole management of a

receiver in chancery, over whose acts the corporation has no control. *State v. Vt. Central R. Co.*, 30 Vt. 106.

**159.** Under a statute prohibiting certain offenses against the property of "any railroad corporation," an indictment alleged the acts as committed against "the Vermont Central Railroad Company." *Held* insufficient, for that the expression "railroad company" does not *ex vi termini* import a corporation more than a voluntary association. Nor is this aided, in pleading, by the fact that the charter of the "Vermont Central Railroad Company" declares it to be a public act. *State v. Mead*, 37 Vt. 722.

**160. Suit on bonds and coupons.** Railway bonds and coupons are held to be negotiable, and, like promissory notes, bills of exchange and bank bills, when received as money, are treated as money, and form the basis of a recovery upon the common money counts. So *held* as to railroad bonds. *Conn. & Pass. R. R. Co. v. Newell*, 31 Vt. 384.

**161. Pleading.** In an action against a railroad company, the declaration, after alleging the duty and neglect of the defendants to maintain a fence along their track, averred that "for want of such fence a horse of the plaintiff escaped from his pasture and went at large, and, by means of going at large as aforesaid, the horse was greatly injured, &c." *Held*, that though this declaration might have been ill on demurrer for its generality and uncertainty, it was sufficient on motion in arrest. *Holden v. Rut. & Bur. R. Co.*, 30 Vt. 297.

**162.** A declaration against certain individuals to recover damages for cattle killed by an engine which the defendants were running upon the Vt. & Canada railroad, of which road they were in the possession, use and occupation, by reason of the want of cattle guards and fences which they had neglected to build, did not allege that the defendants were a corporation or the agents of a corporation, or trustees, lessees or mortgagees, or in what capacity they were running the railroad. This was *held* ill on demurrer;—that the facts alleged did not impose upon the defendants the legal duty to make or maintain fences or cattle guards; and that the averment in the declaration, that by reason of so using the railroad the defendants were bound to make and maintain fences and cattle guards, was not an allegation of a fact, but an attempt to draw a legal conclusion from what was previously alleged. *Cooley v. Brainerd*, 38 Vt. 394. G. S. c. 28, s. 47.

#### REAL PROPERTY.

**1. Severance—Manure.** Manure is not necessarily real estate. It may be real, or per-



sonal, according to the circumstances in which it is placed. When lying upon the soil where it was first dropped, without severance, it is a part of the soil, like a clod of earth, loose stones, or fallen and decaying vegetation, and is real estate. When severed from the soil, gathered up and secured for use elsewhere, it is merely a personal chattel. *Wheeler, J., in French v. Freeman*, 48 Vt. 95.

2. So of other articles severed from the land and designed for removal and use elsewhere. *Stone v. Proctor*, 2 D. Chip. 114. *Noble v. Sylvester*, 42 Vt. 146. *Yule v. Seely*, 15 Vt. 231.

3. The owner of a farm sold all the manure upon it, agreeing to collect it and put it in a heap for the purchaser upon another part of the farm. He did so collect and deposit the manure, and received part payment therefor. Before the removal of the manure by the purchaser, the farm owner sold and conveyed the farm without reservation, and without any knowledge on the part of the grantee that the manure had been sold. *Held*, that the manure was not an appurtenance which passed with the farm, but had become a personal chattel and was at the time of the conveyance the property of the purchaser of the manure. *French v. Freeman*, 48 Vt. 93.

4. **Fixtures.** Whether fixtures remain personal property or become part of the realty, should be determinable and should plainly appear from an inspection of the property itself, taking into consideration their nature, the mode and extent of their annexation, and their purpose and object, from which the intention would be indicated. *Hill v. Wentworth*, 28 Vt. 428. *Sweetser v. Jones*, 35 Vt. 322.

5. A chattel does not lose its identity as personalty by annexation to the freehold, unless substantially annexed in a manner which will not permit it to be separated without material injury to itself, or to the freehold. Nailing a case of drawers to the wall of a building, does not change their character as personalty. *Cross v. Marston*, 17 Vt. 533. *Hill v. Wentworth*.

6. Buildings erected for temporary use by persons other than the owner of the soil, and not intended for permanent fixtures, may in some cases be considered and treated as personal property; but, as between vendor and vendee, heir and executor, mortgagor and mortgagee, all buildings which enhance the value of the estate, and are designed to be occupied by the owner thereof, agreeably to the principles of the common law, become a part of the realty and pass with it by deed, or by descent. *Leland v. Gassett*, 17 Vt. 403. *Preston v. Briggs*, 16 Vt. 124. 30 Vt. 756.

7. Where the defendant's son, at his own cost, erected buildings upon land of the defendant and by his license, and under an agreement

that the son might occupy the same, and that the defendant would at some time convey the land to him;—*Held*, that such buildings became real estate, and that the administrator of the son could not maintain trover for the buildings, upon the defendant's refusing to allow the administrator to occupy them, or to remove them, and refusing to pay for them. *Leland v. Gassett*.

8. The question whether a structure [as a house] is to be regarded as part of the freehold, or not, is [as to a purchaser] to be determined by its character and manner of erection, and not by the fact that it was erected and is owned by some one other than the owner of the soil, and that such other person has the right to remove it. *Powers v. Dennison*, 30 Vt. 752.

9. A dwelling erected under a parol license upon the land of another, over a cellar partially dug and stoned, is part of the freehold, and passes by a deed of the land to a purchaser having no notice of the license. *Id.*

10. Where the defendant for his own use erected a building upon the land of another by his parol license, but to be removed upon notice of the latter, and the building was so erected as to become affixed to the freehold;—*Held*, that for the removal of the building he was liable in trespass to a mortgagee of the land, who had taken his mortgage after such erection and without notice of such license, when the building was removed after the expiration of a decree of foreclosure of the mortgage and the plaintiff had entered into possession under his decree. *Id.*

11. Double windows and window blinds made to be used in a house, but not actually put in place and fastened, nor otherwise annexed to it, and not known of by the purchaser of the house, were *held* not to pass by deed of the house. *Peck v. Batchelder*, 40 Vt. 233.

12. Where a farm was leased on which was a hop-yard, but no hop-poles, and the tenant purchased poles and set them in the ground for his crop;—*Held*, that as against the landlord and him who had taken a deed of the farm while the tenant was so in possession, he had a right, during his term, to take up and remove and appropriate the poles to his own use. *Wing v. Gray*, 36 Vt. 261.

13. Potash kettles set in brick arches in an ashery, in the usual way for use, with chimneys to the arches, and capable of being taken out without any essential injury to the brick work, are chattels. *Wetherby v. Foster*, 5 Vt. 136.

14. Carding machines in a woolen factory, connected by a band with other wheels in motion, and which remained stationary by their own weight without fastening, were *held*, as between mortgagee and creditor of the mort-

gagor, to be chattels, although the machines could not be removed without taking them in pieces. *Tobias v. Francis*, 3 Vt. 425.

15. Machinery in a woolen factory, affixed to the building in the usual manner, some parts with nails, some with spikes and screws, and some with cleats, was *held*, as between mortgagee and creditor of the mortgagor, to be chattels. *Sturgis v. Warren*, 11 Vt. 433.

16. If articles of machinery, used in a factory for manufacturing purposes, are only attached to the building to keep them steady and in their place, so that their use, as chattels, may be more beneficial, and are attached in such a way that they can be removed without any essential injury to the freehold, or to the articles themselves, they still remain personal property. *Hill v. Wentworth*, 28 Vt. 428. *Fullam v. Stearns*, 30 Vt. 452. *Bartlett v. Wood*, 32 Vt. 372. *Sweetzer v. Jones*, 35 Vt. 317.

17. An iron boiler of a paper-mill, set in brickwork laid on a stone foundation placed upon the ground, the floor of the building laid up to it, but in no other way attached; engines in the same mill for grinding rags into pulp, fixed in large oval tubs, in the usual way—the tubs standing on timbers, and the floor of the building scribed up to them, and the engines operated by a band connecting with the iron shafting which communicated the motive power; and other articles of machinery which, although placed and used in the mill, and designed to remain there permanently, and necessary and usual for manufacturing paper, were attached to the building and kept in place only by nails, spikes, screws, nuts, or cleats, were *held*, as between mortgagee and creditor of the mortgagor, to be chattels. *Hill v. Wentworth*.

18. Shafting in a mill for the purpose of turning and putting in motion the machinery, put up by means of hangers of iron bolted to the beams and sills of the building, is a constituent part of the mill as realty, as a water wheel would be. *Id.* So, as to shafting and pulleys. *Harris v. Haynes*, 34 Vt. 220.

19. The steam boilers of a mill, set in brick work, and the arch mouth and grate, the engine, and the shafting and pulleys, all annexed to the mill for the purpose of furnishing motive power to the machinery of the mill, were *held* to be part of the realty, as between mortgagee and the purchaser from the mortgagor. *Harris v. Haynes*; and as between mortgagee and creditor of the mortgagor. *Sweetzer v. Jones*, 35 Vt. 317.

20. Where machinery to be used for a mill is sold upon the condition that it shall remain the vendor's property until paid for, but it is understood that it is to be put to use in advance of the payment of the price, and to be so annexed to the realty as to become apparently

parcel thereof and it is thereafter so annexed;—*Held*, that the same will pass to a subsequent mortgagee of the mill and machinery as against the conditional vendor, where such mortgagee advances his money and takes his mortgage after such annexation, without notice of such claim of the conditional vendor. *Davenport v. Shants*, 43 Vt. 546.

21. But as to other parts of the machinery not so annexed until after such mortgage;—*Held*, that the conditional vendor has the superior equity. *Id.*

22. **Recaption.** The right of the owner of a chattel to reclaim it, when wrongfully taken from him or appropriated, does not exist where it has lost its identity, or has been annexed to the freehold. *Jackson v. Walton*, 28 Vt. 43.

See DEED OF LANDS, 74 *et seq.*

## RECOGNIZANCE.

- I. IN GENERAL.
- II. ON APPEAL FROM A JUSTICE.
- III. ON PETITION: REVIEW; ERROR.

### I. IN GENERAL.

1. **Authority to take.** The power to take a recognizance, with any legal condition, is incident to every common law court of record. *Young v. Shaw*, 1 D. Chip. 224.

2. It is incident to every court having criminal jurisdiction, not only to bring the offender before them, but to take bail for his appearance in such form as shall secure the object intended, to wit: the appearance of the accused at all times when required. *State Treasurer v. Rolfe*, 15 Vt. 9.

3. **Irregular and void.** A recognizance taken for a purpose not authorized by law, or where the court has no jurisdiction of the subject matter, or authority to act, is void. *State Treasurer v. Wells*, 27 Vt. 276. *Same v. Danforth*, Brayt. 140.

4. A recognizance given in a criminal case, where the justice omitted to make a minute of the time when the complaint was exhibited, was *held* void. *State Treasurer v. Cook*, 6 Vt. 282. *Williams, C. J.*, dissenting.

5. Although by statute, judgment for costs may be rendered against the plaintiff when the proceedings are dismissed for want of jurisdiction of the subject matter, yet *held*, that the recognizance taken in such case for costs, &c., was void, and no recovery thereon could be had for the costs. *State Treasurer v. Wells*, 27 Vt. 276.

6. A recognizance taken by a judge condi-

tioned for the appearance of a prisoner to the county court, where the case had already passed to the supreme court on exceptions, was *held* void, although the supreme court afterwards remanded the case to the county court for a new trial. *State Treasurer v. Seaver*, 7 Vt. 480.

7. A recognizance for the appearance of a respondent at a time when no term of the court was to be holden, where there was nothing in the record itself to aid an intendment that the proper term was intended, was *held* void; as, where it was returnable to the last Tuesday save one "in 1840," and the true term was the last Tuesday save one in August, 1840. *State Treasurer v. Merrill*, 14 Vt. 64.

8. A recognizance for one's appearance to the county court to answer for a violation of the license law of 1846, was required to be taken to the State treasurer. Where taken to the county treasurer, although the penalty went to the county treasurer, an action was *held* not to lie upon it in the name of such treasurer. *Treasurer of Chittenden Co. v. Mitchell*, 23 Vt. 181.

9. **Informal.** Under statutes authorizing the taking of a recognizance for the "appearance" of a party accused, or a witness;—*Held*, that adding to the word "appear," the words: *and remain from day to day and time to time, and abide the order of the court in the premises, and not depart without leave of the court*, did not avoid the recognizance, for that such was its legal effect; and that the recognizance to "appear" remains in force until discharged by order of court, or until the prosecution is ended. *State Treasurer v. Rolfe*, 15 Vt. 9. *State Treasurer v. Woodward*, 7 Vt. 529. (So now by G. S. c. 124, s. 28.)

10. A recognizance in a criminal case was taken in vacation before a judge of Franklin county court. The venue in the margin was, "*State of Vermont, Franklin county, ss.*;" and, in the body of the recognizance, it was stated that the principal was confined in jail "*in St. Albans*," and that both recognizors personally appeared before the subscribing authority. *Held*, that it sufficiently appeared that the recognizance was entered into in Franklin county, within the local jurisdiction of the magistrate taking it—the court taking judicial notice that St. Albans was in Franklin county. *State Treasurer v. Bishop*, 39 Vt. 358.

11. It was objected to a recognizance in a criminal case, that it did not show when and where the offense was committed. *Held* sufficient in this case, and that it is not necessary to recite in detail all the proceedings before the justice, and that their regularity would be intended. *Id.*

12. **Return to county court.** The original recognizance taken by a justice on binding up

to the county court for trial is not required to be returned to the county court, but only a copy, as part of his record. *State Treasurer v. Pierce*, 2 D. Chip. 106.

13. A recognizance taken of a prisoner in jail by a judge in vacation, becomes, on being returned and filed in the county court, part of the record, and requires no enrollment by the clerk. Upon an issue of *nul tiel* record, an inspection, in the same court, of the original recognizance is the proper evidence. *Blood v. Morrill*, 17 Vt. 598.

14. A recognizance taken in a criminal case in vacation, is not defeated by a neglect of the judge to return it to the county court "before the next succeeding term," as required by G. S. c. 124, s. 14, where it is returned during such term, and such neglect has not operated, and could not operate, to the recognizor's prejudice. This provision is designed for the convenience of the State, and not for the benefit of the recognizor. *State Treasurer v. Bishop*, 39 Vt. 353.

## II. ON APPEAL FROM A JUSTICE.

15. **By what person given.** Under a statute requiring the party claiming an appeal to become recognized with sufficient surety, a recognizance entered into in behalf of such party is sufficient, though not joined in by such party. *Chittenden v. Catlin*, 2 D. Chip. 22.

16. The security by way of recognizance to be given by a party appealing from a justice's judgment (G. S. c. 81, s. 66), must be the recognizance of some person other than the appellant. A recognizance in this form, "J M [the appellant], as principal, and \$50 cash deposited with the court as surety, recognized, &c.," is insufficient. *Cheney v. McLellan*, 43 Vt. 157. *Wheeler, J.*, dissenting.

17. **The condition.** The condition of a recognizance for an appeal, "that the appellant shall prosecute his appeal to effect, and pay all intervening damages, and additional costs in case of failure," is, in legal effect, the same as prescribed by the statute. *Way v. Swift*, 12 Vt. 390.

18. A justice's record of a recognizance taken on an appeal granted, was expressed to be "for the prosecution of the appeal *in due form of law*." *Held* sufficient, as embracing the statute conditions by implication. *McGregor v. Balch*, 17 Vt. 562.

19. **Minute not a record.** A declaration in *scire facias* upon a recognizance for an appeal, setting out the condition in the words of the statute, is not sustained, upon a plea of *nul tiel* record, by a record of the usual minute made by the justice upon allowing the appeal,—as, A B recognized, &c., for the prosecution of the appeal *in due form of law*. Such a minute is

not a record that can be declared upon as a record of recognizance. *Brackett v. McLeran*, 28 Vt. 90.

**20. Liability of recognizer.** The bail for an appeal from a justice judgment, where the appellee finally recovers, is liable on his recognizance for all costs following the appeal, and so much of the debt as is lost by the delay occasioned by the appeal. *Hubbard v. Davis*, 1 Aik. 296.

**21.** In an action on a recognizance for an appeal, the plaintiff is entitled to recover, as "intervening damages," the value of his chance of collecting his debt which he has lost by the appeal, and he is to be made as well off as if no appeal had been taken. To estimate this, the state of the appellant's property at and from the time of the appeal until final judgment, is to be considered. *McGregor v. Balch*, 17 Vt. 562;—although such property was out of the State, and, by afterwards disposing of it, the appellant had qualified himself to take the poor debtor's oath. *Richardson v. Hitchcock*, 28 Vt. 757.

**22.** In an action against the surety in a recognizance for an appeal, to recover intervening damages;—*Held*, that the fact that the principal had, at a previous date, given in property to be set in his list at \$600, tended to prove that he then had property to that amount; and that this act of the principal was equally evidence against the surety. *Id.*

**23.** The recognizance to pay "intervening damages" and costs occasioned by an appeal from a justice, in a case under Stat. of 1797 for wrongfully holding over demised premises, does not embrace the rents and profits accruing during the pendency of the appeal. *Drew v. Chamberlin*, 19 Vt. 578.

**24.** It is no bar to a *scire facias* upon a recognizance given on an appeal, that the plaintiff has a remedy for the intervening damages and costs against the sheriff who attached the appellant's property on the original writ. *Holmes v. Woodruff*, 20 Vt. 97. 1 D. Chip. 388.

**25.** But in such case, *held*, that the defendant could use in mitigation of the intervening damages, the probable value of the claim which the plaintiff had against the sheriff, for having suffered the property of the principal, attached by him upon the original writ, to be eloiigned—the attachment being the prior security. *Holmes v. Woodruff*.

**26.** Where, on an appeal from a justice, judgment was recovered in the county court by the appellee, and upon that judgment a second judgment was recovered, and the debtor was committed to jail thereon, but the judgment was not satisfied;—*Held*, that the bail for the appeal remained still liable on his recognizance. *Hubbard v. Davis*, 1 Aik. 296.

**27.** A *feme sole* administratrix gave a recognizance for an appeal, in which the defendant joined as surety. *Held*, that her marriage before the appeal was entered in court did not affect the defendant's obligation upon the recognizance. *Burnham v. Bass*, 5 Vt. 463.

**28.** Where a suit is discontinued by the death of the defendant and the appointment of commissioners, the recognizance taken on the defendant's appeal is discharged. *Peake v. Keyes*, 8 Vt. 317.

**29.** Otherwise, where no commissioners are appointed and the administrator enters to defend, in a case where the cause of action survives. *Mott v. Hazen*, 27 Vt. 208.

**30.** Where an appeal from a justice judgment is carried up by neither party, the suit is discontinued, and no action lies on the recognizance taken on the appeal. *Love v. Estes*, 6 Vt. 286. 35 Vt. 27. (By Stats. 1865 and 1866 an appeal only suspends the judgment.)

**31. Action.** In order to maintain an action upon a recognizance given for an appeal, it is not necessary that an execution should have been taken out upon the judgment rendered on the appeal. *Page v. Johnson*, 1 D. Chip. 388. 20 Vt. 103.

**32.** In an action on a recognizance of bail for an appeal, it is not necessary to aver that the judgment against the original debtor, or the intervening damages, or costs, remain unsatisfied. If paid, that is matter of defense. *Way v. Swift*, 12 Vt. 390. (*Contra* to *Page v. Johnson*, 1 D. Chip. 388.)

**33.** A judgment of forfeiture of a recognizance is conclusive in a *scire facias* brought to enforce the recognizance. *State v. Nichols*, 43 Vt. 91.

**34. Assessment by jury.** After judgment by default upon a recognizance, taken for an appeal, the court denied the motion of the plaintiff to have the sum due assessed by the jury. *Held* erroneous. *Benham v. Sage*, 1 D. Chip. 247. (G. S. c. 80, s. 68.)

### III. ON PETITION; REVIEW; ERROR.

**35. On petition.** A recognizance taken by a judge upon a petition to the county court to set aside a justice's judgment, becomes a security in the principal action, if a new trial is granted; and becomes a record in the supreme court, if the suit is finally determined there. (G. S. c. 38, s. 9.) *Shumway v. Sargeant*, 27 Vt. 440.

**36. On review.** A recognizer for a review becomes absolutely liable for the costs occasioned by the review to the extent of his recognizance; and to charge him, no execution need be issued against the principal debtor, nor any effort be made to collect the judgment of him. Though property was attached, the result is the

same, since the remedies of the creditor, as well as the liabilities of the officer and of the recognizer, are distinct and independent. *Held*, that a receptor, taking an assignment from the judgment creditor, might in the creditor's name recover of the recognizer upon his recognizance. *Smith v. Ingraham*, 22 Vt. 414.

37. The mere affirmance of a judgment reviewed is not a breach of the recognizance for a review. The condition of the recognizance is not broken, unless intervening damages have been sustained, or additional costs recovered; and in an action on the recognizance, such fact must be averred in the declaration. *Brown v. Clark*, 28 Vt. 690. *S. C.* 27 Vt. 576.

38. In *scire facias* upon a recognizance given for a review, where the reviewer was wholly destitute of property at the time of the review, and so continued;—*Held*, that as no damage had accrued from the loss of any part of the debt, the plaintiff could not recover the accrued interest as "intervening damages." *Roberts v. Warner*, 17 Vt. 46.

39. Extra expense in procuring witnesses, and of employing counsel, and time and money necessarily expended in defense of a suit, are not "intervening damages," within the meaning of those words in a recognizance for a review. *Peasey v. Buckminster*, 1 Tyl. 264.

40. Bail for a review was *held* not discharged by the death of the reviewer, where the suit proceeded to judgment against his administrator. *Hoy v. Herrington*, Brayt. 36.

41. The county court has the power to change the bail taken for a review, and the substituted bail will be held for the cost and intervening damages accruing from the time the review was granted; but the exercise of this power is discretionary, and not the subject of exception. *Colgate v. Hill*, 20 Vt. 56.

42. Appeal to supreme court. A declaration upon a recognizance entered into in the supreme court, in a cause where the court had appellate jurisdiction only, was *held* good on demurrer, though it was not averred that the cause came to that court by appeal. *Treasurer v. French*, Brayt. 140.

43. In error. Bail on a writ of error, recognized that the plaintiff in error shall prosecute his writ to effect "and answer all damages and costs if he shall fail," &c., is liable only for the actual damages occasioned by the delay, and the costs. *Brace v. Squire*, 2 D. Chip. 49.

44. The condition of a recognizance for the prosecution of a writ of error is satisfied by a reversal of the judgment on error, although the defendant in error may again recover in the original action, and suffer damage by the delay. *Smith v. Keyes*, 2 Aik. 77.

See PROCESS I., 2.

## RECORD.

1. **Authority to make record.** One who has been county clerk has no authority, after the expiration of his office, to complete a record commenced by him while in office. Such authority is annexed to and passes with the office, being a trust of a public rather than of a personal character. *Perrin v. Reed*, 33 Vt. 62.

2. In general, it is the right of the clerk of a town or other municipal corporation while having the custody of the records, to make any record according to the facts; and this, although he may have been out of office and restored again. But he cannot alter or amend a record upon the testimony of third persons, ordinarily, and ought not to do it upon his own recollection, unless in very obvious cases of omission or error. Such amendments should ordinarily be made by the original documents or minutes. *Mott v. Reynolds*, 27 Vt. 206.

3. If the clerk who made the record were out of office, or were a party to the suit, such amendment might be improper. *Hadley v. Chamberlin*, 11 Vt. 618. 27 Vt. 208.

4. **Docket entries.** The docket entries in a cause showed a verdict for the defendant, exceptions allowed and execution stayed, without showing, in express terms, judgment on the verdict. *Held*, that such entries showed the practice of the court to have been, as in some other county courts, not to make any formal entry of judgment on verdicts, but to treat all verdicts, left to stand, as having judgment rendered on them, and to have the records made up accordingly; and, in this view, *held*, that such entries showed a verdict and judgment thereon for the defendant. *Armstrong v. Colby*, 47 Vt. 359.

5. **Devise of lands.** The constitution of 1777 and the statute of 1779, requiring "all deeds and conveyances of lands" to be recorded, were *held* not to embrace a devise of lands, but only conveyances *inter vivos*. *Smith v. Perry*, 26 Vt. 279.

6. **What is a recording.** The indorsement by a town clerk upon a paper left for record: "Received into record"—is not a recording of the paper. That is to be done by transcribing the paper into a book kept for that purpose. *Pawlet v. Sandgate*, 17 Vt. 619; and see *Sawyer v. Adams*, 8 Vt. 175, 184.

As to records of different kinds and in particular cases, see appropriate titles—as DEED; MORTGAGE; EXECUTION; TAXES, &c; PROBATE COURT; JUSTICE PEACE; TOWNS; SCHOOLS, &c.

As to amendment of records, see AMENDMENT; Records as evidence, see EVIDENCE; Pleading a record, see PLEADING.

## REFERENCE.

- I. UNDER RULE FROM THE COUNTY COURT.
- II. UNDER RULE FROM A JUSTICE
- III. UNDER RULE FROM PROBATE COURT.

## I. UNDER RULE FROM THE COUNTY COURT.

1. **Likeness to arbitration.** A reference under a rule of court stands upon the same general principle as do all arbitrations, the mere agreement of the parties; and the power of the arbitrator extends to just what the parties have agreed to submit, and no more; and if he undertakes to try and award of other matters not submitted, the award is invalid. *Poland, C. J., in Cook v. Carpenter, 34 Vt. 126.*

2. The court has no power to enlarge a rule of reference without consent of the parties, each enlargement being in effect a new reference. *Rice v. Clark, 8 Vt. 104. Baxter v. Thompson, 25 Vt. 505. Luell v. Houghton, 32 Vt. 579.*

3. A report of referees was set aside because they refused evidence of an agreement that they should exercise chancery powers. *Bellows v. Ingham, 2 Vt. 575.*

4. Where a submission is to three or more referees, by rule of court, and the rule is silent as to the number that must agree, all must concur in the report; but where the rule authorizes all or a majority to make report, only a majority need agree in the report; yet, as the submission is to all of them, all must be present and hear the parties. But if the parties mutually agree to dispense with the attendance of one of the referees, and, in pursuance of such agreement, they appear and submit to a hearing before the others, the absence of such referee is no objection to the report of the others. *Howard v. Conro, 2 Vt. 492.*

5. **Scope and effect—Waiver.** All questions affecting the mere form of the suit, and all questions of variance merely between the declaration and proof, are waived by a reference; and every matter which could properly have been introduced by way of amendment to the declaration will be considered as added, or its absence waived or cured, by the reference, provided it sufficiently appears that the matter set up as the ground of recovery before the referee is the same real cause of action for which the plaintiff sued. *Waterman v. Conn. & Pass. R. R. Co., 30 Vt. 610. Laport v. Bacon, 48 Vt. 176.*

6. Where a pending action is referred by agreement of parties under a rule of court, though the rule be, that the case be heard and decided according to law, it is the cause of action which is referred, and not the particular form of the declaration or any particular issues formed, and the referee is not bound thereby,

but may try the case upon its merits and award upon the subject matter embraced in the submission; and judgment will be entered upon the report whenever, without changing the nature of the action, the declaration or pleadings could be so amended as to accommodate them to the facts found by the referee. *Cook v. Carpenter, 34 Vt. 121. Eddy v. Sprague, 10 Vt. 216. Clifford v. Richardson, 18 Vt. 620. Maxfield v. Scott, 17 Vt. 634. Davis v. Campbell, 23 Vt. 236. Briggs v. Oaks, 26 Vt. 138. Briggs v. Bennett, 26 Vt. 146. Sumner v. Brown, 34 Vt. 194. Ladd v. Lord, 36 Vt. 194. Windham Proc. Inst. v. Sprague, 43 Vt. 502. Hicks v. Cottrill, 25 Vt. 80. Spaulding v. Warren, 25 Vt. 316. Barker v. T. & R. R. Co. 27 Vt. 766.*

7. *It seems*, that where a case is referred, although with the stipulation that it is "to be decided according to law," it will not be fatal to the plaintiff's right to recover upon a report in his favor, that the form of action was misconceived,—since the power of amendment extends even to changing the form of action; as, from trespass to case. *Briggs v. Oaks. Briggs v. Bennett.*

8. But where no such amendment would be allowed, as where it would change the form of action, or introduce a new cause of action, or different from the one declared upon or sought to be recovered for, then such facts, not embraced in the declaration, are outside the submission and the authority of the referee. *Cook v. Carpenter, 34 Vt. 121. Sumner v. Brown. Id. 194.*

9. The insufficiency of the declaration is no objection to the acceptance of a report of referees. *Jewell v. Catlin, Brayt. 215.*

10. Where a cause was referred by rule of court and the defendant died before hearing;—*Held*, that his administrator had the right to take out the rule and proceed with the reference. *Williams v. Cook, Brayt. 112.*

11. Where the defendants were sued as a corporation, and appeared by the name by which they were sued, and put in no plea of misnomer, nor denied their corporate existence, and the cause was referred;—*Held*, that such objections could not be taken before the referees. *Stone v. Berkshire Cong. Socy., 14 Vt. 86.*

12. In an action brought originally in the county court and referred by rule of court to a referee mutually chosen by the parties, it cannot be objected before the referee, or on his report, that the action was not, by reason of the amount claimed, within the original jurisdiction of the court. Such objection is waived by the reference. *Maxfield v. Scott, 17 Vt. 634. 26 Vt. 144.*

13. So, on an appeal from a justice, it cannot be objected, after such reference, that the justice had not jurisdiction by reason of the

amount in controversy, and so the county court no appellate jurisdiction. *Reed v. Stockwell*, 84 Vt. 206.

**14. Limitations.** The statute of limitations may be used in defence before a referee, without having been pleaded in bar. *Carter v. Howard*, 39 Vt. 106.

**15. Award.** A failure to plead in bar an award which operates to discontinue a suit, and consenting to a reference of the suit, are not a waiver of the defense before the referee. *Babcock v. School Dist. Guilford*, 35 Vt. 250.

**16. Set-off.** Demands in set-off, not before pleaded in set-off, cannot be urged before a referee. *Fulton v. Wiley*, 32 Vt. 762.

**17.** The objection that a plea in set-off was not filed in season, was held waived by a reference, and could not be taken before the referee. *Swift v. Harriman*, 30 Vt. 607.

**18. How far referees are bound by legal rules of decision.** If auditors err in point of law, it is fatal; but as to referees and their reports, the rules are those which obtain in chancery upon awards of arbitrators. *Sawyer v. Doane*, 1 Aik. 138. 27 Vt. 693.

**19.** Referees, being judges of the parties' choice, are not obliged to decide upon the strict principles of law, but may disregard them altogether, and adopt certain principles of equity or justice to govern their decision. But if they attempt to decide according to law, and mistake the law in their decision, and so produce a result different from what would have been produced if they had correctly decided the law, their report may be set aside. So, a mistake made by them on the principles they adopt for their decision—as, mistaking a fact, or an error in computing or stating an account—may be a reason for setting aside their report. *Hazeltine v. Smith*, 3 Vt. 535. *Johns v. Stevens*, 3 Vt. 308. 8 Vt. 83. 21 Vt. 255.

**20.** The referee, as the report stated, considered that the plaintiff "in a legal point of view" was not entitled to recover. From the facts stated it appeared that his decision was contrary to law, and, it thus appearing that he meant to follow the law, the report was set aside. *Johns v. Stevens*.

**21.** Though referees, intending to follow the law, make a mistake on a doubtful point, yet this is not always a reason for setting aside their report, unless the mistake evidently led them to a wrong conclusion on the whole case. *Bliss v. Rollins*, 6 Vt. 529. 8 Vt. 83.

**22.** Referees are not bound to proceed by legal principles strictly; and where they proceed upon equitable principles, and are not misled in the application of them, their report will not be set aside. *Downer v. Downer*, 11 Vt. 395.

**23. What the report must show—as to law.** Unless it appear from the rule of refer-

ence that a referee was required to decide the case upon strictly legal grounds, or, from his report, that he intended so to decide, his report will not be set aside though he may have mistaken the law. *Steen v. Wardsworth*, 17 Vt. 297.

**24.** Under a general reference, no question can be raised in regard to any question of law decided by the referee, unless it appears from the report that he intended to decide according to the rules of law. *Cutting v. Stone*, 23 Vt. 571.

**25.** In order for the court to revise the decision of a referee in matter of law, he must either refer that question to the determination of the court in such a manner as to make the result of his finding depend upon the determination of such questions of law as arise upon the report, or else it must appear to the court that the referee, intending to follow the law, has mistaken it, whereby he is brought to a different result from that which he would have reached had he known what the law was; and this mistake must be obvious, or be clearly made to appear to the court. *White v. White*, 21 Vt. 250.

**26.** Where a referee does not state in his report that he intended to decide according to law, and does not refer the question of law to the court, his decision will not be reversed unless it is apparent that he has violated some principle of right whereby injustice is done. *Park v. Pratt*, 38 Vt. 545; and it may be taken, unless it appears to the contrary, that he decided the case, as a referee may, entirely upon equitable grounds. *Smith v. Sprague*, 40 Vt. 43.

**27.** Where a referee states in his report that he intended to decide according to law and to have his decision revised by the court, this can only have reference to matters of law and not of fact; and statements of fact in the report, or inferences of fact from the facts before stated, if what is so previously stated warrants such inference and finding as a matter of fact, must be so treated. If the referee could so legally find, his finding is not erroneous. *Riley v. Noyes*, 44 Vt. 455.

**28.** The court refused to set aside the report of referees where they received incompetent testimony, although they reported that they intended to decide according to law, where such testimony had no tendency to mislead them, and it did not appear that they were misled thereby. *Learned v. Bellows*, 8 Vt. 79.

**29. —as to items of account.** A referee is not required to state in his report the items allowed, and those disallowed, unless requested so to do. *McDaniels v. McDaniels*, 40 Vt. 340.

**30. —as to facts.** In case of a reference, the county court can only pronounce the law upon the facts found by the referee. It

cannot add to the facts so found from evidence reported. *Fuller v. Adams*, 44 Vt. 543.

31. The county court cannot, upon the report of referees, infer facts from other facts reported, as they may sometimes do upon the report of auditors. *Kimball v. Baxter*, 27 Vt. 628.

32. Where a referee reports such facts as constitute an agency, the county or supreme court can find the agency, as matter of law, without any express statement of such conclusion by the referee. *Alexander v. Bank of Rutland*, 24 Vt. 222.

33. **Errors on hearing.** Where a party submits to a decision of a referee which requires him to testify, it is no objection to the report that he was improperly required to testify; but the testimony so given may be treated as the party's admission. *Mattocks v. Owen*, 5 Vt. 42.

34. In order for a party to avail himself of his objection to the admission of improper evidence before a referee, he must file exceptions to the report for such error, and interpose it by way of objection to the acceptance of the report, or by motion to set aside or recommit it. The question cannot be raised for the first time in the supreme court. *Graham v. Stiles*, 38 Vt. 578.

35. **Regularity presumed.** The proceedings of referees are presumed to be correct, both in matters of fact and of law, and the burden is upon the party seeking to set them aside, to show error. *Martin v. Wells*, 43 Vt. 433. *Hogaboom v. Herrick*, 4 Vt. 131. *Hapgood v. Burt*. *Id.* 161. *Stevens v. Pearson*, 5 Vt. 503. *Bliss v. Rollins*, 6 Vt. 529. *Learned v. Bellows*, 8 Vt. 79. *White v. White*, 21 Vt. 250.

36. It would be unsafe to permit a statement made by one of a board of referees to have any effect on the question of accepting or rejecting their report. *Wellman v. Bulkley*, 6 Vt. 299.

37. **Amendment and recommitment of report.** Referees having drawn up their report and handed it to the attorney of the recovering party, discovered an error in computation, and thereupon made a supplementary report correcting the error, requesting that it be made a part of the former report. Both being filed, and exceptions taken to the whole, the supreme court treated the additional report as part of the first. *Haseltine v. Smith*, 8 Vt. 535. *Hutchinson, J.*, dissenting.

38. It is not error to allow a referee to amend his report; or to recommit it to him for the correction of errors, and for the further statement of the facts on which his findings were based, and to report at the same, or the next term. *Smith v. Sprague*, 40 Vt. 43.

39. Where a report of referees is recommitment for amendment, it is only for the pur-

pose of having the referees do what they intended to do. This gives them no new powers, nor extends their powers, nor authorizes any further hearing of the parties. *Rice v. Clark*, 8 Vt. 104. *Baxter v. Thompson*, 25 Vt. 505.

40. Where a report of referees was subject to be set aside only in part, the court refused to discharge the rule of reference, and recommitment the report for amendment. *Baxter v. Thompson*.

41. The supreme court refused to recommit the report of a referee for additional findings, where the sum in controversy was trifling. *Congdon v. Darcy*, 46 Vt. 478.

42. A party cannot present to a referee his open account alone, placing his claim exclusively upon that, and taking his chances of recovery upon it, and afterwards, in court, resort to a settlement to enlarge his recovery. *Rowell v. Marcy*, 47 Vt. 627.

43. **Discretion.** An exception to the report of referees, that the rule and form of report did not follow the agreement to refer, is addressed to the discretion of the county court, and is not revisable by the supreme court. *Wellman v. Bulkley*, 6 Vt. 299.

44. A judgment rendered on report of referees will not be reversed for matters extrinsic,—as, questions of discretion in dealing with the report in the county court, as to recommitting it, the finding of facts, the taxing of their own fees by the referees, &c.,—but only for matters of law apparent upon the report. *Fuller v. Wright*, 10 Vt. 512.

## II. UNDER RULE FROM A JUSTICE,

45. Under a rule of reference issued by a justice under Slade's Stat. c. 9, s. 31, the submission need not be in writing; the matters submitted must appear in the rule, but the amount of the claim need not; and the justice acts judicially in determining to what court the rule shall be made returnable. (See G. S. c. 31, s. 58 *et seq.*) *Barnett v. Peck*, 6 Vt. 456.

46. An enlargement of a rule of reference issued by a justice, under G. S. c. 31, ss. 58-60, can be made only by the justice and by consent of the parties, and the report of the referee is not the proper evidence of this. If attempted to be enlarged by the referee by consent, it becomes a mere arbitration and no judgment can be rendered on his report. *Lasell v. Houghton*, 32 Vt. 579.

## III. UNDER RULE FROM PROBATE COURT.

47. Under Sec. 69 of the probate act of 1821, the only competent parties to a reference were the executor or administrator on one side, and a creditor or debtor of the estate on the other. *Boynnton v. Boynnton*, 10 Vt. 107.



48. The probate court has jurisdiction to revoke, while pending, an order of reference made by it under the statute upon the petition of a party interested, though not a party to the reference; and upon a refusal, such party interested may appeal. *Lathrop v. Hitchcock*, 38 Vt. 496.

### RELATION.

As a general principle, where there are divers acts concurrent to make a conveyance of an estate, the original act shall be preferred, and to this the other acts shall have relation; but this rule is so modified, that this relation by fiction will not have place, where it will prejudice the rights of third persons who are neither parties nor privies to the conveyance. *Bennett, J., in Pettibone v. Burton*, 20 Vt. 302. (This was said in a case where land had been sold by an administrator and the deed was executed some time thereafter; and the question was, when the purchaser's title first accrued.)

### RELATIONSHIP.

1. **Kinds.** Consanguinity is the having of the blood of some common ancestor. Affinity arises from marriage only, by which each party becomes related to all the *consanguinei* of the other party to the marriage, but in such case these respective *consanguinei* do not become related by affinity to each other. In this respect, these modes of relationship are dissimilar. That by consanguinity is in its nature incapable of dissolution, but relationship by affinity ceases with the dissolution of the marriage which produced it. *Blodget v. Brinsmaid*, 9 Vt. 27. 12 Vt. 666. See *Clapp v. Foster*, 84 Vt. 580.

2. **Degrees.** Degrees of relationship by Vermont law are to be computed, not according to the canon law, but the civil law, and the half blood are to be included. By this law, the degree of relationship between two men is computed by reckoning from one up to the common ancestor, and then down to the other. *Churchill v. Churchill*, 12 Vt. 661.

### RELEASE.

1. A general release of all demands, executed after the time in which an award was to have been performed, was *held, prima facie*, as a discharge of the covenant to perform the award. *Bridgeman v. Eaton*, 3 Vt. 166.

2. A receipt in full of all "demands, notes and accounts" was *held*, by natural interpretation of its terms, not to include a pending suit. *Learned v. Bellows*, 8 Vt. 79.

3. A receipt "in full of all demands" does not embrace a right to future support, depending upon contingencies. It must be understood to refer to subsisting debts, or such as are due and susceptible of liquidation. *Austin v. Austin*, 9 Vt. 420.

4. A written receipt for one dollar, expressed to be in full of a certain note, is, *prima facie*, in legal effect, a receipt for the final balance which completed the payment, and not merely a receipt for so much to apply. *Paige v. Perno*, 10 Vt. 491.

5. In case of a settlement, sometimes called a *jumping settlement*, understood and intended to be in full of all demands, and a release or mutual releases are executed, each party takes on himself the risk of any misunderstanding or want of recollection as to the true state of the claims; and such, in the absence of fraud, is the legal effect, and bars a recovery for any claim omitted. *Blackmer v. Wright*, 12 Vt. 377. *Holbrook v. Blodget*, 5 Vt. 520.

6. A release to one of two joint *tortfeasors*, like a satisfaction by one, is a discharge of both. *Brown v. Marsh*, 7 Vt. 320.

7. The release by two of three joint vendees of their right of action against the vendor for fraud in the sale, was *held* to operate as a release of the right of the other vendee, and to entitle him to share in the consideration received for such release. *James v. Aiken*, 47 Vt. 28.

### REPLEVIN.

- I. TO TRY THE RIGHT OF PROPERTY.
- II. OF GOODS ATTACHED.
- III. OF BEASTS IMPOUNDED.
- IV. PROCEDURE.

#### I. TO TRY THE RIGHT OF PROPERTY.

1. **Statute action.** Replevin cannot be sustained as an adversary suit at common law to try the right of property, and is sustainable only in cases authorized by statute. *Bulkley v. Smith*, Brayt. 88. *Taggart v. Hart*. *Id.* 215. *Glover v. Chase*, 27 Vt. 538. *Bennett v. Allen*, 30 Vt. 684. *Eddy v. Davis*, 35 Vt. 247. *Sprague v. Clark*, 41 Vt. 6. 47 Vt. 415.

2. **Justices' jurisdiction.** Under C. S. and before 1853, a justice of the peace had no jurisdiction in a replevin suit, except for beasts distrained or impounded. *Glover v. Chase*, 27 Vt. 538. But by the act of 1853 and G. S. c. 31, s. 18, a justice has jurisdiction in replevin for goods and chattels unlawfully taken or

detained, except where the value thereof exceeds the sum of \$20. *Tripp v. Leland*, 39 Vt. 63.

3. **Title of plaintiff.** Either a general or special property in goods is sufficient title to sustain replevin. *Crushenden v. Harman*, 2 Tyl. 481.

4. It seems, that where goods bailed, though for a definite time, are attached upon the debt of some third party, either the bailor or bailee may, under G. S. c. 35, s. 13, replevy them from the custody of the officer, though not at common law. *Wilder v. Stafford*, 30 Vt. 399.

5. Replevin of goods may be maintained by the person "entitled to the possession thereof" (G. S. c. 35, s. 13), although conveyed to a third person by a bill of sale absolute in terms, but in fact made as security for a debt; or where the bill of sale contains a stipulation that the vendor may retain possession so long as the vendee should think best. *Wills v. Banister*, 36 Vt. 220.

6. The term "goods," as so used in the statute, includes both animate and inanimate movable property. *Eddy v. Davis*, 35 Vt. 247.

7. To maintain replevin under G. S. c. 35, s. 13, it is only necessary that the plaintiff should be entitled to possession as against the defendant; and it is only when the defendant is entitled, under Sec. 16, to a judgment for a return of the goods, that the defendant can prevail; and that can be only where his right is superior to that of the plaintiff. *Sprague v. Clark*, 41 Vt. 6.

8. **Other remedy.** Replevin of attached property lies in favor of the debtor against the attaching officer, where he becomes a trespasser *ab initio*, notwithstanding trespass or trover might lie for the value—the statute giving this remedy where goods are "unlawfully taken, or unlawfully detained." *Briggs v. Gleason*, 29 Vt. 78.

9. **Parties.** The owner of property attached in a suit against another, may maintain replevin therefor against the attaching creditor and the attaching officer jointly, where the creditor assisted the officer in taking and removing the property, and had it in his actual custody when it was replevied. *Esty v. Love*, 32 Vt. 744.

10. Under like circumstances, and where the creditor claimed to own the property and the attachment was made for the purpose of getting possession of it, it not appearing that the attaching officer had any other liens upon it;—*Held*, that the owner could maintain replevin against the creditor without joining the officer. *Tripp v. Leland*, 42 Vt. 487.

11. An officer is liable for taking chattels upon a writ to replevy goods *as attached*, where there has been no attachment in fact, but the party from whom replevied holds them, not

under process, but as owner. *Driscoll v. Place*, 44 Vt. 252.

12. **Taking and detaining.** The plaintiff and defendant had been husband and wife, and had occupied a dwelling house owned by the wife. She petitioned for a divorce, and the judge assigned her a separate part of the house for her sole occupancy pending the litigation. She obtained a divorce. Instead of vacating the premises at once, as was his duty, the plaintiff continued in possession of the other part of the house and kept his goods therein. While the plaintiff, on an occasion, was out of the house the defendant closed and fastened the doors and would not permit him to enter, but told him that any property he had in the house, that he would call for, she would put out for him. The plaintiff did not call for any, and forbade her putting any of his property out of the house. *Held*, that this was not such a taking or detaining of the plaintiff's goods as would sustain replevin. *Bent v. Bent*, 44 Vt. 638.

13. **Pleadings.** In replevin, the defendant in his plea alleged that the property belonged to his minor son, and that he, as natural guardian of his son, was bound to keep the custody of it, and did so. On traverse of the plea, the plaintiff offered proof of title by purchase from such minor and the defendant. *Held*, that the defendant could rebut this by proof of fraud in the purchase, although there was no sufficient, or no allegation of fraud in his plea. *Bliss v. Badger*, 36 Vt. 338.

14. **General issue.** In replevin under G. S. c. 35, s. 13, *not guilty* is the proper general issue, and such plea puts in issue every material fact, as well the property in the thing replevied as the taking and detention. *Plainfield v. Batchelder*, 44 Vt. 9. Under it, the defendant may show anything which will defeat the plaintiff's right to recover on matters alleged in the declaration; as, a justification under legal process. *Loop v. Williams*, 47 Vt. 407.

## II. OF GOODS ATTACHED.

15. Replevin by a debtor of his goods attached is not an independent, original action, or suit, but a part of, or appendage to, the original action, and should not be entered on the docket like ordinary cases. (G. S. c. 35.) It is not a suit *inter partes*. There is neither plaintiff nor defendant. It is a proceeding merely for the compulsory receipt of property attached. *Green v. Holden*, 35 Vt. 315. *Driscoll v. Place*, 44 Vt. 252.

16. **Sureties.** An officer serving a replevin writ in behalf of a debtor to regain possession of property attached, is bound to take sureties on the replevin bond who are at the time *actually* responsible for its amount. It is not

enough that the surety is *apparently* responsible, but he must be *really* so; but if really good at the time the bond is taken, the officer will not be liable, though the surety become unable to satisfy a judgment upon the bond. *Bank of Middlebury v. Rutland*, 38 Vt. 414.

### III. OF BEASTS IMPOUNDED.

17. **Avowry and pleadings.** An avowry in replevin that the beast was taken *damage feasant* and impounded in a public pound, need not give the name of the pound-keeper, nor set forth the avowant's title to the close, further than to state that he was "seized and possessed as of his own close;" nor need he give the bounds, or description. *Gipson v. Bump*, 80 Vt. 175. *Bennett, J.*, dissenting.

18. An avowry in replevin justified the taking and impounding, by reason that the beast was taken *damage feasant* in the defendant's close. The replication to the plea to the avowry described the place where, &c., as lands occupied by the plaintiff and defendant *in common*. *Held*, that the replication was a departure from the avowry, *Hurlburt v. Goodwill*, 30 Vt. 146.

19. This replication, further, set up a right to impound arising from a breach of the plaintiff's duty to maintain part of a division fence. This was *held* to be repugnant and ill on demurrer. *Ib.*

20. An avowry in replevin set forth the impounding of the cattle, and averred that "within twenty-four hours thereafter the defendant gave *legal notice* of the said impounding to, &c.,"—without further stating the manner in which the notice was given. *Held* sufficient on general demurrer. *Keith v. Bradford*, 39 Vt. 34.

21. An avowry in replevin averred the taking of the cattle "in a field and inclosure used and improved," \* \* "the soil and freehold of the defendant," &c. The plea to the avowry averred, that the defendant "did not find said cattle in any field of the defendant inclosed with a legal fence," and concluded to the country. On special demurrer, the plea was *held* ill, for its conclusion; that the terms of the averment of the avowry do not require proof that the field and inclosure was surrounded by [what the statute makes] a legal fence; and that it is not competent to make an issue, in the form of a simple traverse concluding to the country, by using terms that would require the other party to make different proof from what would be required, if the traverse had been in the terms of the averment. *Ib.*

22. **Damages.** In the replevin of cattle taken *damage feasant* and impounded, the defendant can recover only such damages as were done by the cattle upon the occasion

when they were taken to be impounded; since they could not be impounded for any former damage done, nor unless then actually upon the land doing damage. *Holden v. Torrey*, 31 Vt. 690. (G. S. c. 35, s. 6.)

23. In such case, although the defendant has neglected to have his damages appraised, he is entitled at least to nominal damages and costs; but whether, where he has so neglected, he is entitled to recover beyond this, *quære. Ib.*

### IV. PROCEDURE.

24. **Recognizance.** In the action of replevin, the security for costs is in the bond taken, and no recognizance is required to be entered upon the writ. *Dunshie v. Stearns*, 1 Aik. 149. *Stoddard v. Gilman*, 22 Vt. 568.

25. **Bond.** One surety in a replevin bond, in addition to the plaintiff or some one in his behalf, is sufficient in any case of replevin. *Bent v. Bent*, 43 Vt. 42.

26. Not taking a replevin bond, such as is required by law, is cause for dismissing the action on motion; as, where the bond was "in the penal sum of double the value of the goods to be replevied," without naming the sum. *Bennett v. Allen*, 30 Vt. 684.

27. A writ of replevin, brought as an adversary suit under G. S. c. 35, s. 13, was dismissed on motion, where the only bond given was the one prescribed for replevin of goods attached and replevied by the defendant, under G. S. c. 35, s. 8. *Campbell v. Morey*, 27 Vt. 575. *Thurber v. Richmond*, 46 Vt. 395.

28. A replevin bond, with condition as prescribed for the replevin of goods attached, is a mere nullity in a case where there was no attachment. *Driscoll v. Place*, 44 Vt. 252; and so, *vice versa*, where the bond is not applicable to the process; nor can it be sustained at common law as a voluntary bond. *Frothingham v. Howard*, 1 Aik. 139.

29. An objection to the writ that no bond was required by it and that no bond was given, is of a dilatory nature, and, whether by plea or motion to dismiss, must be made at the earliest opportunity. *Wilder v. Stafford*, 30 Vt. 399.

30. In replevin, the writ was defective in not requiring, as a condition of the bond to be given, the return of the property; and the bond returned was signed by the plaintiff only. *Held*, that these irregularities did not make the proceedings void, and that they could be waived; and that by omitting to take advantage of them by motion or plea within the time limited by the rules of court for filing dilatory pleas, and also by pleading to the merits, the defendant did waive them, and was not entitled, of right, to take advantage of them afterward. *Tripp v. Howe*, 45 Vt. 523.

31. **Service and return.** Under a statute

directing writs of replevin to be directed to the sheriff or his deputy ;—*Held*, that service by a constable was void. *Balston v. Strong*, 1 D. Chip. 287. *S. C. Brayt*. 216.

32. Where property held by a sheriff on execution was taken out of his hands by his deputy on a writ of replevin ;—*Held*, that although such service was irregular and was subject to abatement, yet it was not void, and that the sheriff would not have been justified in resisting the service ; and that the replevin was a sufficient excuse for not retaining the property and selling it on the execution. *Shaw v. Baldwin*, 38 Vt. 447.

33. A writ of replevin issued as a writ of summons, must be served as such. Delivery of a copy to an agent of the defendant, the latter being out of the State, is not a good service. *Gaffield v. Avery*, 43 Vt. 668.

34. The officer's return on a writ of replevin stated that the appraisers "upon their oaths" appraised the property, &c. *Held* sufficient. *Miller v. Cushman*, 38 Vt. 598.

35. The same return stated that "he proceeded to appoint appraisers according to law," and gave their names, but did not state that they were "disinterested and discreet." *Held* sufficient. *Ib.*

36. The same return stated that the officer "replevied" the property, had it appraised, took a proper bond, and delivered the property to the plaintiff. *Held* sufficient, and that it sufficiently appeared that the bond was taken between the taking and the delivery of the property—the word "replevied" not being used in its strict technical sense. *Ib.*

37. The bond may be referred to as a part of the proceedings in the cause, to show its invalidity. *Bennett v. Allen*, 30 Vt. 684 ; or, as part of the record, to help out the officer's return, when not sufficiently full. *Miller v. Cushman*, 38 Vt. 598. 43 Vt. 45.

38. Effect of abatement. When in replevin, upon an abatement of the suit, there is judgment for a return merely, such judgment is only a decision that the property was irregularly taken, and that the possession shall be restored, leaving matters in *statu quo*, with the question of title undecided. *Collamer v. Page*, 35 Vt. 387.

39. Where the action was dismissed upon the defendant's motion, because brought in the wrong county ;—*Held*, that the defendant was entitled to judgment for a return without plea, or avowry, or proof of title, and the plaintiff was not allowed to prove title in himself. *Ib.*

40. But *held*, in such case, that the defendant was not entitled to recover damages for the taking and detaining. *Ib.* (Changed by G. S. c. 85, s. 26. See *Thurber v. Richmond*, 46 Vt. 895.)

41. Reciprocal judgments. Where part of the goods were properly replevied and part unlawfully, the verdict must be for the plaintiff for damages and costs as to that portion for which he sustains his replevin, and for the defendant for a return of that portion for which the plaintiff fails to sustain his replevin, with damages to the defendant for its detention and costs. The judgment must follow the verdict, and the costs must be apportioned and set off according to equity. *Poor v. Woodburn*, 25 Vt. 284.

42. In replevin for the taking and detaining of several articles, the jury rendered a verdict of *not guilty*, and added a clause for the return to the defendant of a certain part of the articles replevied. The plaintiff moved to set aside the verdict. That motion being overruled, he moved in arrest of judgment, but judgment was rendered upon and according to the verdict. *Held*, that the first paragraph of the verdict was all that was necessary under the issue ; for that, under G. S. c. 85, s. 26, the court would adapt the judgment to the rights proved ; that the rest was not incongruous or inconsistent with the first paragraph, and did not tend to the injury of the plaintiff. Judgment affirmed. *Hotchkiss v. Ashley*, 44 Vt. 195.

43. Action on bond. In order to any remedy upon a replevin bond for not returning the property replevied, the defendant must first have a judgment for a return. *Collamer v. Page*, 36 Vt. 396.

44. Where a replevin suit was dismissed for a defect in the bond, but there was no judgment for a return of the property ;—*Held*, that the plaintiff was under no obligation to return the property to the defendant, and that while it remained in his possession he could not maintain a new action of replevin to establish his title to it. *Way v. Barnard*, 36 Vt. 366.

45. A declaration against the surety in a replevin bond given for goods attached, was *held* good on demurrer, though not containing any averment of a demand of the property on the execution, or notice of the execution. *Wetherbee v. Colby*, 6 Vt. 647.

46. Where a return of the property has been awarded, no special demand is necessary to an action on the bond. *Cushenden v. Harman*, 2 Tyl. 438.

## REVIEW.

1. A review is not allowed from a judgment rendered on a writ of error. *Enos v. Boardman*, 2 Tyl. 271.

2. Upon the review of a cause decided on demurrer, the court will not prohibit the arguing of the cause again upon the same

pleadings. *Hazen v. Smith*, 2 Tyl. 59. *Chipman v. Sawyer*, *Id.* 61.

3. Statutes authorizing a review in appealed cases where a set-off is pleaded, considered. *Bloss v. Kittridge*, 4 Vt. 272.

4. In an action of book account brought to the county court, where the defendant files in set-off matter of contract, neither party is entitled to a review of the issue upon the plea in set-off. *Hall v. Hall*, 24 Vt. 687.

5. The defendant filed a plea in set-off, but, at the first trial, offered no evidence in support of it and the plaintiff recovered judgment for his whole claim. The defendant entered a review, and on the second trial sustained his set-off, and the plaintiff again recovered judgment, but for a less sum than before. *Held*, that the cause was the same, and that judgment having been "rendered in the cause twice for the same party," the plaintiff was not entitled to a review. *Cheesman v. Lane*, 17 Vt. 88.

6. A review lies from a judgment on a *scire facias* upon a probate bond. *Aldrich v. Williams*, 10 Vt. 295.

7. Under the statute allowing a review in "civil causes;"—*Held*, that a petition for partition was not reviewable. *Nichols v. Nichols*, 28 Vt. 228.

8. One defendant in an action of tort may review the case, although the judgment is final as to the other defendants; and this will not have the effect to carry the case forward as to those who do not review. *Paine v. Tilden*, 20 Vt. 554. 22 Vt. 480. 28 Vt. 737.

9. The plaintiff in ejectment against two defendants, recovered at the first trial against one only, and he reviewed; and the plaintiff reviewed as to the other defendant. On a second trial, the verdict was for both defendants. *Held*, that in this action, the plaintiff's title being an entire thing to be tried, he was not entitled to review as to the defendant against whom he recovered at the first trial. *Frost v. Philbrook*, 28 Vt. 736.

10. In an action of tort against several, the plaintiff on trial voluntarily entered judgment in favor of one of the defendants and then used him as a witness, and a verdict was rendered in favor of the other defendants. The plaintiff thereupon entered a review as to all the defendants, and, at the next term, the defendant in whose favor the plaintiff had voluntarily entered judgment moved to set aside the review as to himself. The court refused so to do, and on a second trial there was a verdict against that defendant, and in favor of the others. *Held*, that there was no error in the proceedings, the plaintiff not having waived his review. *Lyndon v. Cook*, 19 Vt. 35.

11. On a trial upon review after one judgment for the plaintiff, the defendant gave evi-

dence of payment, except a trifling sum which he admitted. Such partial payment the plaintiff denied, and offered and proposed to the court that if the jury should find against him on this point, they should render a verdict against him, though there would still be a small balance due; and requested the court so to instruct the jury. [The effect of a verdict against the plaintiff would have been to entitle him to a review.] The court refused. *Held*, no error. *Austin v. Bingham*, 31 Vt. 577.

12. **Review on nominal bail.** The review of a case by consent of the plaintiff on nominal bail, does not affect the liability of the attaching officer, or the receiptman. *Howes v. Spicer*, 23 Vt. 508.

13. **Repeal.** *Note.* All statutes allowing a review in civil causes were repealed by stat. Nov. 9, 1855, No. 5.

14. **Writ of review.** The statute providing for a writ of review in case of an absent defendant (G. S. c. 31, ss. 50 *et seq.*), applies as well to actions commenced by trustee process, and actions brought by a collector of taxes under G. S. c. 84, s. 34, as to others. *Allen v. Seaver*, 38 Vt. 673.

15. In a writ of review brought by the original defendant, where the original action was commenced by trustee process and there was judgment against him and against the trustee, which the trustee paid;—*Held*, that it was not necessary in the writ of review to allege the judgment obtained against the trustee. *Id.*

See RECOGNIZANCE, III.

## RULES OF COURT.

1. Rules of the supreme court from 1790 to 1802. 1 Tyl. 2. *Id.* 16. *Id.* 479, *et seq.*

2. Rules of supreme court and court of chancery, adopted Jany. T. 1817. Brayt. 11.

3. Do. adopted Dec. 15, 1824. 1 D. Chip. 493. *et seq.*

4. Rule adopted March Term, 1831. 3 Vt. 60.

5. Do. March T. 1832. *Id.*

6. Rule of 1827, general system. 1 Aik. 397, *et seq.* At law, p. 397. In chancery, p. 401. Forms of oaths, p. 407. For admission of attorneys, p. 408. Computation of interest, p. 410.

7. Rules in chancery, with forms of oaths. 11 Vt. 689, *et seq.*

8. Rules of 1839, as to the admission of attorneys. 14 Vt. 565.

9. Rule of 1848, as to publication of notice in divorce cases. 20 Vt. 683.

10. Rule of 1851, as to petitions for new trial. 22 Vt. 670.

11. Rules of 1858, as to copies of case and argument. 24 Vt. 678.

12. The rules of court are subject to be modified or controlled by special order, in the discretion of the court. *National Union Bank v. Marsh*, 46 Vt. 448. 1 Tyl. 59. 2 Tyl. 405.

13. Special rules imposing conditions of judgment, or execution :

**Instances.** *Catlin v. Hurlburt*, 3 Vt. 408. *Blake v. Burnham*, 29 Vt. 487. *Poor v.*

*Woodburn*, 25 Vt. 240. *Smith v. Perry*, 26 Vt. 279. *Briggs v. Taylor*, 35 Vt. p. 66. *Mussey v. Perkins*, 36 Vt. 690. *Vermont Marble Co. v. Mann*, 36 Vt. 697.

14. Tender of bonds under rule. *Rutland & Washington R. Co. v. Bank of Middlebury*, 32 Vt. 639.

15. Paying money into court under rule. See PRACTICE, 35, 36, 37.

## S.

### SALES.

#### A. SALE OF PERSONAL CHATTELS.

##### I. THE CONTRACT.

1. *Generally.*
2. *Executory; future delivery.*
3. *Sale executed so as to pass title; delivery; acceptance.*
4. *Rescission; acceptance as a waiver of objections.*
5. *Stoppage in transitu.*

##### II. WARRANTIES.

1. *What constitutes a warranty—implied; express; particular warranties.*
2. *Effect of breach and remedy.*

#### III. VALIDITY OF SALE AS AGAINST CREDITORS.

#### IV. CONDITIONAL SALE.

#### V. OFFICIAL SALE.

#### B. SALE OF REAL ESTATE.

#### A. SALE OF PERSONAL CHATTELS.

##### I. THE CONTRACT.

1. *Generally.*

1. **The parties.** The characters of vendor and purchaser of the same article at the same time are inconsistent, and cannot be united in the same person. *Chandler v. Moulton*, 33 Vt. 248.

2. **Consent.** Where one writes to another that he will buy certain property of him at a certain price, and the other replies that he might have the property at that price, "if he would come for it," these letters do not on their face purport a sale. *Fenno v. Weston*, 31 Vt. 845.

3. **Misdescription.** The validity of a sale of personal property is not affected by a misdescription, in a written memorandum of the sale, of the locality of the property, and the

identity of the thing sold may be proved by parol. *Rugg v. Hale*, 40 Vt. 188.

4. **Mistake.** In order to constitute a defense at law to a contract of sale, on the ground of mutual mistake as to the state of the subject matter at the time, the property must be so changed as not in any sense to answer the purpose for which the contract was made. This goes upon the ground that if the party buys one thing, or a thing in one state, he is not bound to take a different thing, or the same thing in a different state. But an accidental occurrence, not directly affecting the state or quality of the thing sold, but only its market value, will have no such effect. *Faulkner v. Hebard*, 26 Vt. 452.

5. The plaintiff contracted to sell certain shares of railroad stock to the defendant for certain property of the defendant, the plaintiff representing that the stock was worth a certain sum per share. The directors of the company had recently, and without the knowledge of either party, issued new and additional shares of stock at a reduced price per share, the effect of which was to reduce the value of the shares. *Held*, that this was not such a change in the state or quality of the stock, being only a matter affecting the market value, as authorized the defendant to repudiate the sale. *Held*, also, that if this act of the directors was legal, it was a contingency which the defendant was bound to take into account; if illegal, then the defendant, as a stockholder, could resist it. *Id.*

6. Where the plaintiff purchased of the defendant a quantity of cheese, &c., which was then represented to be, and was by both parties supposed to be, in store at Whitehall where the plaintiff desired to receive it, whereas the property was then in Boston, and it did not come to the use of the plaintiff, and the plaintiff had paid part towards the purchase;—*Held*, that the mutual mistake of the parties as to the *situs* of the property was so material, that the plaintiff was not bound by the sale; and that,

after demand, he could recover the money paid towards it, in an action at law for money had and received. *Ketchum v. Catlin*, 21 Vt. 191.

7. **Sale on credit.** Where there is a sale upon credit, the purchaser agreeing to give his note therefor with surety, no action, as for goods sold, lies, until the expiration of the agreed term of credit. For refusal to furnish the security within the term, the action must be upon the special agreement. *Martin v. Fuller*, 16 Vt. 108. *Scott v. Montague*, 16 Vt. 164. *Eddy v. Stafford*, 18 Vt. 235. 28 Vt. 724. 32 Vt. 240.

8. Where the purchaser of property agrees to furnish a security for the price, or a part of it, payable at a future day, and neglects to furnish the security agreed, an action may be immediately maintained against him counting specially upon the promise to furnish the security; and in such action he cannot claim the benefit of the stipulated credit, and the rule of damages will be the sum agreed to be paid. *Asoutney Bank v. McK. Ormsby*, 28 Vt. 721.

9. Where, upon a sale, a term of credit is offered to those who give notes with surety, the credit is conditional upon the giving of the note with surety, the security being the consideration for the credit. If the security be not given, the purchaser is liable as on a sale without credit. *Rice v. Andrews*, 32 Vt. 691.

10. This rule of construction is different, generally, where the purchaser is only required to give his own note, and especially where he has an election as to the term of credit, and has not been asked to make an election. *Ib. Scott v. Montague*, 16 Vt. 164.

11. One acting as agent for the owner sold a house standing upon the agent's land, at a price agreed, the house to be moved off the premises where it stood. The purchaser did not pay the price, the agent saying, that would make no difference. It being claimed by the owner in an action of trespass against the purchaser for moving off the house before payment, that this was a sale upon credit and so not within the authority of the agent;—*Held*, that this was not a sale upon credit, no time having been given for payment of the price, nor leave given to remove the house without payment. *Riley v. Wheeler*, 42 Vt. 528. *S. C.* 44 Vt. 189.

12. **Lien for price.** In this case, the owner, as soon as he learned that the house had been sold, repudiated the sale and forbade the purchaser removing the house, he already having taken possession for the purpose of removing it. *Held*, that the purchaser had no right to remove the house without payment, or tender of payment, and, having done so, he was liable in trespass to the owner. *Ib.*

## 2. Executory ; Future delivery.

13. Where A, by contract not in writing, agreed to purchase goods of B, and to take delivery and pay for them at a future day named, and paid earnest money, and B, before the day named for delivery, sold the goods to a third party so as to pass the property;—*Held*, that A was entitled, under the money counts, to recover the earnest paid, without tender of performance on his part and whether such breach of contract by B was known to A, or not. *Packer v. Steward*, 34 Vt. 127; and (by *Kellogg, J.*), if after such sale A had, before the expiration of the time limited, tendered performance on his part, he could have recovered damages for such breach of contract. *Ib.* 183.

14. In executory contracts of sale, it seems, that if neither party be ready by the appointed time, and both are in default, the contract is at law *ipso facto* dissolved, and that the deposit is recoverable, unless the time has been prolonged by consent. *Packer v. Button*, 35 Vt. 188.

15. Where the plaintiff contracted to purchase the defendant's wool at a certain price, to be taken and paid for by Feby. 1, and paid part as earnest money, and the plaintiff was prevented by inevitable accident—a storm—from appearing and taking and paying the balance for the wool until the morning of Feby. 2, when he found the defendant delivering the wool to another party to whom he had sold it the day before;—*Held*, that the plaintiff could not recover damages for the refusal to deliver the wool, but could recover the earnest money paid, and that without a special demand. *Ib.*

16. In an executory contract for the sale of property to be taken and paid for at a stipulated time, the purchaser, in order to entitle himself to a performance by the seller, must offer to receive the property and pay the price at the time stipulated, and nothing, not even inevitable accident, will excuse him from so doing, except that the seller has put it out of his own power to perform. *Ib.*

17. If the seller has put it out of his power to perform, and this is known to the purchaser and for this cause he omits to make what he knows must be a wholly useless offer to perform, he may hold the seller liable. *Ib.*

18. Where a purchaser pays a part of the price in advance, but fails to pay the residue according to the contract so as to entitle him to performance, and the seller is in no fault, what has thus been paid cannot be recovered back. *Ib.*

19. This rule is universal, and applies to contracts of sale of real estate, though by parol—the statute of frauds not rendering such contracts void, but only not enforceable by action. The vendor in such case being ready to per-

form, part payment cannot be recovered back. *Cobb v. Hall*, 29 Vt. 510. (S. C. 33 Vt. 239.) 29 Vt. 507. *Shaw v. Shaw*, 6 Vt. 69. *Smith v. Smith*, 14 Vt. 440.

20. The defendant sold to the plaintiff all his dairy of cheese then made and to be made by a day named, to be delivered at a future time and place named, and received fifty dollars in part payment, the balance, at a certain price per pound, to be paid on delivery. The defendant performed on his part, but the plaintiff failed to appear, at the time and place specified, to receive and pay for the cheese. The defendant thereupon, in reasonable time, resold the cheese at a less price, leaving in his hands, with the \$50, no excess above the contract price. *Held*, that the plaintiff could not recover either specially upon the contract, or upon the general counts for the money paid. *Jones v. Marsh*, 23 Vt. 144.

### 3. Sale executed so as to pass title.

21. **Essentials—Delivery, etc.** To constitute a valid sale of chattels, it is necessary there should be a transfer and change of property. Without a delivery of the goods by the vendor, the price not having been paid, the property is not divested, and the vendee cannot seize it or maintain trover for it. An undertaking to pay at any other time, accepted and relied upon by the vendor, may have the same effect as payment at the time. *Towsley v. Dana*, 1 Aik. 844. See *Riley v. Wheeler*, 42 528. *Miller v. Cushman*, 38 Vt. 598.

22. Where A agrees to purchase property for B, but B furnishes no funds, and A has no general agency for B, and A makes the purchase in his own name, although with the purpose of delivering the property to B, this does not vest the title in B; and if he takes the property forcibly, he is liable to A therefor; as, in trover. *Paige v. Hammond*, 26 Vt. 875.

23. Where the plaintiff contracted to purchase the defendant's farm, and to pay, in part, in a certain yoke of steers, but afterwards declined to complete the purchase;—*Held*, that the defendant was liable in trover for afterwards taking away the steers without the consent of the plaintiff. *Nye v. Taggart*, 40 Vt. 295.

24. An agreement to procure and deliver to the defendant, for a sum named, an article of property belonging and understood to belong to a third person, though procured and offered, cannot be declared upon as a sale. *Bruce v. Bishop*, 48 Vt. 161.

25. Where a contract is to deliver at a future day property not *in esse*, but to be thereafter produced, as by the cultivation of the earth, or to be manufactured, the property does not pass by a simple tender or delivery to the purchaser according to the terms of the

contract, but to this end he must accept the same; and without such acceptance an action for goods sold and delivered, or an action on book for the price, cannot be maintained. *Rider v. Kelley*, 82 Vt. 268. *Latham v. Lewis*, cited in *Carpenter v. Brainerd*, 87 Vt. 147, and in *Hodges v. Fox*, 36 Vt. 81 (overruling *Mattison v. Westcott*, 18 Vt. 258). *Allen v. Thrall*, 36 Vt. 711.

26. If the party contracting for the property wrongfully refuses to receive it, the action must be upon the contract for such refusal; in which case the rule of damages would be, not the value or contract price of the property, but the difference between the contract and the market price. *Id.* *Hodges v. Fox*, 36 Vt. 74. *Boardman v. Keeler*, 21 Vt. 78.

27. **Sale differs from an exchange.** A sale and an exchange are, legally, different contracts; and, in strictness, an averment of one is not supported by proof of the other. *Vail v. Strong*, 10 Vt. 457.

28. Where property is transferred, and other property with some money is received therefor, a sale, rather than an exchange, may justly be inferred from the fact that the trade was governed by a fixed price for the property—an agreed price being essential to a proper sale, but altogether needless in the case of a mere exchange. *Loomis v. Wainwright*, 21 Vt. 520.

29. The plaintiff agreed to sell her farm to the defendant for \$1,200 and to take for it the farm of one G at the same price,—which it was agreed that the defendant should purchase—if the defendant could not induce G to take a less price. The defendant purchased the G farm for \$1,050 and falsely represented to the plaintiff that he had been obliged to pay \$1,200. Upon this the deeds were exchanged, the plaintiff saying at the time that she was not swapping farms, but buying and selling. In an action of assumpsit to recover for land sold;—*Held*, that this was a sale at the price of \$1,200, and not an exchange without reference to any agreed price, and that the plaintiff was entitled to recover the difference. *Jordan v. Dyer*, 84 Vt. 104.

30. —**from a lease.** The lessor of a farm for three years covenanted by his lease to furnish ten cows, to be kept on the farm for the use and benefit of the lessee, the lessor to risk the cows against all unavoidable accidents and to pay the taxes upon them—the lessee covenanting to deliver to the lessor, at the end of the term, the same ten cows, or those worth as much in all respects. *Held*, that this was a lease, and not a sale of the cows—the lessee having the right to supply the loss chargeable upon him as not “unavoidable,” by substituting other cows of equal value. *Smith v. Niles*, 20 Vt. 315. 22 Vt. 351.



**31. Something remaining to be done.** If anything remains to be done to property by the seller before delivery, no property passes to the buyer, even as between themselves—as, to complete the burning of a coal-pit, and then to measure out the coal. *Hale v. Huntley*, 21 Vt. 147.

**32.** In a contract of sale, if any thing remains to be done by one or both of the parties before delivery, the title does not pass. And even where the property has been delivered, if any thing remains to be done by the terms of the contract before the sale is complete, the title still remains in the vendor. To effect a completed sale, the contract must be executed. *Gibbs v. Benjamin*, 45 Vt. 124.

**33.** The defendant had purchased of the plaintiff absolutely a yoke of oxen, and took possession of them. He afterwards executed a writing to the plaintiff, acknowledging the receipt of the oxen to enable him to do a job of work for the plaintiff, and containing a condition that when the job was done, or at any time, if the plaintiff should choose, he should have a right to take the oxen by paying the defendant for what he had done towards the job. The defendant, before the completion of the job, sold the oxen. In an action of trover therefor;—*Held*, that this contract did not have the effect of a re-sale of the oxen to the plaintiff, and that the plaintiff under it had no right to the oxen without first paying the defendant for what he had done towards the job. *Walker v. McNaughton*, 16 Vt. 388.

**34.** The plaintiff sold the defendant a lot of wool unsacked, at a certain price per pound, for cash or sight drafts. The plaintiff afterwards sacked the wool in sacks furnished by the defendant, and then weighed it and shipped it to the defendant. *Held*, that as the sacking preceded the delivery of the wool, the plaintiff could not recover for his services in sacking the wool, in the absence of an express contract of the defendant to pay therefor. *Cole v. Kerr*, 20 Vt. 21.

**35. Terms of payment.** While the terms of payment remain to be settled as between vendor and vendee, the sale is not complete. *Miller v. Crushman*, 38 Vt. 598.

**36.** The plaintiff bought of G a mare, supposed to be with foal, and agreed to give therefor the colt at four months old which the mare should bring. The mare brought no colt while the plaintiff possessed her, which was for nearly three years, when the defendant attached her, as the property of G. The plaintiff had in no way paid for the mare. *Held*, that by the contract the title to the mare vested in the plaintiff; that although the mode of payment agreed upon had become impossible of performance, he was liable to pay in some other way; and that if G might have rescinded and claimed a return

of the mare, yet as he had acquiesced, the defendant could not step in and set aside the contract. *Reed v. Canady*, 34 Vt. 198.

**37. Measuring.** It is not necessary that an article should be measured before the sale is complete, if it is the intention of the parties that the property shall pass before that time, and that the amount shall be subsequently determined by a measurement of the product of the article when changed in form. *Fitch v. Burk*, 38 Vt. 688.

**38. Actual removal not always essential—Instances.** As between the parties to a sale of a chattel, the title may pass without delivery, all the other elements of a valid sale existing. *Fletcher v. Howard*, 2 Aik. 115; and *held*, where the plaintiff purchased of the defendant a heifer and paid the price, the defendant agreeing to keep the heifer for the plaintiff until foddering time, and the defendant afterwards refused to deliver the heifer on demand, that he was liable in trover therefor. *Bemis v. Morrill*, 38 Vt. 153.

**39.** Where property is in the possession of a third person, a sale of it by the owner and payment therefor, with an agreement that such third person shall be notified of the sale, transfers the title as between the parties. *Wooley v. Edson*, 35 Vt. 214.

**40.** A sale of lumber lying at different places in a river, the purchaser agreeing to take it where it lies, is an executed contract and requires no other delivery to transfer the property. A subsequent destruction of part of the property by strangers will not excuse the purchaser from payment of the purchase price. *Evarts v. Butler*, Brayt. 216.

**41. Sufficiency of delivery.** The plaintiff purchased plank and timber, a part being in the vendor's bark-house and a part in his shop, and took possession of that in the bark-house, and the vendor agreed to leave the shop key with a third person so that the plaintiff could come and get the property there at his convenience, and he did so leave the key. The defendant afterwards bought the timber in the shop of the same vendor, and procured the key from such third person and removed the timber. *Held*, that there was a sufficient delivery to the plaintiff to enable him to sustain trespass for the taking. *Chappel v. Marvin*, 2 Aik. 79.

**42.** C contracted to buy of D all the potatoes D should raise the next season, taking them in the field after they were dug and laid in heaps. D gave notice when he should commence digging, and kept C advised from time to time that more potatoes were dug and were ready. C drew away a part and then stopped drawing, and the potatoes lay there and became frozen. *Held*, that the title to all the potatoes so delivered in heaps passed to C, and that he was liable for the whole in an action on book,

as for goods sold and delivered. *Carpenter v. Dole*, 18 Vt. 578.

43. H contracted with T to deliver, at a place named, from 800 to 1000 cords of wood before a day named. H from time to time delivered the quantity of wood as agreed, but a flood came and carried it off before it had been measured by T. It would have been measured but for T's neglect. *Held*, that the title became vested in T by the delivery, and that he was holden to pay for the wood in an action on book, as for goods sold and delivered. *Hunt v. Thurman*, 15 Vt. 386.

44. In the sale of articles of bulk—as, two and a half tons of straw by estimate—all that is necessary to constitute a delivery, so as to sustain the action for goods sold and delivered, or book account, is that the contract of sale should be complete, the particular portion be set apart by itself, nothing more remain to be done on the part of the vendor, and that the vendee should agree to take the goods as they are, and where they are. *Chamberlain v. Farr*, 28 Vt. 265.

45. Where standing trees are sold by a parol contract, and the purchaser has cut the trees, although left upon the land, the contract has become executed, and the timber cut is the property of the purchaser. *Yale v. Seely*, 15 Vt. 221. 27 Vt. 166. 32 Vt. 39. 43 Vt. 97.

46. A and B owned a quantity of cheese in individual shares, A having a lien for his security upon B's share, and a right to receive the whole proceeds of the sale of the cheese and to account to B, on settlement of accounts, for his share. B, by contrivance with C, in order to obtain the pay for his share and thus embarrass A in enforcing his lien and securing his accounts, pretended to sell his share of the cheese to C, and going with C to the property, then in the hands of a carrier for the market, looked at it, saying, "I deliver this to you"—without doing any thing more, or notifying the carrier. *Held*, that C acquired no right thereby against A. *Shepard v. Briggs*, 26 Vt. 149.

47. A contract to deliver a cow to the defendant, is not satisfied by putting the cow in the defendant's barn-yard in his absence. *Bruce v. Bishop*, 43 Vt. 161.

48. **First possessor.** Where the same chattel is sold or mortgaged, to two different persons by conveyances equally valid, the one who lawfully acquires the possession will hold it against the other. *Fletcher v. Howard*, 2 Aik. 115. *Coty v. Barnes*, 20 Vt. 78.

49. Where the second mortgagee of a chattel allowed it to be in the joint possession of himself and the mortgagor;—*Held*, that the first mortgagee might take it into his own possession and thus complete his title. *Coty v. Barnes*.

50. **Acceptance—What is, and its effect.** What constitutes a delivery and accept-

ance of goods so as to transfer the title, considered and discussed. *Redington v. Roberts*, 25 Vt. 686.

51. The use or sale of a part of the property delivered upon a contract, although the party may not be bound to accept it, is evidence of an acceptance of the whole under the contract, and may be a confirmation of the contract as claimed by the other party, notwithstanding accompanying declarations to the contrary. *Bliss v. Granger*, 6 Vt. 340.

52. Where the defendant contracted to take of the plaintiff 20,000 feet of lumber to be delivered at a place and by a day named, and while the plaintiff was drawing the lumber the defendant notified him that he (defendant) should not want the full quantity, without specifying how much he did want and what quantity he would accept, and the plaintiff continued to deliver and did deliver the whole quantity contracted for, and the defendant used a part;—*Held*, in an action on book, that the defendant was holden to pay for the whole. *Id.*

53. The defendant contracted with the plaintiff for all the lumber on 12 acres of land, to be sawed and delivered by the plaintiff on the defendant's premises. The plaintiff sawed and delivered the lumber into the possession of the defendant, and it was placed where the defendant directed. The defendant used all except the basswood lumber, which the defendant refused to take at the plaintiff's measurement. *Held*, that the title to the basswood lumber passed to the defendant, the plaintiff so electing, and that an action on book lay for the price. *Carpenter v. Brainerd*, 37 Vt. 145, citing *Hunt v. Thurman*, 15 Vt. 386.

54. *Held*, also, that the contract was entire, and the actual acceptance and use of a part was an acceptance of the whole. *Id.*, citing *Bliss v. Granger*, 6 Vt. 340. *Carpenter v. Dole*, 18 Vt. 578.

55. The defendant and one M, made a contract by which the defendant was to procure to be sawed from logs of the defendant certain boards, the logs being then selected and marked with the initials of M's name; the boards to be received by M, at the mill, at the sawyer's measurement, at a certain price per thousand feet; M not to take the boards from the mill yard, until he had paid for them. But from time to time, as the boards were sawed and measured by the sawyer, M, in the absence of the defendant, drew them away from the mill yard, some six or eight rods, and piled them up in an open space near a building in part occupied by him, expressing dissatisfaction with the sawyer's measurement, and repeatedly declaring that he would not take them at that measurement. *Held*, that the defendant was entitled to prove, as tending to show that M had not accepted the boards, so as

to transfer the title to him, that upon being called on for payment he replied "that when the defendant furnished lumber according to the contract, he would pay for it." *Fletcher v. Cole*, 23 Vt. 114.

56. Where the owner of goods in the possession of his bailee proffered to sell them to the bailee, and the bailee thereupon proceeded to use and sell them as his own;—*Held*, that he was liable as for goods sold. *Jones v. Hard*, 32 Vt. 481.

57. **Election.** The plaintiff let the defendant have, under a written contract, a yoke of oxen "to work and use well and run all risk of accident, sickness and death for one year, for \$115, and interest." If returned, the defendant was to pay \$12 for the use of the oxen; and if he paid \$115, and interest, in one year, he was to own them. Near the end of the year the defendant informed the plaintiff that he should not return the oxen, and he continued to use them until after the end of the year, and until one of them died. In an action for goods sold;—*Held*, that the defendant, by his notice, had elected to become the purchaser, and that the bringing of the suit was an affirmation by the plaintiff of such election. *Fuller v. Burwell*, 84 Vt. 107.

58. The plaintiff's intestate (Roberts) and the defendant (Mann) made the following written agreement: "Springfield, March 22, 1865. Received of G. H. Roberts \$800 on a lot of assorted fur skins, billed at \$847.25. This money is to be applied in payment for the skins if we can agree on the prices; otherwise, the skins are to be returned to Brattleboro, Vt., by Roberts, and I am to return the \$800. Gilbert H. Mann." The defendant having refused after more than three days to receive back the skins, Roberts sold them in market for less than \$800, and brought this suit to recover the difference. *Held*, that the written contract contemplated a future agreement supplementary to the written contract as to price, and that it was competent for the defendant to testify, that immediately after the execution of the written contract, at the same interview, Roberts agreed to notify the defendant in three days whether he would keep the skins and pay the price for them or not. *Field, Admr., v. Mann*, 42 Vt. 61. *Held* (Peck, J., dissenting), that this evidence tended to prove a sale at the price named, if Roberts did not within the three days notify the defendant whether he would take the skins at the price named or not. *Id.*

59. **To sell or return.** The plaintiffs left with K, a trader, goods "to sell or return on demand" at prices set in the bill receipted, K's commission, or compensation, to be what he could sell the goods for above the prices named. The defendant attached the unsold

goods as the property of K. *Held*, that he was liable to the plaintiffs in an action of trespass. *Shloss v. Cooper*, 27 Vt. 623.

60. **Special cases.** Where A agreed to build a barn for the plaintiff by a specified time, for which the plaintiff was to furnish timber standing in his woods;—*Held*, that the timber drawn and sawed into boards by A, for that purpose, remained the property of the plaintiff and was not subject to attachment as the property of A. *Gallup v. Josselyn*, 7 Vt. 384.

61. I agreed to cut and draw for P a quantity of wood which P had a right to cut upon the land of a third person, and by the agreement I was to "own and possess" the wood until he should be paid for cutting and drawing. I cut and drew the wood and deposited it in the highway and on land belonging to R, by consent of all parties, where it was attached by a creditor of P, as his property. After the attachment, I sold the wood to the defendant. The wood was then sold on the execution against P to the plaintiff. After this, the defendant drew away the wood. P had paid nothing towards the cutting and drawing of the wood. In trespass, *held*, that I under his agreement with P, had a special property in the wood binding against P, and, upon these facts, against his creditors, which passed by the assignment of I to the defendant and that the plaintiff could not recover. *Hammond v. Plimpton*, 30 Vt. 333.

#### 4. *Rescission—Acceptance as a waiver of objections.*

62. **Right to rescind.** In case of sales, assumpsit will lie for breach of warranty, or an action of deceit for fraud in the sale; and, in some cases, the purchaser may, for fraud in the seller, rescind and demand back the consideration paid. In such case, he may rescind the contract, or affirm it, at his election; as, by bringing his action for damages. If he would put an end to the contract and recover back the consideration, he must, in due time, offer to rescind and demand a repayment of the consideration. *Warner v. Wheeler*, 1 D. Chip. 159.

63. Where one purchased goods upon credit, upon the recommendation of a third person to whom the buyer had referred the seller for information;—*Held*, that the buyer was responsible for the representations made, the same as if made by himself, on the common principles of agency; and, the recommendation which induced the credit being materially false and this known to the buyer, that the seller upon obtaining knowledge of the falsehood could rescind the sale, and recover the goods from the buyer, or his attaching creditor. *Fittsim-*

*mons v. Joslin*, 21 Vt. 129. 25 Vt. 234. 31 Vt. 109. 36 Vt. 198. 42 Vt. 111.

64. The mere insolvency of the purchaser of goods, together with a consciousness on his part of inability to pay for them, does not amount to such a fraud as to enable the seller to avoid the contract of sale and reclaim the goods. *Redington v. Roberts*, 25 Vt. 686.

65. The plaintiff sold the defendant certain teas at a price named, as and for good teas, but not by sample, nor was there any fraud, nor warranty. The defendant received the teas, whose quality was ascertainable on inspection, and sold part thereof, and within five or ten days after the receipt of the teas, but before discovering their inferiority, gave his note for the price. In an action on the note;—*Held*, that the inferiority of the teas, they not being worthless, was no defense to the note, in whole or in part. *Henderson v. Ward*, 27 Vt. 432.

66. **Acceptance as a waiver.** Waiver of condition in a contract, and of objection to quality of goods purchased, by receiving part, and use and payment. *Cole v. Champ. Tr. Co.*, 26 Vt. 87.

67. A person contracting for the purchase of articles to be in good condition, is bound to pay the price stipulated, although they were in bad condition and depreciated, if he has accepted them with knowledge of their condition and without objection. *Cram v. Watson*, 28 Vt. 22.

68. The plaintiff sold the defendant a horse for which the defendant agreed to pay a wagon worth \$60, to be delivered at a future day named, and \$10 in money. *Held*, that the value of the wagon was an essential part of the contract, and not matter of description merely; and that the delivery and acceptance of a wagon worth only \$25, in consequence of defects not known to the plaintiff, and which he could not have discovered on careful inspection at the time of his acceptance, should count as but \$25 towards the \$60. *Brown v. Sayles*, 27 Vt. 227.

69. **Time to rescind.** Where the right to rescind a purchase of varnish, on trial of the article, was reserved in the contract;—*Held*, that the using of it to a greater extent than was necessary to test it, barred the right to rescind. *Mayer v. Duinell*, 29 Vt. 298. 32 Vt. 182.

70. Acceptance of an article by non-return after expiration of time given for trial. *Waters Heater Co. v. Mansfield*, 48 Vt. 378.

71. Where the right of rescinding a sale exists it must be exercised within a reasonable time, or the property becomes the purchaser's and he must pay for it according to the contract, subject to the right of recoupment for fraud. *Tilton Safe Co. v. Tisdale*, 48 Vt. 83.

72. Where goods of a specific description are ordered, and when received they do not

answer the description, if the party giving the order would avail himself of the right to return the goods, he should do so as soon as he has time and opportunity to ascertain the fact. *Boughton v. Standish*, 48 Vt. 594.

73. In an action for a false warranty on the exchange of horses, the defendant cannot object that at the time of the exchange there existed a lien upon the horse he received, in behalf of a former conditional vendor for part of the purchase price, where such lien has been discharged before the trial, the defendant never having been disturbed in his title or possession, and never having offered to rescind the contract. *Clayton v. Scott*, 48 Vt. 553.

74. **Case of duress.** Where a party had made sale of property by duress and taken the purchaser's note for a sum which included that and other matters, and gave notice that he repudiated the trade and all of the note which embraced it;—*Held*, that it was not necessary to offer to return the note in order to such repudiation—he never having offered to collect or negotiate the note, and bringing it into court. *Brownell v. Talcott*, 47 Vt. 243.

75. **Articles agreed to be manufactured.** Where an article is to be manufactured to order, and the contract is silent as to quality of the material to be used, it is implied that the material shall, at least, be of an ordinary quality as to goodness. *Brown v. Sayles*, 27 Vt. 227.

76. Where the plaintiff under a written contract had, at the time and place specified, delivered articles of the number and description agreed to be manufactured, and the defendant used a part of them, and paid part of the price, and promised to pay the balance;—*Held*, that this was such an acceptance of all, that he could not object on account of any apparent defects in them. *Wilkins v. Stevens*, 8 Vt. 214. 18 Vt. 581.

77. The purchaser of an article manufactured for him at a stipulated price, under an order specifying style, quality, &c., may reject it, if not made according to the contract, and give notice of non-acceptance, and bring his action for non-performance of the contract; but if he accepts it, there being no warranty or fraud, he becomes liable to pay the stipulated price. He cannot accept it, and impose conditions, and sue for non-compliance with such conditions. *Gilsom v. Bingham*, 48 Vt. 410.

78. Where articles are manufactured and delivered, inferior or different in some respects from those contracted for, and the sale is not repudiated by notice of non-acceptance within a reasonable time, this will be a ratification of the sale. *Esty v. Read*, 29 Vt. 278.

79. The acceptance of an article manufactured to order, which the purchaser supposes to be without defects, is not conclusive upon him

if the defect could not be ascertained by careful inspection, or there was no opportunity to inspect it. In such case, the purchaser is not liable for the contract price, but for what the article was worth. *Brown v. Sayles*, 27 Vt. 237.

80. A manufactured a pump for B, under an agreement that if the pump was not a good one he should have nothing for making it. The pump was put in B's well, and B paid part of the price of the pump. On trial, the pump proved not to be a good one, not being constructed on an approved plan, and answered its purpose but imperfectly. A tried to fix the pump several times, and not succeeding, B several times requested him to take it away. *Held*, that the pump never became B's property; that no acceptance of it could be presumed, under the circumstances, and that A could not recover either for the pump, or for his labor in fixing it. *Sias v. Bates*, 18 Vt. 579.

#### 5. *Stoppage in transitu*.

81. **The right.** Where goods are purchased and paid for by the order, note, or accepted bill of a third party, without any indorsement or guaranty of the purchaser, the vendor has no right of stoppage *in transitu* for the insolvency of such third person. *Eaton v. Cook*, 32 Vt. 58.

82. **Where the transitus ends.** Goods sold and shipped at Troy, N. Y., were directed to the vendee at Vergennes, and were landed on the wharf at Vergennes, which was half a mile from the vendee's place of business. This wharf was the usual place of the vendee's receiving such goods, and, after landed, neither the wharfinger, nor any one for him or for the carriers, had any charge of the goods, and they would in the usual course of business have been taken away by the vendee without any claim for payment of freight. *Held*, that the wharf was the place of ultimate destination named by the consignor, and that when the goods passed from the hands of the carrier they came into the constructive possession of the vendee, and that the right of stoppage *in transitu* had ceased. *Sawyer v. Joslin*, 20 Vt. 172. 28 Vt. 212. 30 Vt. 552.

83. When goods are delivered at a place where they will remain until a fresh impulse is communicated to them by the vendee, the *transitus* is at an end, and the vendor's right of stoppage *in transitu* is ended. *Guilford v. Smith*, 30 Vt. 49. 40 Vt. 149.

84. P, residing at Burlington, Vt., purchased flour on credit of G at Toronto, Canada, and ordered it shipped to F at Ogdensburgh, N. Y., who was P's agent for the purpose of receiving the flour there and forwarding it as directed by

P. The bills of lading described F as consignee, Ogdensburgh, "to be forwarded to P, Burlington." The flour arrived by steamer at Ogdensburgh, whence there was a railroad to Burlington, run in connection with the steamers. The freight and government duties being unpaid, the flour was placed, subject to the provisions of the U. S. warehousing system, in a warehouse of the R. R. Co., but under the charge of the owners of the steamers, from which warehouse it could not be moved until the freight and duties were paid, or the latter were secured according to U. S. laws. The flour in the warehouse was held subject to the special direction of F, and would not be forwarded without his direction. P having become insolvent, his assignees notified F of the assignment, and directed him to hold the flour subject to their order. F thereupon went to the warehouseman and countermanded a previous order to forward the flour, and gave directions to have it remain in the warehouse for further orders. *Held*, that the *transitus* was ended, and that G, the vendor, could not thereafter, by paying the freight and complying with the U. S. customs regulations, exercise the right of stoppage *in transitu*. *Id.*

85. Where goods purchased in N. Y. arrived on the railroad cars at R, in Vt., their place of destination, subject to charges, but before unloading or delivery and while in the hands of the carriers as such, they were attached by a creditor of the purchaser and removed on payment of charges;—*Held*, that the *transitus* was not ended; that the unpaid vendor had the right of stoppage *in transitu*, and that after demand, he could recover in trover against the attaching creditor. *Kitchen v. Spear*, 30 Vt. 545.

86. Where goods are sold to A, who, before delivery, resells them to B, and this being known to the first vendor, he consigns them to B, this new destination is a final and irrevocable delivery, and the right of stoppage *in transitu* is gone. *Eaton v. Cook*, 32 Vt. 58.

## II. WARRANTIES.

### 1. *What constitutes a warranty; implied; express; particular warranties.*

87. **Implied warranty of title.** If one affirms that he has an interest in a chattel, and releases that interest upon a sale, when in fact he has none, he is liable as for a warranty, whether he sells the chattel itself, or his interest, right or title in it. *Strong v. Barnes*, 11 Vt. 221.

88. In the conveyance of personalty there is always an implied warranty of title, unless it be the vendor's title, and not the thing itself, which is intended to be conveyed; and a subsequently acquired title in the vendor will inure

to the benefit of the vendee. *Sherman v. Champlain Transportation Co.*, 81 Vt. 162.

89. A warranty of title is implied upon an exchange, the same as upon the sale, of chattels. *Patee v. Pelton*, 48 Vt. 182.

90. —of genuineness. The defendant assigned by writing to the plaintiff a promissory note, describing the paper as "a note signed by," &c. *Held*, that this was an express warranty that the note was a valid note, and that the signer had sufficient capacity to make it. A warranty to this extent would probably be implied from the sale itself. *Thrall v. Newell*, 19 Vt. 202.

91. Sound price not a warranty. A sound price is not *per se* a warranty of the soundness of an article sold, and the seller is not liable for defects or unsoundness without an express warranty, or unless guilty of fraud. *Penniman v. Pierson*, 1 D. Chp. 894. 1 Aik. 272.

92. In an action for the agreed price of a patent right sold without warranty or fraud, the plaintiff is entitled to recover the full price, if the patent is of any value. *Vaughan v. Porter*, 16 Vt. 266.

93. It is no defense to an action to recover the price of a cow sold, that the cow was so diseased as to be worthless, where the sale was without fraud, or warranty. *Bryant v. Pember*, 45 Vt. 487.

94. Sale for a particular use. Where an article is bought, and sold, for a particular known use, the sale ordinarily implies a warranty that the article is fit for that use. *Beals v. Olmstead*, 24 Vt. 114.

95. The plaintiff purchased of the defendant, for a sound price, cheese made by the defendant, and for the purpose, made known to the defendant, of sale in a foreign market. The cheese was maggoty and so unfit for market, which was from a fault of the manufacture and was a latent defect. *Held*, that the defendant was liable upon an implied warranty that the cheese was fit for the purpose stated. *Pease v. Sabin*, 88 Vt. 482.

96. Particular terms. The terms "good cooking stoves" in a contract of sale were *held* not to imply a warranty of quality. *Barrett v. Hall*, 1 Aik. 269.

97. The plaintiff bargained and sold to the defendant, at a specified price per pound, "old potash kettles," which, as the plaintiff knew, the defendant intended to melt up and use in his business of manufacturing stoves. There was no express warranty of the quality; the plaintiff knew of no defect and was guilty of no fraud. The defendant had an opportunity to examine the kettles, knew that they had been used in the manufacture of potash, and received them without objection. On breaking them up for melting, one-half the entire weight was found wholly unfit for use, by reason of their

having been badly burned in the manufacture of potash. *Held*, that there was no implied warranty of fitness for use, and that the defendant was liable for the full price agreed. *Stevens v. Smith*, 21 Vt. 90.

98. The plaintiffs, manufacturers of safes, sent the defendants a safe answering the terms of their written order, viz.: "A No. 4 safe with combination lock of their make." *Held*, that there was no implied warranty as to the merit or *usableness* of the lock. *Tilton Safe Co. v. Tisdale*, 48 Vt. 88.

99. The words, in a bill of sale of a horse, "considered sound," were *held* not to be a warranty of soundness, but only a representation of soundness, bearing upon the question of deceit practiced. *Wason v. Rowe*, 16 Vt. 525.

100. A warranty that a horse is "sound and right," means that the horse is right in conduct and behavior, as to all matters materially affecting its value, as well as in physical condition. Such a warranty covers a case of "cribbing," whether or not that be a physical unsoundness. *Walker v. Hoisington*, 48 Vt. 608.

101. Representations constituting a warranty—Question of intent. Where the declarations of the vendor as to the character and quality of the thing sold, form the basis of the sale, such declarations are ordinarily to be regarded as a warranty. They should be submitted to the jury, unless it is apparent that they were understood by the parties at the time as nothing more than recommendation and matter of opinion, leaving the purchaser to understand that he must examine and judge for himself. *Beals v. Olmstead*, 24 Vt. 114.

102. A simple affirmation made in the sale of property as to soundness or the like, is not a warranty, nor can it be held such by the court, unless it is found by the triers of fact that it was intended and understood by the parties as a warranty. *Bond v. Clark*, 85 Vt. 577. *Foster v. Caldwell*, 18 Vt. 177. *Beeman v. Buck*, 3 Vt. 58.

103. In an action for the breach of warranty as to the quality of butter sold, the referee reported what was sold by the parties during the negotiations for the sale, and found that "the language used imported that the butter *should be* of the best quality, &c.; that both parties so understood it, and intended it to make a part of the contract as to the quality of the butter;" and reported, as a conclusion of law, that such language amounted to a warranty. *Held* (with hesitation), that this was a finding of a warranty as matter of fact, and the report was confirmed. *Houghton v. Carpenter*, 40 Vt. 588.

104. Apparent defects—Special warranties. The rule excluding from a general warranty of soundness such defects as are

known to the purchaser, only applies to such as are perfectly obvious to the senses, and the effects and consequences of which may be accurately estimated, so that no purchaser would expect the seller intended to warrant against them. Such general warranty embraces all other defects, though apparent to some extent, but still equivocal and doubtful in their character, whether they are permanent, or temporary, or whether they are mere harmless blemishes, or but partially developed unsoundness. *Poland, C. J.*, in *Hill v. North*, 34 Vt. 615; and embraces those apparent defects, to understand the true nature and extent of which requires the aid of skill, experience or judgment. *Wilson, J.*, in *Pinney v. Andrus*, 41 Vt. 641.

105. This rule as to general warranties has no application to the case of a special warranty against a specified defect; for the seller may warrant against a defect which is patent and obvious, as well as against any other. *Ib.*

106. Thus, where the declaration counted upon a special warranty that the sheep purchased had not *the foot-rot*, and averred a breach that they had *the foot-rot*;—*Held*, that on proof of the special warranty and breach, the plaintiff was entitled to recover without any regard to whether the existence of the disease was obvious and discoverable, or was discovered and known by the plaintiff when he made the purchase. *Pinney v. Andrus*.

107. Where the parties to a sale of sheep settled the terms of the trade, agreeing upon the price and the time and place of future delivery, and a part of the purchase price was paid, and as part of that agreement the seller warranted the sheep to be sound, and on the next day the purchaser went to pay the balance for the sheep, and then discovered that the sheep were unsound, and offered to rescind the trade, when the seller repeated his warranty made on the first day;—*Held*, that the two interviews were to be regarded as parts of the one trade and sale, and whatever was said or done at either interview, in relation to the trade, was part of the contract. *Ib.*

108. In an action for breach of warranty of a horse, the declaration averred a warranty of soundness of the horse except a bunch on one hind leg, and averred that the horse was unsound in other particulars specified; but did not aver that the bunch, in its effects upon the horse, was other than and beyond what was obvious, and what the defendant warranted. The court below charged, that if the horse was sound "except so far as that bunch made him unsound," then there was no breach of the warranty, "even if the bunch made him lame." *Held* correct. *Morrill v. Bemis*, 37 Vt. 155.

109. **Limited warranty.** Assumpsit lies upon a limited warranty of soundness—as, sound so far as the warrantor knows—the dec-

laration averring his knowledge of the unsoundness. *Parlin v. Bundy*, 18 Vt. 582.

## 2. Effect of breach, and remedy.

110. **Effect.** A breach of warranty in the sale of goods, where there was no fraud nor agreement for a rescission, does not entitle the purchaser to rescind the contract, but only to claim a deduction from the agreed price, or damages for a breach of the warranty. *Mayer v. Dwinell*, 29 Vt. 298. *West v. Cutting*, 19 Vt. 586. 27 Vt. 282. *Matteson v. Holt*, 45 Vt. 336.

111. Where property is bought upon inspection, with warranty as to quality, no duty is imposed upon the purchaser to give notice of the defect, or to offer to return the property, in order to entitle him to an action for breach of warranty. Nor has he generally a right in such case to return the property; but he has, if there was fraud in the sale. But when the property is not bought upon inspection, but the sale is executory, and the seller, contracting to furnish goods of a particular quality, forwards them, and they do not answer the contract, the buyer may return them; and if he neglects to do so, but keeps and appropriates them to his own use, it is often held that the objection to the quality is thereby waived. *Houghton v. Carpenter*, 40 Vt. 588.

112. In the sale of chattels, or of an article manufactured to order, if there be a warranty or fraud, an action by the purchaser will lie therefor, though the property be retained by him. *Gilson v. Bingham*, 43 Vt. 410.

113. **Action—Pleadings.** In an action for breach of warranty of soundness of a horse, it is sufficient to assign the breach in the negative of the terms of the contract, without alleging wherein the unsoundness consisted. *Dictum contra*, in *Martin v. Blodgett*, 1 Aik. 875, denied. *Wheeler v. Wheelock*, 33 Vt. 144. *Parlin v. Bundy*, 18 Vt. 582.

114. In an action on the case for a false warranty, in the common form—*warrantieando vendidit*,—alleging a *scienter* of the falsity of the warranty, the plaintiff may recover on proof of the warranty and its breach, without proof of the *scienter*; or if he fails in proof of the warranty, but proves the *scienter*, he may recover for the deceit; and if he proves the warranty and the *scienter*, his right of recovery on both grounds is made out. *Beeman v. Buck*, 3 Vt. 53. *Vail v. Strong*, 10 Vt. 457. *Goodenough v. Snow*, 27 Vt. 720. *Pinney v. Andrus*, 41 Vt. 681.

115. **Evidence.** A declaration in assumpsit counting upon an express warranty of soundness in a sale, was *held* not sustained by mere proof of fraud in this respect. *Shepherd v. Worthing*, 1 Aik. 188.

116. Where a contract of sale is in writing containing no warranty, parol proof of a warranty is excluded. *Bond v. Clark*, 35 Vt. 577.

117. This extends to an ordinary bill of sale, describing the property sold and receipting for the price. *Reed v. Wood*, 9 Vt. 285.

118. **Recoupment.** A purchaser upon warranty is entitled to a deduction from the agreed price when the article is inferior to the warranty, unless he has waived his claim upon the warranty; as, by accepting the article unconditionally. *Mayer v. Dwinell*, 29 Vt. 298.

119. **Damages.** Where an unsound horse was sold on warranty of soundness, and the buyer, acting with common prudence and discretion, resold the horse, it was *held*, in an action for the false warranty, that the price obtained should be deemed the proper measure of the value of the horse; and that the difference between such price and what the horse ought to be worth by the warranty, was the actual loss, and was recoverable, although the buyer did not, before such resale, offer to return the horse. But he could not recover special damages beyond this—as, for the keeping of the horse—unless he had previously offered to return the horse. *Woodward v. Thacher*, 21 Vt. 580.

120. In estimating the damages for a breach of warranty of the quality of property sold, the price paid may be taken, in lack of other evidence, as what its value would have been had it been as warranted; and the difference between the price paid in such case, and the actual value, is the measure of damages. *Houghton v. Carpenter*, 40 Vt. 588.

121. In an action for breach of warranty of the character of goods sold, the general rule of damages is the difference between the value of the property as it was warranted to be, and the value as it in fact was. *Pinney v. Andrus*, 41 Vt. 681. [The charge in this case, as to the damages, was *held* to be too general; and as embracing too remote damages, and such as were not covered by the declaration.]

### III. VALIDITY AS AGAINST CREDITORS.

122. **The rule as to change of possession.** As between the parties to a sale, property in personal chattels may pass by a bargain and sale, for a sufficient consideration, without delivery; but as against every one but the vendor, there must be a delivery of possession. *Fletcher v. Howard*, 2 Aik. 115.

123. **Fraud per se—Fraud in law.** Such sale without change of possession is usually termed a fraud in law. It is not complete as to creditors till there is a change of possession; and this must be a visible, substantial change, so that the possession will no longer give a

credit to the former owner. *Hutchinson, J., in Mott v. McNiel*, 1 Aik. 162.

124. If he who purchases personal property permits him who sells it to remain in possession after such sale, it is a fraud in law, and such possession is a fraud *per se*. This is the settled law of the land, from which "we are not disposed to recede a jot, nor to advance a whit." *Matlocks, J., in Farnsworth v. Shepard*, 6 Vt. 521; and see *Durkee v. Mahoney*, 1 Aik. 116. *Boardman v. Keeler*, *Id.* 158. *Weeks v. Weed*, 2 Aik. 64. *Batchelder v. Carter*, 2 Vt. 168. *Moore v. Kelley*, 5 Vt. 84. *Judd v. Langdon*, *Id.* 281. *Fuller v. Sears*, *Id.* 527. *Gates v. Gaines*, 10 Vt. 348. *Kendall v. Samson*, 12 Vt. 515.

125. No stipulation in a contract of sale that the vendor shall remain in possession, will take the case out of the rule requiring a change of possession, except in certain special cases, where the purpose of the conveyance and the nature of the transaction require the vendor to continue in possession. *Weeks v. Weed*, 2 Aik. 64.

126. **A rule of policy.** All the cases in Vermont treat the matter of *fraud in law*, constructive fraud, predicated upon a lack of possession, as originating in policy, and limited to creditors and *bona fide* purchasers without notice. In favor of such, the law adopts a kind of conclusive *estoppel in pais*, when the former owner continues in the possession and use of the property in a manner consistent with his continuing still to be the owner of it. *Barrett, J., in Daniels v. Nelson*, 41 Vt. 161.

127. **Pledge—Mortgage.** Neither a mortgage, nor pledge of personal property, nor a lien upon it, can prevail against a subsequent attachment, without taking and retaining possession. *Russell v. Fillmore*, 15 Vt. 180.

128. A sale or pledge of chattels, which from their nature or situation it is not impracticable to move, will, if not accompanied by a manifest and substantial change of possession, be voidable by attaching creditors. *Houston v. Howard*, 89 Vt. 54.

129. The ostensible nature and purpose of the possession of chattels pledged, as well as its duration, should be considered in determining whether it was so manifest and substantial as to be unprejudiced by the pledgee's allowing the property to return to the control of the pledgor. *Id.*

130. If one sells and delivers property absolutely, and the parties afterwards attempt to make the transaction a conditional sale, or to create a lien upon the property in behalf of the vendor, a change of possession becomes necessary in order to protect the property from attachment by the creditors of the vendee. *Wright v. Vaughn*, 45 Vt. 369.

131. The defendant, a blacksmith, ironed



Scott's sled and asserted his lien thereon for his pay; whereupon it was agreed that the sled should be the defendant's till he was paid, but Scott took and kept possession of the sled, yet always recognizing the defendant's ownership. *Held*, that the defendant's lien for repairs was lost by parting with the possession; and that the conditional sale, by reason of Scott's possession, was not good as against Scott's attaching creditors. *Barrett, J.*, dissenting. *Kitteridge v. Freeman*, 48 Vt. 62.

See MORTGAGE 209 *et seq.*

**132. How far the change must be apparent.** The change of possession, necessary to perfect a sale as against attaching creditors of the vendor, is only such a divesting of the possession of the vendor as any man, knowing the facts which could be ascertained upon reasonable inquiry, would be bound to know and to understand was the result of a change of ownership; such an one as he could not reasonably misapprehend. *Redfield, J.*, in *Stephenson v. Clark*, 20 Vt. 624.

**134.** When chattels are in the possession of a third person when sold, a subsequent attaching creditor of the vendor is put upon *inquiry* as to the ownership, and is not allowed to rest content with mere observation that there has been no visible change of possession; but in case of an apparent concurrent possession of vendor and vendee, he is not bound to inquire, but it is sufficient if he carefully *observe*, and if a careful observer would be at a loss to determine which had the chief control, it is a joint possession. *Aldis, J.*, in *Flanagan v. Wood*, 33 Vt. 332. See *Parker v. Kendrick*, 29 Vt. 388.

**133.** In respect to the question how apparent and observable the change of possession of goods purchased must be, in order to protect them from attachment for the debts of the vendor, I think it correct to say, that on the one hand, the purchaser must see to it that he so conducts with the property as to indicate by the appearances to an observer a change in the possession; and on the other hand, the creditors of the vendor are bound to see what others can see, and judge and act upon it with that prudence that is required of men in business affairs. *Peck, J.*, in *Stanley v. Robbins*, 36 Vt. 488.

**135. How far exclusive.** A concurrent possession in the vendor and vendee after the sale of a chattel, renders the sale void as to the vendor's creditors, as a fraud *per se*; but to have that effect, it must appear that the possession and use of the property by the vendor was of the same description as that of a joint owner in using, occupying or disposing of it; and the important inquiry in such case is, who was at the head, controlling the business;—and if a careful observer would be at a loss to determine, this would be a joint possession. *Allen*

*v. Edgerton*, 3 Vt. 442. *Hall v. Parsons*, 15 Vt. 358. *S. C.* 17 Vt. 271. *Mills v. Warner*, 19 Vt. 609. *Flanagan v. Wood*, 33 Vt. 332; and see *Farnsworth v. Shepard*, 6 Vt. 521. *Lyndon v. Belden*, 14 Vt. 423. *Wilson v. Hooper*, 12 Vt. 653.

**136. Question for jury.** Where the question was one of change of possession—whether such possession was exclusive in the vendee, or a joint possession with the vendor, depending on appearances as to which was at the head controlling the business;—*Held*, that the question should be left to the jury to be determined from the special facts proved, with proper instructions as to what constitutes possession under such circumstances, in connection with agency. *Hall v. Parsons*, 15 Vt. 358. *Williams, C. J.*, dissenting.

**137.** The county court rightly refused to rule, as matter of law, that there was no sufficient change of possession to perfect a transfer as against attaching creditors, where the debtor had no relation to the attached property until it went into his hands under the assignee's employment, and where all actual as well as apparent possession by him had ceased for several weeks before the attachment. *White v. Miller*, 46 Vt. 65.

**138. How long continued.** After a sale of personal chattels has become perfected by such a visible, notorious and continued change of possession that the creditors of the vendor may be presumed to have notice of it—in this case, it was for nearly six years—the vendee may lend, or let the thing to the vendor, or employ him to sell it, or perform any other service about it with the same safety as he might if dealing with a stranger. *Dewey v. Thrall*, 13 Vt. 281.

**139.** The purchaser of a horse took it into his possession and kept and used it as his own for over seven months, but had for a few times loaned or hired it to the former owner for a temporary purpose, and it was so hired to him and in his use for a mere temporary purpose, when it was attached for his debts. *Held*, that the change of possession was sufficient to protect the property to the purchaser. *Farnsworth v. Shepard*, 6 Vt. 521. *Lyndon v. Belden*, 14 Vt. 423. 17 Vt. 277.

**140.** But where the purchaser took and retained possession of the thing purchased for only some two to four weeks, and then suffered it to go back into the permanent possession and use of the vendor, and in his own business;—*Held*, that it was subject to attachment for the vendor's debts. *Mills v. Warner*, 19 Vt. 609.

**141.** The purchaser of a horse committed it to a third person to keep for him, who on the next day allowed the horse, though without the knowledge or consent of the purchaser, to go

back into the possession and use of the former owner, when it was attached by his creditor. *Held*, that the purchaser was bound by the act of his agent, and that for want of a sufficient change of possession the attachment must prevail. *Morris v. Hyde*, 8 Vt. 352. 11 Vt. 687. 16 Vt. 329.

142. Property returned to the possession of the former owner was *held* subject to attachment for his debts, notwithstanding it had been assigned by him to trustees for the payment of certain debts and then for all other debts, and the trustees had taken exclusive possession of the property and so kept it for fourteen days, when they sold it upon advertisement at public auction to the plaintiff. *Rogers v. Vail*, 16 Vt. 327.

143. In March, R assigned and delivered all his property, including two wagons, to H, to be disposed of for the payment of certain debts of R. H sold part of the property and applied the avails upon the debts. In June following, the debts not being fully paid, H allowed the wagons to return to R's possession, being advised that he could safely do so. *Held*, that the wagons in R's possession were subject to attachment by other creditors of R. *Houston v. Howard*, 39 Vt. 54.

144. A calf given to the plaintiff remained in the donor's keeping, but at the plaintiff's expense, for one year, when the plaintiff put it into the possession of a third person and hired him to keep it for a year, after which it went back into the keeping of the donor, and was in his keeping for a month, when it was attached as his property. *Held*, that the change of possession was sufficient to protect the property from the attachment. *Allen v. Knowlton*, 47 Vt. 512.

145. **Article substituted.** Where the vendor of a horse had been allowed to keep such possession as subjected it to attachment for his debts, and he afterwards, for the convenience and advantage of his own business, and, for aught that appeared, in his own name and ostensibly on his own account, exchanged that horse for another which he put to his own use;—*Held*, that the second horse became as much a means of false credit as the other had previously been, and was equally liable to attachment for the vendor's debts. *Mills v. Warner*, 19 Vt. 609. 27 Vt. 387.

146. **Cases without the rule.** At an auction sale, property was struck off to B as the highest bidder, but he was unable to comply with the terms of sale as to ready payment or security. S then gave his note for the property, with the required security, to the amount of B's bid. This was done in the presence of B, but not at his request, nor did he know why it was done. *Held*, that S became the purchaser, and that the subsequent possession

of the property by B did not *per se* subject it to attachment for his debts. *Spring v. Chipman*, 6 Vt. 662.

147. A sold to B a cow, but without change of possession. A again sold this cow to a third person, and the price was paid to B. B handed the price to A, who purchased with it another cow for B, but in A's own name and ostensibly on his own account, and he took and retained possession, until the cow was attached for A's debt. *Held*, that the doctrine of fraud in law did not apply, as this second cow was never the property of A; and, in the absence of fraud in fact, *held*, that B could hold the cow against the attachment. *Ridout v. Burton*, 27 Vt. 888.

148. **Goods in hands of third person.** It is a sufficient delivery and transfer and change of possession of goods sold which are in the care and keeping of a third person, so as to protect them from subsequent sale by the vendor, or attachment for his debts, that the party holding the goods, on notice and application of the purchaser, assents to retain the goods for him. *Barney v. Brown*, 2 Vt. 874. *Spaulding v. Austin*, 2 Vt. 555.

149. Where goods in the possession of a third person are sold, mere notice of the sale given by the purchaser to such third person, will not protect them from attachment by the creditors of the vendor. In order to defeat such right of attachment, such third person must consent to keep them for the purchaser. *Whitney v. Lynde*, 16 Vt. 579. *Rice v. Courtis*, 32 Vt. 460.

150. And the purchaser himself must give the notice of the transfer, or cause it to be done by some person other than the vendor. *Whitney v. Lynde*. *Judd v. Langdon*, 5 Vt. 281. 33 Vt. 337.

151. Where chattels sold or attached are in the hands of a third person, no visible change of possession is required in order to perfect the sale or attachment as against subsequent attachments, provided the purchaser or creditor [or attaching officer] gives notice to such third person of his purchase or attachment. *Aldis, J.*, in *Flanagan v. Wood*, 33 Vt. 337. *Harding v. Jones*, 4 Vt. 462. *Pierce v. Chipman*, 8 Vt. 334. *Merritt v. Miller*, 13 Vt. 416. *Potter v. Washburn*. *Ib.* 558. *Willard v. Lull*, 17 Vt. 412.

152. But where such third person is the servant or agent of the vendor, notice to him of the sale, and his agreement to keep the property for the purchaser, are not equivalent to a visible change of possession. *Sleeper v. Pollard*, 28 Vt. 709. *Flanagan v. Wood*, 33 Vt. 333. 46 Vt. 69. 47 Vt. 517.

153. Where a chattel is in the possession of a third person when sold, notice of the sale must be given by the purchaser to such third

person in order to perfect the sale as to creditors of the seller; and, in case he is the mere keeper or custodian of the property, there would seem to be some propriety in requiring that he should assent to become the keeper or bailee of the purchaser; but where he has a right of possession in himself, it would seem that mere notice from the purchaser should be enough. *Poland, C. J., in Wooley v. Edson*, 85 Vt. 221.

154. The plaintiff purchased of A a cow then in the possession of a third person under a contract of bailment for a certain time. The plaintiff gave the bailee notice of the purchase, with a request to keep the cow for him. To this the bailee assented, but declined to give up the cow until the expiration of the bailment. Afterwards, without the knowledge of the plaintiff, the bailee returned the cow to A, when she was attached by the defendant in A's possession, and as his property. *Held*, that such possession by A did not subject the cow to attachment for his debts. *Lynde v. Melvin*, 11 Vt. 688.

155. **Removal to premises of third person.** If the purchaser of personal property remove it from the premises of the vendor to the premises of a third person with his consent, this is a sufficient change of possession, as against the creditors of the vendor, although such third person was not informed of the sale. *Bailey v. Quint*, 22 Vt. 474. 30 Vt. 387.

156. The plaintiff bought certain lumber of A at a fixed price, to be delivered on the premises of the plaintiff then under lease to H. The lumber was so delivered. H having knowledge of the arrangement, and of the delivery, did not object to it, but did not agree to keep the lumber for the plaintiff. The plaintiff paid for the lumber, and it was afterwards attached as the property of A. *Held*, that there was a full and complete change of possession and that the lumber could not be taken on A's debts. *Chase v. Snow*, 48 Vt. 486.

157. Where attached property was by the attaching officer put into the barn of a third person by his consent, but he declined to assume any responsibility for its custody or safe keeping;—*Held*, that notice of a sale of it, such as to effect a change of possession and protect it from further attachments, should be given to the officer, and that notice to such third person would not be sufficient. *Marshall v. Town*, 28 Vt. 14.

158. **Possession of chattels as connected with possession of land.** It is not a sufficient change of possession, that the vendor had moved from the premises where the property was kept, if it remains in the care of his servant. *Moore v. Kelley*, 5 Vt. 84.

159. The plaintiff purchased of W certain

colts and the farm on which they were kept, then in the care of a person employed by W. The plaintiff did not put his deed upon record, nor take possession of the farm or colts, nor did he inform the keeper of them of his purchase, until after they were attached by a creditor of W. *Held*, that there was no sufficient change of possession as against the attachment. *Judd v. Langdon*, 5 Vt. 231.

160. A sale of personal property raised and kept on a farm by the tenant is void against his creditors, if still kept by him on the farm, notwithstanding the owner of the farm agrees to keep it for the purchaser, when such owner is not in actual possession. *Rockwood v. Collamer*, 14 Vt. 141.

161. Where the occupant of a farm sold to the owner a wagon and fanning-mill then on the farm, and they remained there in the occupant's use as before;—*Held*, that they were subject to attachment for his debts, although the owner continued to reside on the farm. *Mills v. Warner*, 19 Vt. 609.

162. As to how far the actual or constructive possession of land may dispense with a removal of personal property situate upon it, in case of sale or attachment: (1). If the grantee takes actual and exclusive possession of the land, the personal property on it upon purchase, is of course in his possession, and no removal is necessary. *Aldis, J., in Flanagan v. Wood*, 33 Vt. 343, citing *Burrows v. Stebbins*, 26 Vt. 668. *Wilson v. Hooper*, 12 Vt. 653; and see *Rothchild v. Rowe*, 44 Vt. 389. (2). If the grantee buys land not in the possession of another and personal property situate upon the land, though he does not take actual possession, yet his constructive possession of the land gives constructive possession of the personalty, and no removal is necessary. This applies to all wild or unoccupied land, and to land left vacant by the grantor. *Id.*, citing *Wilson v. Hooper*. (3). If one sells personal property situate on the land of a third person, who agrees to keep it or allows it to remain on his land for the benefit of the purchaser, the vendor after that having no ostensible occupancy of the land or control of the property, such property is held to be in the possession of a third person, and no removal is necessary. *Id.*, citing *Merritt v. Miller*, 13 Vt. 416. *Potter v. Washburn*, 13 Vt. 558. (4). But when the land sold or leased remains in the actual possession of the vendor or lessor, or in the joint possession of the vendor and vendee, or lessor and lessee, the same rule as to change of possession of personalty applies as in case of a sale of personalty alone. *Id.*, citing *Stiles v. Shumway*, 16 Vt. 485. *Mills v. Warner*, 19 Vt. 609. *Stephenson v. Clark*, 20 Vt. 624. *Parker v. Kendrick*, 29 Vt. 388. See also, *Beattis v. Robin*, 2. Vt. 181.

**163. Articles cumbrous, or incapable of present removal.** The rule requiring a change of possession of property sold, in order to protect it from further sale by the vendor or attachment for his debts, does not require an actual removal or manual change of possession, where from the nature of the property, or its situation, such removal or manual possession is impracticable; as, in the sale of standing trees. *Fitch v. Burk*, 38 Vt. 688. *Sterling v. Baldwin*, 42 Vt. 811.

**164.** So, of sawlogs, they being of a cumbrous character and difficult of removal. *Sanborn v. Kittredge*, 20 Vt. 632. *Hutchins v. Gilchrist*, 28 Vt. 82. *Birge v. Edgerton*, 28 Vt. 291. 42 Vt. 811.

**165.** Where cumbrous articles somewhat difficult to remove, as mill logs, deposited on the land of a third person with his consent, or on the land of a stranger, are, in this situation, sold;—*Held*, that the mere constructive possession connected with the ownership was by the sale transferred to the purchaser; that the place of deposit became "the warehouse of the purchaser," and that the logs were not thereafter subject to attachment as against the vendor, although the purchaser had not removed them, nor taken actual possession, nor given notice of his purchase to the owner of the land where they lay. *Hutchins v. Gilchrist*. *Sanborn v. Kittredge*, 28 Vt. 296. 38 Vt. 344. 38 Vt. 688. 42 Vt. 811.

**166.** The plaintiff contracted for the purchase of a quantity of logs to be delivered and loaded on the railroad cars, and to pay for them in parcels, as they should be delivered by the side of the railroad track. The vendor delivered the logs for the plaintiff near the track upon the land of a third person, with his consent and knowledge, until they should be loaded, and gave notice to the plaintiff of the delivery, and the plaintiff paid for the logs. *Held*, that the title and possession of the logs passed to the plaintiff on such delivery, and they were not thereafter subject to attachment as against the vendor; that the contract for loading the logs was for a service to be performed on the plaintiff's property. *Birge v. Edgerton*, 28 Vt. 291.

**167.** A sold the plaintiff "one hundred cords of wood standing" on A's land, the plaintiff to commence upon one side of two specified pieces and take all the trees clean, except the oak and ash, until he should get his 100 cords, "the quantity to be ascertained by piling and measuring as it was cut." The plaintiff afterwards employed A to procure the wood to be cut, and A did procure it to be cut by his hired man, who cut and piled the wood on A's land and measured it. The plaintiff drew away a part, and the residue, while on A's land, was attached by the defendant as A's

property. *Held*, that this was not a contract for cord wood, but conveyed a right to enter and to manufacture or make cord wood of the growing trees, by the expenditure of the plaintiff's labor and money, and as fast as the trees were cut, and before measurement of the wood, they became the property of the plaintiff; that as movable property they were never owned or possessed by A, and as growing trees no possession by removal was practicable; and that the wood was not subject to attachment as the property of A. *Fitch v. Burk*, 38 Vt. 688.

**168. Certain exceptions.** The sale of property exempt from attachment and execution is valid as to the creditors of the vendor, without a change of possession. *Foster v. McGregor*, 11 Vt. 595. *Jewett v. Guyer*, 38 Vt. 209.

**169.** Where the plaintiff had purchased the interest of both parties in a cow conditionally sold, and had bailed her anew to the conditional vendee "to winter the cow for the milk";—*Held*, that such bailee had no attachable interest in the cow, and that no change of possession was necessary to protect the plaintiff's title. *Wilder v. Stafford*, 30 Vt. 399.

**170. Notice of sale—Effect.** Notice of the sale of personal property, where there is no change of possession, will not affect an attaching creditor of the vendor. *Pierpont, J.*, in *Perrin v. Reed*, 35 Vt. 8. *Redfield, C. J.*, in *Hart v. Farm. & Mech. Bank*, 38 Vt. 263. "Often so decided." 23 Vt. 89.

**171.** But such notice would affect a subsequent purchaser. *Redfield, C. J. Id.*

**172. When change of possession may be made.** The change of possession of property purchased, so as to protect it from attachment as the property of the vendor, need not be immediate, but may be perfected at any time before an attachment intervenes. *Kendall v. Samson*, 12 Vt. 515.

**173. Who a creditor.** The necessity of a change of possession of goods sold, in order to protect them from attachment against the vendor, is not limited to *creditors* of the vendor in the strict technical sense, but applies to any attachment; as, in an action of trover. *Rice v. Curtis*, 32 Vt. 460.

**174.** But no such change of possession is necessary to protect the property against a levy for a tax against the vendor—such tax not being properly a debt. *Daniels v. Nelson*, 41 Vt. 161.

**175. Bona fide purchaser.** In order to constitute one a *bona fide* purchaser, as against one who owned the property by an earlier purchase but without change of possession, it is necessary that the last purchaser should have parted with money, or other thing, in payment for the property so purchased. It is not sufficient that it be taken in payment of a debt; as,

by indorsing it upon a note. *Downs v. Belden*, 46 Vt. 674 and see *Poor v. Woodhouse*, 25 Vt. 234.

#### IV. CONDITIONAL SALE.

**176. Title remains in vendor.** On a sale with delivery of goods at a fixed price to be paid at a time limited, but, until paid, the title to remain in the vendor, payment is a condition precedent, and, until performance, the property is not vested in the vendee. *West v. Bolton*, 4 Vt. 558. *Bigelow v. Huntley*, 8 Vt. 151. *Bradley v. Arnold*, 16 Vt. 382. *Smith v. Foster*, 18 Vt. 182. *Buckmaster v. Smith*, 22 Vt. 208. *Chaffee v. Sherman*, 26 Vt. 287. *Davis v. Bradley*, 28 Vt. 118. *Child v. Allen*, 33 Vt. 476. *Hurd v. Fleming*, 34 Vt. 169. *Armington v. Houston*, 38 Vt. 448.

**177. Vendor's right until condition fully performed.** Where property is sold conditionally, that is, to become the property of the purchaser upon payment of the price, or performance of other conditions of the sale, the legal title does not vest in the purchaser until he has made full payment, or until full performance of the condition. Such conditional sale is not fraudulent as to creditors of the purchaser; and the vendor may retake it, for failure to perform the condition, in whosoever hands it may be; nor, until conditions performed, is the property attachable as the property of the purchaser. See cases *supra*, and *Martin v. Eames*, 26 Vt. 476, 482.

**178.** The vendor of a chattel, sold upon condition that it is to remain his property until paid for, is the entire owner, with the absolute right of possession upon failure of the vendee to pay according to the condition; and for a conversion thereof he may recover the full value. *Burnell v. Marvin*, 44 Vt. 277. *Bradley v. Arnold*, 16 Vt. 382. *Buckmaster v. Smith*, 22 Vt. 208.

**179.** Property sold conditionally is not subject to attachment for the debt of the conditional vendee, until it becomes his by full performance of the condition; nor can it be so attached by tendering to the vendor the part of the price which remains unpaid. *Ib.* (Changed by G. S. c. 88, s. 28.) *Duncans v. Stone*, 45 Vt. 118.

**180.** A sale of provisions, not fraudulent in fact, on condition that they were to remain the property of the vendor until paid for, but with the understanding that they might be consumed in the vendee's family before payment, was held good against an attachment of the provisions as the property of the vendee. *Armington v. Houston*, 38 Vt. 448.

**181.** Where a chattel was sold conditionally, and possession delivered under an agreement to pay the price;—*Held*, that the conditional ven-

dor's title was not lost by a judgment recovered for the price, so long as the judgment remained unsatisfied, although before the judgment the vendee had left the property in the vendor's possession, but against his consent. *Root v. Lord*, 28 Vt. 568.

**182.** In case of a conditional sale with a power of sale to the conditional vendee, if he make a sale under such circumstances as that he might avoid it for the fraud of the purchaser, such sale may be avoided by the principal vendor. *Dunham v. Lee*, 24 Vt. 482.

**183. Particular instances.** B and F entered into a written contract in which it was agreed that B would deliver to F at his factory, from time to time as required to keep the factory in operation, a specified quantity of wool; that F would manufacture the wool into cassimeres, and deliver all the cassimeres so manufactured to B at the factory, from time to time, when finished and ready for market; that B would send the cassimeres to market and have them sold within twelve months at the option and direction of F, and pay F, for manufacturing, the balance of money obtained for them, after deducting forty cents for every pound of wool so delivered by B and the interest and cost of freight; that B should pay F one-third of the money received from the consignees in advance for the cassimeres, for defraying the expense of manufacturing; that B before sending the cassimeres to market, might take one-ninth the whole number of yards at 90 cents per yard; and that F would also manufacture for B another lot of wool of about 5,000 lbs., then owned by certain other persons, upon receiving notice within two weeks that B so desired. *Held*, that the property in the cassimeres so manufactured was in B, and that he had the right to the possession as fast as manufactured, and that he could maintain trover against both F and one to whom he had sold a portion of the cloth, to recover for the cloth so sold. *Buckmaster v. Mower*, 21 Vt. 204.

**184.** And that the rule of damages was the full value of the cloth at the time of the conversion. *Ib.* *Bennett, J.*, dissenting.

**185.** L received of the plaintiff a quantity of goods to peddle, upon an agreement that the goods were to remain the property of the plaintiff until sold, he having the right to retake them whenever he pleased, and L the right to return them, or a part thereof, at his pleasure; the goods sold by L to be accounted for at prices specified in a list furnished him; and L deposited with the plaintiff, as agreed, a sum of money equal to the value of the goods so taken, as specified in the list, to remain as collateral security for the performance of L's contract. L sold part of these goods, took others on the same terms, paid a part, leaving his deposit as a security, as before. The goods unsold in the

hands of L were afterwards attached by the defendant, as the property of L. In an action of trespass therefor;—*Held*, that the plaintiff could recover the value of the goods so attached, deducting only the sum paid on the second bill. *Chaffee v. Sherman*, 26 Vt. 287. *Redfield*, C. J., dissenting, would have deducted also the amount of the deposit.

186. A leased to B certain lands and 500 sheep for the term of sixteen years, *on condition*, among other things, that B should pay him 1,000 lbs. of wool from the sheep, of an average quality of the whole, each year; B not to dispose of any of the sheep or their increase during the term, nor of any of the wool, until A had received his yearly rent; and at the expiration of the term, if the conditions were complied with, the property leased was to belong to B. *Held*, that A remained the owner of the sheep until the end of the full term and the performance of all the conditions of the lease; that the wool was not leased, and that A had a present property in the wool shorn from the sheep, at least as tenant in common with B, in the proportion of 1,000 lbs. to the whole; and that the defendant was liable to A in trover, to the extent of the value of 1,000 lbs. of the wool, for having taken and sold on execution against B the whole clip of wool as the property of B. *Bradley v. Arnold*, 16 Vt. 382.

187. C leased a farm to L for three years, and before the expiration of the whole term L was, by the lease, to do certain work upon the farm extending into the third year. In consideration of such work to be done, C gave L a cow, but "to be holden by and belong to C." until L's agreement was fulfilled. *Held*, that L acquired but a conditional right to the cow, which did not become absolute until full performance by him of the work stipulated. *Hogle v. Clark*, 46 Vt. 418.

188. **Change—Substitution.** The lease of a farm for ten years, with stock and farming tools thereon valued in the lease at \$1,000, contained a provision that the lessee should keep at least the same amount in value of stock and tools during the term, and that the original stock and tools and all other which might be thereafter added to or substituted for the same, should be and remain the property of the lessor as a security for the payment of the rents and performance of other stipulations of the lessee, but with a privilege to the lessee of taking the property at \$1,000 at the end of the term. *Held*, that the contract was valid as against the creditors of the lessee, and covered property purchased by the lessee and substituted for the original, although the lessee had not in making his exchanges always disclosed the lessor as owner; and that the lessor, in an action on the case, could recover, to the extent of \$1,000, of one who had attached the property as the property

of the lessee. *Poris v. Vail*, 18 Vt. 277. 26 Vt. 188. 27 Vt. 389.

189. The plaintiff sold a horse to M, with condition that it was to remain the plaintiff's property until paid for, but gave M leave to trade off the horse, provided the pay or avails were paid to him. After paying a portion of the price, M exchanged the horse with the defendant for two other horses, and kept them himself. *Held*, that the title to the horse did not vest in the defendant, and that he was liable to the plaintiff in trover therefor. *White v. Langdon*, 30 Vt. 599.

190. The lien of a conditional vendor will attach to other property taken in exchange for it by the vendor's consent, and when it is so agreed. *Keiley v. Kendall*, 48 Vt. 24.

191. **Transfer by vendor.** A conditional vendor may sell the property to a third person, and invest him with the same rights that he had himself, subject to any contingent rights of the conditional vendee. For a conversion or injury to the property thereafter, the action must be in the name of such third person. *Burnell v. Marvin*, 44 Vt. 277. *Deering v. Austin*, 84 Vt. 330.

192. H bought a stage-wagon of B, to remain B's property until paid for. The plaintiff repaired it for H by adding new wheels and new iron axles in place of the old ones, when H, without the plaintiff's knowledge or consent, took it away without paying for the repairs. A few days thereafter, the plaintiff took H's note for the repairs, with an agreement thereunder written that the "running part" of said wagon should be and remain the plaintiff's property until said note was paid. H never paid B for the wagon, but the plaintiff knew nothing of B's claim. B, knowing that the wagon had been repaired, but not knowing by whom, and without knowledge of the plaintiff's claim, took back the wagon from H and sold it to the defendant, who knew nothing of the plaintiff's claim until long after his purchase. *Held*, that the plaintiff could maintain trover for said wheels and axle. *Clark v. Wells*, 45 Vt. 4.

193. **Forfeiture.** The plaintiff gave his note for the purchase price of a cow, with a condition annexed, that the cow should remain the property of the payee "till said note was paid." *Held*, that the mere omission of the plaintiff to pay the note at maturity did not operate as a forfeiture of his rights under the contract, in the absence of a demand of payment or of the property for non-payment; and that on such demand, even after the note was overdue, the plaintiff would have the right to pay the note and retain the cow. *Taylor v. Finley*, 48 Vt. 78.

## V. OFFICIAL SALES.

**194. Change of possession—Rule.** The doctrine of fraud in law, as applied to sales of personal property without change of possession, does not apply to public sheriff's sales. *Boardman v. Keeler*, 1 Aik. 158. *Bates v. Carter*, 5 Vt. 602. *Gates v. Gaines*, 10 Vt. 346.

**195.** And a sale by any authorized public officer, or by an authorized person, is to be treated as such "sheriff's sale." *Gates v. Gaines*.

**196. Qualification — The process.** A sheriff's sale of chattels, such as to protect them from subsequent attachment or sale without change of possession, must be upon process warranting the sale, and must be in the mode prescribed by law, and not rest upon consent of the parties. *Batchelder v. Carter*, 2 Vt. 168. *Prentiss, J.*, dissenting.

**197.** To constitute a sheriff's sale, such as to be valid against creditors of the debtor without change of possession, the proceeding must be under the authority of his precept, and not rest upon the consent of the debtor; as, where it was sold at auction, by consent, without posting. *Kelly v. Hart*, 14 Vt. 50.

**198.** The exception which distinguishes sheriff's sales from private sales, in the matter of change of possession, rests rather upon the character of the sale—as, in the one case, transferring the title by operation of law, but in the other, by the contract of the party—than upon the supposed notoriety of a sheriff's sale. *Austin v. Soule*, 36 Vt. 645. *Kelly v. Hart*.

**199. Sale must be absolute.** The sale of property on execution is in its very nature an absolute sale. It can be nothing else. The law does not recognize such sales as conditional, or defeasible, or as vesting a title liable to be defeated by redemption. *Webster v. Denison*, 25 Vt. 498.

**200.** A creditor cannot make use of a confession of judgment by his debtor and a sale of the debtor's personal property on execution, according to a secret agreement between them to create a lien merely upon the property to secure the debt. In such case, if he allow the property to remain in the possession of the debtor, it will be subject to attachment as the debtor's. *Id.*

**201. Not fraudulent in fact.** The protection afforded by public sheriff's sales, as to change of possession, does not cover such sales when fraudulent in fact. *Boardman v. Keeler*, 1 Aik. 158.

**202.** Evidence that a sale on execution was made at an *unusual* place merely, was held inadmissible as tending to prove the sale fraudulent. *Masham v. Place*, 46 Vt. 494.

**203. Purchaser and his title.** A purchaser at sheriff's sale is not affected by any

irregularity or impropriety in the proceedings of the officer, not having the character of positive fraud. *Janes v. Martin*, 7 Vt. 92. *Wood v. Doane*, 20 Vt. 612. *Hale v. Miller*, 15 Vt. 211. See *Austin v. Soule*, 36 Vt. 652.

**204.** The title of a purchaser at an official sale upon execution does not depend upon the return of the officer, but upon the fact of the sale and purchase, which may be proved by parol. Such title does not depend upon anything subsequent to the sale, and cannot be defeated by any neglect of the officer. *Bates v. Carter*, 5 Vt. 602. *Gates v. Gaines*, 10 Vt. 346. *Hill v. Kendall*, 25 Vt. 528.

**205.** Held, that the officer could recover the price of property sold by him on execution, although he had made no return of sale upon the execution. *Hill v. Kendall*.

**206.** One who claims title to property by purchase on execution sale, is not concluded by the facts stated in the officer's return, but may show that the sale was made in a different manner from that therein stated. *Drake v. Mooney*, 31 Vt. 617.

**207.** The sale of personal property upon an attachment vests the title in the vendee, though the plaintiff never recovers judgment in the suit; and the officer is accountable only for the money which he holds in substitution for the property. *Morse v. Morse*, 44 Vt. 84. *Abbott v. Kimball*, 19 Vt. 551.

**208.** A sheriff's sale of goods on execution conveys no greater title than that of the debtor; it does not pass the title of a stranger. *Griffith v. Fowler*, 18 Vt. 390. 20 Vt. 818. *Lull v. Matthews*, 19 Vt. 322. *Sanborn v. Kittredge*, 20 Vt. 632.

**209. Advertising.** The advertising of property previous to its sale on execution is for the benefit of the debtor and to protect his rights, and when he waives that protection and consents to a sale without posting, the sale is legal. *Burroughs v. Wright*, 16 Vt. 619. *S. C.* 19 Vt. 510.

**210.** Where an officer, by consent of the debtor, sells property on an attachment or execution without advertising according to the statute, the sale is valid, and is an official sale, so that the return is *prima facie* evidence in favor of the officer and of those who acted under him. *Burroughs v. Wright*, 19 Vt. 510. *Gleason v. Briggs*, 28 Vt. 185.

## B. SALE OF REAL ESTATE.

**211. The contract.** In a contract for the sale and conveyance of land at a price to be paid at the same time the deed is to be executed, the seller must be ready and able to perform on his part, as a condition precedent to any obligation of the purchaser to pay the price. *Lawrence v. Dole*, 11 Vt. 549.

212. In the purchase of lands, though by parol, and payment of part of the purchase price in advance, if the vendor be ready to perform the contract on his part, such part payment cannot be recovered back. The same rule applies as in case of sale of personalty. *Shaw v. Shaw*, 6 Vt. 69. *Cobb v. Hall*, 29 Vt. 510.

213. The defendant sold land to C by a verbal contract, and C paid part of the purchase money and went into possession under an express agreement, and while in possession under such contract and by consent of the defendant, he cut and peeled bark and piled it upon the land. *Held*, that the bark became the property of C, and it was held by an attaching creditor of C against the defendant who removed it. *Pike v. Morey*, 32 Vt. 87; and see *Yale v. Seely*, 15 Vt. 221.

214. Notice of sale. In the case of a mere sale and conveyance of land by the absolute owner, without notice, either actual or constructive, to a creditor of the vendor, or any change of possession, the land is still subject to levy or attachment by such creditor. *Hart v. Farm. & Mech. Bank*, 33 Vt. 252.

215. A *bona fide* purchaser of lands from one who holds the legal title of record, but in trust for another, stands upon a higher equity as to the *cestui que trust*, than an attaching or levying creditor of the trustee. *Dictum* of *Isham, J. contra* in *Bigelow v. Topliff*, 25 Vt. 289, disapproved. *Hackett v. Callender*, 32 Vt. 108. *Hart v. Farm. & Mech. Bank*.

216. Vendor's lien. The vendor of real estate has a lien upon the estate for payment of the full purchase money, as against all persons except *bona fide* purchasers without notice of its non-payment. Knowledge that some portion of the purchase money remains unpaid, although without knowing how much, or how secured, is sufficient to put a subsequent purchaser on inquiry, and operates as constructive notice of the lien. *Manly v. Slason*, 21 Vt. 271.

217. Such lien may be waived, as by taking an independent security; but the taking of a promissory note for the purchase money, though payable at a future day, is not a waiver. *Id.*

*Note.* The vendor's lien was abolished by Stat. 1851 (G. S. c. 65, s. 33), unless evidenced by deed.

#### INFANT, 26.

As to *deceit in sales*, see FRAUD; *contracts of sale* as affected by the *Statute of Frauds*, see FRAUDS, STATUTE OF, and see CONTRACTS.

### SCHOOLS.

- I. CONSTITUTIONAL LAW.
- II. SCHOOL DISTRICTS.
  - 1. *Organization.*
  - 2. *Evidence of organisation.*
  - 3. *Powers of district.*
  - 4. *Officers; powers and duties.*
  - 5. *Meetings.*
- III. TAXATION.
- IV. ACTIONS AGAINST SCHOOL DISTRICT.
- V. TEACHERS.
  - 1. *Certificates and School Register.*
  - 2. *Powers, duties, wages, &c.*

#### I. CONSTITUTIONAL LAW.

1. The taking of land for the location of a district common school house is for a *public use*; and the act of 1857, No. 58, providing for the taking of land *in invitum* for that purpose, upon an appraisal and payment of compensation therefor, is constitutional. (G. S. c. 22, s. 114.) *Williams v. School Dist. Newfans*, 33 Vt. 271. 44 Vt. 651.

#### II. SCHOOL DISTRICTS.

##### 1. Organization.

2. *Geographical.* Under the statute requiring towns "to define and determine the limits of school districts;"—*Held*, that they should be defined by geographical limits; and that a vote "to set A B" to a named district was insufficient to transfer him and his farm to that district. *Gray v. Sheldon*, 8 Vt. 402. 33 Vt. 221. *Pierce v. Carpenter*, 10 Vt. 490. 21 Vt. 407. *Sawyer v. Williams*, 25 Vt. 811; and see *Cutting v. Stone*, 7 Vt. 471.

3. Such geographical limits must be defined by vote in town meeting creating the district, or else by a like vote recognizing, approving and ratifying such designation already made; as, when made by the district and recorded. *Sawyer v. Williams. Pierce v. Carpenter.*

4. Where a school district was formed by the description of persons "and their real estate," or persons "and the farms on which they reside;"—*Held*, that this was a sufficient definition by geographical limits. *Moore v. Beattie*, 33 Vt. 219.

5. It is not essential that a school district be formed of connected, contiguous territory. (G. S. c. 22, s. 20.) *Weeks v. Batchelder*, 41 Vt. 817.

6. A vote in town meeting setting a farm from one school district to another, takes effect presently, no other time being named. *Ovitt v. Chase*, 37 Vt. 196.

7. *Alteration.* G. S. c. 22, s. 53, does not provide the only mode for dissolving or



altering the limits of school districts formed of parts of two or more towns; but this may be done by mutual consent of the district and of the town within which the territory is located. *Jones v. Camp*, 84 Vt. 384. *Pierce v. Whitman*, 28 Vt. 626. *Bowen v. King*, 84 Vt. 156.

8. Such consent may be shown by vote of the district. *Pierce v. Whitman*; or by long acquiescence. *Jones v. Camp*. *Bowen v. King*.

9. Where a town by vote set certain of its inhabitants to a school district of an adjoining town, such district consenting by vote to receive them (G. S. c. 22, s. 27), they, for all practical purposes, as in sharing the privileges and burdens of the district, become members of that district, although the districts, regarded *territorially*, are not thereby changed. Such arrangement is to be viewed in the light of mere license and temporary consent, and subject to be revoked or annulled by either party;—herein differing from the case of a district formed of territory and inhabitants belonging to adjoining towns. *Hewitt v. Miller*, 21 Vt. 402.

10. Where, by act of the legislature, a town was divided and incorporated into two distinct towns, by a line so drawn as to pass through one of the school districts of the old town, leaving  $\frac{2}{3}$  of the district, with the school house, in one town;—*Held*, nevertheless, that such part alone was not authorized to act as a or the school district of such town, and could not lay a legal tax. *Williston v. Newman*, 23 Vt. 421.

11. **Town warning and vote.** An article in the warning of a town meeting was “to see if the town will make alterations in school districts when met”;—*Held* sufficient to warrant the consideration of any proposed change in the limits of the existing school districts, and to support a vote setting the plaintiff's farm from one district to another. *Ovitt v. Chase*, 87 Vt. 196. See *Moore v. Beattie*, 88 Vt. 219. *Weeks v. Batchelder*, 41 Vt. 317. *Hall v. School Dist. Calais*, 46 Vt. 19.

12. The warning of a town meeting was:—“To see if said town will accept and adopt the report of the committee to alter school districts.” *Held*, that this confined the action of the town, in the alteration of school districts, to such as the committee should recommend in their report, and that any other alteration was unauthorized and void. *Wiley v. Wilson*, 44 404.

13. *Held*, that a vote in town meeting “to set the whole of school district No. 10 to district No. 4,” was authorized by a warning “to see if the town will divide school district No. 10, and annex a portion of it to district No. 4, the remainder to district No. 5.” *Moore v. Beattie*, 88 Vt. 219.

14. The warning of a town meeting to see

if the town will vote to divide school district No. 9, and to make such other alterations in school districts as may be found necessary, was *held* sufficient to warrant a vote of the town, forming a new district of a portion of the territory of No. 9. *Weeks v. Batchelder*, 41 Vt. 317.

15. **Effect of alteration.** A legal vote in town meeting “to unite school district No. 5 to No. 4 and constitute them one district,” has the effect of abolishing No. 5 and annexing the territory of which it had been composed to No. 4. No. 4 continues in existence as before, only enlarged. Hence a warning for a school meeting in No. 4, posted before the annexation, can be legally acted under after the annexation. *Greenbanks v. Boutwell*, 43 Vt. 207.

16. A town voted to “unite school districts No. 4 and 12 into one district, and called district No. 4.” *Held*, that said districts were thereby formed into a new district, distinct from either, and that a new organization was proper. *Barnes v. Ovitt*, 47 Vt. 316.

17. The creation of a new school district, embracing the prudential committee of another district, was *held* to create a vacancy in that office in the latter. *Stevens v. Kent*, 26 Vt. 503.

## 2. Evidence of organization.

18. **Parol.** Where the records of a school district are lost, the organization and continued existence of the district may be shown by parol. *Sherwin v. Bugbee*, 16 Vt. 439.

19. **Presumption.** The mere fact that a school district has maintained its existence and operations for a great number of years, say fifteen, is sufficient evidence of its regular organization; and the same rule of presumption must be applied to the subdivision of the town into districts, the same having been acquiesced in by the town and the inhabitants. *Id.*

20. The legal existence and organization of a school district will be presumed after a long-continued maintenance of such organization, and exercise of the functions of a district, although the records of both town and district fail to show its creation, or organization. *Bowen v. King*, 84 Vt. 156. *Barnes v. Barnes*, 6 Vt. 388. *Bull v. Griffith*, 30 Vt. 273.

21. The legal existence of a union school district composed of parts of three towns, and indissoluble by the action of one of the towns, was presumed after an existence of seventy years. If there was no general law authorizing the creation of such district, a special act of the legislature creating the district might be presumed. *Bowen v. King*.

22. **Reputation.** The organization and existence of a school district, and that a certain

person was prudential committee, may be proved by reputation, and that they severally acted as district and committee, without production of the records, in a case where these questions arise collaterally and where the district is not a party. *State v. Williams*, 27 Vt. 755.

**23. Organization in fact.** Where a school district had been in existence under an organization in fact for 26 years;—*Held*, that the selectmen could not treat it as an unorganized district and organize it again, because of doubts of the regularity of the former organization; and that such attempted reorganization was void. *Thomas v. Gibson*, 11 Vt. 607.

**24. Suspension.** A suspension of all the functions of a school district for ten years is not necessarily conclusive evidence of the dissolution of the corporation. In such case it may properly be newly organized with the consent of the town, without a vote of the town setting it off anew as a school district. *Sherwin v. Bugbee*, 16 Vt. 489.

**25. Vacating office.** Under G. S. c. 22, s. 40, providing that by reason of a neglect to keep a school in the district, &c., "all the offices of said district shall be vacated," and that the selectmen shall, on application, fill the vacancies;—*Held*, that the failure to cause the school to be kept, furnished cause for vacating the offices, but that the officers were not displaced without the appointment of others by the selectmen; and by *Poland, C. J.*, in many cases the word *void* in a statute has been construed to mean *voidable*—ground or cause for making void; so the words *forfeit*, or *forfeiture* in a statute, have usually been construed to mean *cause of forfeiture*, requiring some proceeding or action to effect the forfeiture. *Woodcock v. Bolster*, 35 Vt. 632.

#### 8. Powers of district.

**26. As to collector.** A school district cannot choose a collector *pro tem.* but only for the year; nor to do part of the duties of collector—as, to collect a particular tax, or arrearages—and this, whether or not the office of collector is vacant. *Hadley v. Chamberlin*, 11 Vt. 618.

**27. Prudential committee.** It is not competent for a school district, having once appointed one as prudential committee, to supersede him during the year by appointing another in his place, nor to add to the number of the committee. *Mason v. School Dist. Brookfield*, 20 Vt. 487. *George v. School Dist. W. Fairlee*, 20 Vt. 495. *Chandler v. Bradish*, 28 Vt. 416.

**28. Moderator.** In the absence of the regularly elected moderator of a school district at a school district meeting, the meeting can appoint a moderator for the occasion, and this,

without any statute specially authorizing it. *Stevens v. Kent*, 26 Vt. 508.

**29. "By vote."** Under C. S. c. 20, s. 88 [now changed by G. S.], a school district had power by a majority vote to locate its school house. "By vote," means a majority vote, unless other intent is expressed. *Bean v. School Dist. Glover*, 38 Vt. 177.

**30. School house.** A school district has, as against its prudential committee, the control of its school house for the purposes of education—as, for the keeping of a private school at such times as not to interfere with the keeping of the district school; and may, under such circumstances, license individuals to occupy the house for such private school, *Chaplin v. Hill*, 24 Vt. 528. *Russell v. Dodds*, 37 Vt. 497.

**31.** A school district may provide such buildings and rooms as, in the exercise of an honest discretion, it shall judge that the interests of the district, in the matter of its schools and for the purposes of its schools, require—as, a hall for the purpose of school examinations and exhibitions and school meetings, although intended, also, and used in connection therewith, and rented, for concerts, festivals, religious meetings, lectures, courts, &c.,—the rent going into the district treasury; and may make such provisions with reference to the prospective enlarged wants of the district for school purposes. *Greenbanks v. Boutwell*, 43 Vt. 207.

**32.** A school district may unite with another association in the building of a house on the lands of the district, one part of the house to belong to the district for use as a school house, and the other part to such other association for its purposes. *Eddy v. Wilson*, 43 Vt. 363.

**33.** A school district having proceeded, under invalid votes, to purchase and pay for land for a school house, and having built a school house thereon which has become their property, may legally vote and enforce a tax for the purpose of paying for the house; and such purpose may be embraced in the terms of the vote, to pay "our indebtedness." *Greenbanks v. Boutwell*, 43 Vt. 207.

**34.** So, the district may adopt a school house, however it came into existence, and legally vote a tax to pay for it. *Id.*

**35. Parliamentary rules.** A school district is not so bound by parliamentary rules that they are concluded by a vote—as, not to build a school house—from afterwards, at the same or an adjourned meeting, adopting other valid votes inconsistent with the first without formally rescinding the first; as, for the raising of a tax, and passing all other votes necessary for the erection of a school house. *Id.*

4. *Officers; Powers and duties.*

36. **Qualification.** It is not a requisite qualification of a voter or office-holder in a school district (or town), that he be a freeman; a man of foreign birth and not naturalized may be such. *Woodcock v. Bolster*, 85 Vt. 682. (Changed by stat. 1868, No. 89, and stat. 1869, No. 50.)

37. **De facto.** The doings of an officer *de facto* of a school district holding his office by virtue of an election, though irregular, he being eligible, are binding as to third persons. So *Held*, in respect to a school district clerk, on the question of the validity of a tax. *Woodcock v. Bolster*. Also, in respect to the prudential committee of a school district. *Goodwin v. Perkins*, 89 Vt. 598.

38. **Ineligible.** But (*dictum*), one who is ineligible and cannot by law hold the office of prudential committee, cannot, as such, assess a valid tax. *Woodcock v. Bolster*.

39. **Prudential committee.** The power of employing and dismissing teachers in school districts is, by law, vested in the prudential committee; and the district has no power or control over the subject; as, to dismiss a teacher by vote. *Mason v. School Dist. Brookfield*, 20 Vt. 487.

40. The prudential committee have full authority and power, as matter of law, to remove and dismiss a school teacher; but a contract to teach a school is to be considered as an ordinary contract for services and work, with like incidents, and if the teacher be removed or dismissed without just and sufficient cause he may recover damages. *Holden v. School Dist. Shrewsbury* 88 Vt. 529. *Richardson v. School Dist. Westminster, Ib.*, 602.

41. *Held*, that the prudential committee of a school district might lawfully exclude scholars from further attendance for absence contrary to the rules of the school, though such absence was by the command of their Roman Catholic parents, and by direction of their priest, for the purpose of attending religious services on *Corpus Christi* day. *Ferriter v. Tyler*, 48 Vt. 444.

42. The prudential committee have no authority, without a vote of the district, to employ counsel at the expense of the district to prosecute or defend a suit for the district, or to defend a suit against some officer of the district in which the district may be interested. *Harrington v. School Dist. Alburgh*, 80 Vt. 155. 86 Vt. 695.

43. The defendant, being prudential committee of a school district, agreed that A might use the district school house for a private school for eleven weeks during the usual school vacation; and A took possession and kept his school there for some weeks, the district not objecting,

when the defendant, for no alleged reason, locked up the school house and undertook by force and an assault to prevent the entrance of A. *Held*, in an action for the assault, that the defendant could not set up in justification his want of authority to make the agreement. *Russell v. Dodds*, 87 Vt. 497.

44. It had been the custom of a school district to apportion the wood for the school to the scholars, and to sell the right of furnishing any deficiency to the lowest bidder; but there was no vote to that effect. The plaintiff, being prudential committee, furnished the deficiency himself. *Held*, that without a vote of the district, he could not assess this expense upon the scholars or the district, but that he could recover his charges in an action against the district. *Norton v. School Dist. Tinmouth*, 87 Vt. 521.

5. *Meetings.*

45. It is not necessary in the warnings of school meetings, or in the record, to state that such meetings were warned upon the application of the required number of freeholders, or voters; the maxim *omnia rite acta*, &c., applies to this and all similar subjects. *Sherwin v. Bugbee*, 16 Vt. 489.

46. It is not essential to the regularity of a school district meeting, that there should be a written application to the clerk to call it. He may issue the warning upon his own mere suggestion. *Mason v. School Dist. Brookfield*, 20 Vt. 487. *Chandler v. Bradish*, 28 Vt. 416.

47. The statute does not require that a warning of a school district meeting should be dated. The date and posting may be proved by parol. *Braley v. Dickinson*, 48 Vt. 599.

48. It is essential that the warning for a school district meeting should be recorded. The terms of the warning cannot be proved by parol. *Sherwin v. Bugbee*, 17 Vt. 387.

49. **Record.** The proceedings of a school district meeting are to be determined by the record, where it can be produced; and the legal effect of the record or of a vote cannot be enlarged, restricted, explained away by parol, or controlled by evidence of what the voters at the meeting intended to do, or by what they supposed they had done. *Adams v. Crowell*, 40 Vt. 31. *Cameron v. School Dist. North Hero*, 42 Vt. 507;—or that the vote was passed by such as were not legal voters. *Eddy v. Wilson*, 43 Vt. 362.

50. **Annual meeting.** The annual meeting of a school district may be a few days more or less than a year from the former one. *Held*, that a prudential committee elected at such meeting, Sept. 16, 1847, became such committee from that date, in place of the committee elected at the annual meeting of Oct. 24, 1846. *Chandler v. Bradish*, 28 Vt. 416.

**51. The warning.** A school meeting held under a warning giving more than twelve days' notice is not lawfully "appointed and notified," and a tax voted at such meeting, although it is the annual meeting, is invalid. (G. S. c. 22, s. 41-43.) *Greenbanks v. Boutwell*, 48 Vt. 207. *Peck, J.*, dissenting.

**52.** The proceedings of a special school district meeting held with only six days' notice, and not specifying the business to be done, were held void for both reasons. *Hunt v. School Dist. Norwich*, 14 Vt. 300.

**53.** A school meeting held under a warning not naming the hour of meeting, is irregular; and although such meeting be adjourned to a future day and hour named, the proceedings at such adjourned meeting are void. *Sherwin v. Bugbee*, 16 Vt. 489. *S. C.* 17 Vt. 387.

**54.** Where the record of the warning of a school district meeting showed that the hour of the day for the holding of the meeting was not specified in the warning;—*Held*, that the defect could not be supplied by parol evidence that in the original warning the hour was specified; that such defect was not cured by the fact, offered to be proved, that all the legal voters of the district were present at the meeting at the same time, and voted; and that such testimony was properly excluded. *Id.*

**55.** In the adjournment of a school meeting to a future day, the vote must state the hour of the day to which it is adjourned; otherwise, the proceedings at the adjourned meeting will be invalid. *Greenbanks v. Boutwell*, 48 Vt. 207.

### III. TAXATION.

**56. Vote to tax.** The prudential committee of a school district are not authorized to assess a tax, unless such tax be first voted by the district. *Bowen v. King*, 84 Vt. 156.

**57.** The vote of a school district was this, and no more:—"Voted to sustain a school during four months the ensuing year, in summer and fall." *Held*, that this did not justify the assessing of any tax by the prudential committee, no tax being voted. *Adams v. Crowell*, 40 Vt. 31.

**58. Tax upon the scholar.** Under the school acts of 1797, 1827, and 1833, a school district tax voted and assessed upon the inhabitants in proportion to the number of scholars actually sent by them to school, was *held* legal. *Brown v. Hoadley*, 12 Vt. 472.

**59. School fund.** The interest on the U. S. deposit fund is not to be treated as part of the school fund, in the assessment of the school tax under the act of 1827. *State v. Jericho*, 12 Vt. 127. *State v. Northfield*, 13 Vt. 565.

**60. Limit.** A vote by a school district that a tax be raised to pay the expenses of the repairs of their school house, or to pay the

expenses of the school, is valid, without naming or limiting the amount to be raised, or the rate *per cent* upon the list; and the committee are authorized, under it, to assess a tax for the amount found necessary. *Adams v. Hyde*, 27 Vt. 221. *Chandler v. Bradish*, 23 Vt. 416. *Brown v. Hoadley*, 12 Vt. 472.

**61.** Where the vote of a school district was, "to pay the expense of the school with money drawn from the town, and the residue, if any, on the grand list of the district," it was *held* not a fatal objection to the tax bill, that the tax exceeded the sum required by \$1.08; and, by *Redfield, J.*: It is of course impossible to know how large a portion of the tax will fail of collection, and it must of necessity be somewhat larger than the precise sum required. *Chandler v. Bradish*.

**62. Who to assess.** A committee appointed by a school district to remove the school house, upon an appropriation voted, have no authority to assess the tax and certify the tax bill therefor. This can be done only by the prudential committee. (G. S. c. 22, s. 47.) *Johnson v. Sanderson*, 34 Vt. 94.

**63. List.** If an inhabitant of a school district has no list, his name need not appear in the tax rate bill. *Bull v. Griffith*, 30 Vt. 278.

**64. Where taxable.** All property subject to taxation should, for school district purposes, be assessed and set in the list of the district within which it had its *situs* at the time with reference to which the assessment should be made, and not elsewhere. *Held*, that school district taxes voted March 27 and April 4 were properly assessed on lands situate in that district on the 1st of April, though annexed to another district by vote in town meeting of May 12, and though the grand list was not then completed, and the tax was not made up or assessed by the prudential committee until March 26 of the next year. *Ovitt v. Chase*, 87 Vt. 196.

**65. Residence.** A resident of a school district on the first day of April, and properly listed there, remains taxable therein upon the list taken as of that date, during the year following, although he may have removed from that district to another, or out of the State. *Woodward v. French*, 81 Vt. 337. *Walker v. Miner*, 32 Vt. 769. 37 Vt. 203.

**66.** The plaintiff moved with his family from his own farm in school district No. 7, to the town farm in district No. 8, under a contract to carry on the town farm for one year, and moved there for that purpose, intending that to be his home and residence during that year; and for the same purpose, under similar contracts and with like intentions, continued with his family to live on the town farm for a second and third year. *Held*, that this made him an inhabitant of school district No. 8, for

purposes of taxation for each of said years, although he carried on his own farm at the same time, and intended all the time to return to reside on his own farm when he should get through with his contract, and claimed all the while his residence to be in No. 7. *Woodard v. Isham*, 48 Vt. 123. (G. S. c. 22, s. 43.)

**67. Partnership.** *Held*, that all the personal property of a partnership should be designated in the grand list as in the school district where a portion of it was actually situated, where a majority of the partners resided, and where the partnership business was carried on,—“the business domicile of the firm.” *Fairbanks v. Kittridge*, 24 Vt. 9.

**68. Acquiescence.** Attending the school meeting of a district to which the plaintiff had been, against his consent, illegally set, for the purpose of resisting the laying of a tax, and the paying of such district taxes “when required so to do by the collectors,” were *held* not to be such an acquiescence as to make him taxable in such district. *Wyley v. Wilson*, 44 Vt. 404.

**69. Lands.** Where lands are erroneously set by the listers in the wrong school district, this is not conclusive upon the owner or the district for purposes of taxation, if the town records furnish the necessary means of correcting it. *Held*, in this case, that land erroneously set in the grand list as in district No. 2, was properly taxed in No. 1, its actual *situs*. *Ovitt v. Chase*, 37 Vt. 196.

**70.** Before the statute of 1847, No. 40 (C. S. 457), it was the duty of the prudential committee of a school district, in assessing a tax, to assess all lands actually situate in the district which were set in the grand list of the town, though not there designated as being in the district; and to exclude from their assessment such lands as were not actually within the district, although designated in the grand list as being there. But they could not include in their assessment lands actually within the district, if wholly omitted in the list. *Moss v. Hines*, 29 Vt. 188.

**71.** In such case, and where no separate valuation was stated in the list, it was competent for the committee to assess the tax upon a valuation proportioned to the valuation of the whole listed lands of the party and of the aggregate list of lands of the district. *Id.* *Adams v. Hyde*, 27 Vt. 221.

**72. Liability of listers.** Where listers set property in the list as belonging to school district No. 2, which belonged to district No. 1, whereby the latter district was deprived of the right of assessing taxes upon such property, and the listers refused to correct the list on request;—*Held*, that they were liable to district No. 1, for damages. *School Dist. St. Johnsbury v. Kittridge*, 27 Vt. 650.

**73. Tax on what list.** The vote of a

school district laying a tax on a list not to be completed until after thirty days from the vote, is void. *Waters v. Daines*, 4 Vt. 601.

**74.** Where a school district tax is voted upon a grand list then in existence, it is no objection to it that it was so voted at a school meeting held by adjournment from a day previous to the completion of such list. *Moss v. Hines*, 29 Vt. 188.

**75.** A school district in October, 1869, voted “to build a new school house,” and “to raise money to defray the expenses of said house.” In March, 1870, the district voted, “to raise 800 cents on the dollar to defray the expenses of building the new school house.” *Held*, that this last vote took the place of and wholly superseded the former one, and became the only vote upon which the tax could be made out; and that it could not lawfully be assessed upon the list of 1869. *Capron v. Raistrick*, 44 Vt. 515. 45 Vt. 213.

**76. Warning and vote.** An article in the warning of a school meeting, to see “if the district will have a school the ensuing winter, and if any, how much,” and “to see what method the district will take to pay the expense of said school,” is sufficient to authorize a vote to pay the expense on the grand list of the district. *Chandler v. Bradish*, 23 Vt. 416.

**77.** Under an article of the warning of a school district meeting, “to see what measures the district will take in relation to building a school house”;—*Held*, that the district was authorized to vote to purchase land whereon to erect the school house, it having no land for that purpose. *Dix v. School Dist. Wilmington*, 22 Vt. 309. 37 Vt. 45.

**78.** Where a school district by vote authorized their prudential committee to purchase a particular parcel of land, for a specified price, for the site of a school house;—*Held*, that the vote did not necessarily import that the purchase should be made free of all restrictions; and that the committee were authorized to agree to certain restrictions in the deed which in no manner defeated or impaired the object of the purchase—as, that the school house should be placed on a line with the meeting house, and no building should be erected in front of it, and that the land should be kept open. *Dix v. School Dist. Wilmington*.

**79.** The fact that a school district, in mistake of their rights, located their school house where they had no right to locate it, and that they were obliged to remove it on conviction for a nuisance, was *held* not to invalidate a tax laid for the building of the school house on that spot. *Stevens v. King*, 26 Vt. 508.

**80.** Where a school district, having an apparent interest in the defense of a suit against its collector, assumed by vote such defence, upon a supposed liability to indemnify

him, but which liability, depending upon the construction of a statute, was doubtful;—*Held*, that a tax thereafter voted to pay the expenses of such defense was legal, although, perhaps, the district was not legally bound to assume such defense and indemnify the collector. *Johnson v. Colburn*, 86 Vt. 693.

**81. Collector—Warrant.** A school district collector is not limited to the district, as the place for advertising and selling property taken for a tax. *Sherwin v. Bugbee*, 16 Vt. 439.

**82.** By C. S. c. 20, s. 41, the collector of a school district was required by the warrant to pay the taxes collected to the *prudential committee*. Stat. of 1854, No. 42, *authorized* each school district to elect a treasurer, and specified his duties in part. *Held*, that where a district had elected a treasurer, the warrant to the collector properly required the taxes collected to be paid to the *treasurer*, notwithstanding the provision of C. S. *Bull v. Griffith*, 30 Vt. 273.

**83.** The omission in a school district tax-warrant to limit the time within which the collector should collect and pay over the tax, as prescribed by statute, is not a defect of which the person taxed can take advantage; nor, that there is but one warrant for the collection of three tax bills. *Walker v. Miner*, 32 Vt. 769.

#### IV. ACTION AGAINST SCHOOL DISTRICT.

**84. Service of process.** A writ of attachment against a school district was served by attaching property, and leaving a copy, &c., at the house of the then usual abode of the clerk of the district in the hands of his wife, as is provided for the service of an ordinary writ of attachment. *Held* sufficient service. *Dow v. School Dist. Walden*, 46 Vt. 108.

**85. Past consideration.** The plaintiff built a good school house for a school district, worth \$200, according to a plan furnished by one of a committee of two, such committee-man telling him that the district would probably pay him what it was worth. After its completion, the district voted to accept the house and to pay the plaintiff therefor \$105, which sum the plaintiff declined to accept. In an action against the district;—*Held*, that whether or not a single one of the committee was authorized to make such contract, the vote to *accept*, and to *pay*, was divisible; that the acceptance was absolute, and was a ratification of the doings of the committee-man; and that the plaintiff was entitled to recover the value of the house. *Kimball v. School Dist. Roxbury*, 28 Vt. 8.

**86.** The prudential committee of a school district employed a teacher to teach an extra school in the district, and engaged the plaintiff to board him. The district afterwards voted to raise a tax to pay the teacher. *Held*, that

whether or not the committee was authorized to employ the teacher on the credit of the district, this vote was a ratification of the whole act of the committee in providing for and sustaining that school at the expense and on the credit of the district, and the plaintiff could recover of the district for the board of the teacher. *Cameron v. School Dist. North Hero*, 42 Vt. 507.

**87. Agency.** A school district voted to build a school house, and determined its location, and chose a committee for the building of the house. The committee employed the plaintiff, on the credit of the district, to build the house, and he built it where the committee directed, but not on the spot where the district had voted to locate it. The plaintiff had no knowledge of the vote locating the house, or that the house was being built in a wrong place, but acted in good faith under the direction of the committee, and according to their apparent authority. *Held*, that the district was bound by the contract made by the committee to pay for building the house. *Baker v. School Dist. Barton*, 46 Vt. 189.

**88.** In a suit against a school district to recover for services as an attorney, under an employment in behalf of the district by an officer having no authority to bind the district by such employment;—*Held*, that the fact that the officers of the district, and the voters generally, knew, during the progress of the business, of the employment and the services rendered under it, had no legal tendency to show any acquiescence in, or adoption of, such employment. *Harrington v. School Dist. Alburgh*, 30 Vt. 155.

**89. Trustee process.** A disclosure of a school district, as trustee, made by the clerk in the presence and with the assistance of the prudential committee, was *held* to bind the district. *Udall v. School Dist. Hartford*, 48 Vt. 588.

#### V. TEACHERS.

##### 1. Certificate and school register.

**90. Certificate.** The statute of Nov. 9, 1827, providing that no school teacher "shall be entitled to receive any compensation, &c., without first obtaining from, &c., a certificate of his qualification,"—*construed*, as making the certificate a pre-requisite to performance of service as a teacher, and as indispensable to the creating of any legal obligation for such service. *Baker v. School Dist. Bakersfield*, 12 Vt. 192.

**91.** Under C. S. c. 20, s. 12, providing that any contract for school teaching "shall be null and void if the teacher shall fail to obtain a certificate of qualification, &c., before the commencement of the school for which such contract

*shall have been made,"* makes this a prerequisite to any right of action. It is not excused by the fact that the teacher was a minor, or that the superintendent was sick and unable to make the examination; nor can the prudential committee waive the requirements of the statute. *Goodrich v. School Dist. Fairfax*, 26 Vt. 115. *Hopkins v. School Dist. Danby*, 27 Vt. 281.

92. In an action to recover on such contract, the obtaining of such certificate is a necessary part of the plaintiff's proof. *Welch v. Brown*, 80 Vt. 586; but need not be averred in the declaration. *Doyan v. School Dist. Montgomery*, 35 Vt. 520.

93. But where the teacher had such certificate when the contract was made and before he commenced his school, and continued on in his employment after the expiration of the time limited in the certificate;—*Held*, that he could recover for his entire services. *Holman v. School Dist. Halifax*, 84 Vt. 270.

94. Where the plaintiff under a contract to teach school for three months, no time being specified for beginning the school, applied for examination and a certificate, on the morning of the day he began school, and before he began, and the superintendent deferred the examination until evening, saying it would do just as well, and at evening, at the close of the first day's school, he made the examination and gave a certificate, and after this the school proceeded for about seven weeks without any new contract, but without objection;—*Held*, that this was a substantial compliance with this statute; and that, in any view of the case, the contract was good as to all service performed after the first day. *Paul v. School Dist. Hartland*, 28 Vt. 575.

95. A school teacher's certificate, made out and dated before the commencement of the school, but retained by the superintendent to be delivered when called for, but not actually called for or delivered until after the close of the school, was *held* to take effect from its date. By *Redfield, C. J.*: The act which gives validity to the certificate is the judgment of the superintendent. The certificate is merely the record of that judgment. *Blanchard v. School Dist. Warren*, 29 Vt. 438.

96. Under G. S. c. 22, s. 11, a school teacher's certificate granted on an examination after, but dated back to a date before, the commencement of the school, was *held* good, where the teacher seasonably applied to be examined and subjected himself to the direction and convenience of the superintendent as to the time of examination, and both acted in good faith. *Wells v. School Dist. Granby*, 41 Vt. 853.

97. Where a school teacher was employed to teach school and taught one week without a certificate of qualification, and then went

with the prudential committee of the district and obtained such certificate and continued teaching with the consent and approbation of the committee;—*Held*, that this was equivalent to making a new contract, commencing with the obtaining of the certificate, upon the same terms as the original contract. *Scott v. School Dist. Fairfax*, 46 Vt. 452.

98. **Duration of certificate.** Under G. S. c. 22, s. 11, providing that a certificate of qualifications given by a town superintendent of schools to a teacher "shall be available for one year only";—*Held*, that such certificate was available for one full year from its issue, although given by a superintendent appointed by the selectmen to fill a vacancy, and his appointment expired before the end of such year. *Holman v. School Dist. Halifax*, 84 Vt. 270.

99. **Form.** The certificate of qualifications required to be given to school teachers, is of no prescribed form; that the teacher was "examined and approved as a teacher," &c., is sufficient. *Wells v. School Dist. Granby*, 41 Vt. 853. See also *Crosby v. School Dist. Readsboro*, 85 Vt. 623.

100. **Impeachment.** A school teacher's certificate cannot be impeached by the fact that the superintendent granted it without personal examination of the qualifications of the teacher. *George v. School Dist. W. Fairlee*, 20 Vt. 495. *Blanchard v. School Dist. Warren*, 29 Vt. 438.

101. Such certificate may be impeached by showing that it was falsely dated, and given when the teacher was not entitled to it, under an assurance that no legal use should be made of it. *Hopkins v. School Dist. Danby*, 27 Vt. 281.

102. **Register.** A school teacher is required by G. S. c. 22, s. 110, to file his school register in the town clerk's office, previous to the receipt of his wages; but not to give notice thereof to the prudential committee. *Wells v. School Dist. Granby*, 41 Vt. 853.

103. A school teacher does not forfeit his wages by neglect to answer the interrogatories in the school register, and to certify to the correctness of his record of attendance of scholars according to G. S. c. 22, s. 110, although thereby the district loses its share of the public money; but such loss may be deducted from his wages. *Crosby v. School Dist. Readsboro*, 85 Vt. 623. *Barrett, J.*, dissenting.

104. Where a school teacher was prevented from finishing the school term through the fault of the prudential committee;—*Held*, that his omission to make the prescribed entries in the school register "at the close of his school" (G. S. c. 22, s. 110), i. e., at the close of the term of school, did not prevent his recovery of wages. *Scott v. School Dist. Fairfax*, 46 Vt. 452.

## 2. Powers, duties, wages &amp;c.

105. **Power to expel.** The teacher of a private school may require a pupil to leave for insubordination and misconduct, and, on refusal, may use the necessary force to remove him; and a third person, acting by request of the teacher, may justify in so doing as the servant of the teacher. *State v. Williams*, 27 Vt. 755.

106. A requirement by the teacher of a district school that the scholars in grammar shall write English compositions, is reasonable; and if the scholar refuse to comply in the absence of any request from his parents that he be excused, he may for this cause be expelled from school. *Guernsey v. Pitkin*, 32 Vt. 224.

107. It is the duty and right of a district school teacher to maintain proper and necessary discipline in the school; and, to that end, the teacher may, when necessary, expel a scholar; and if the prudential committee insist upon the return of such scholar, when his presence would be detrimental to the discipline of the school, the teacher is justified in quitting the school. *Scott v. School Dist. Fairfax*, 46 Vt. 452.

108. —**to punish.** Though a school-master, for all ordinary acts of misbehavior committed after the dismissal of school for the day, and the return of the pupil to his home, has no right to punish the pupil, yet he may, on the pupil's return to school, punish him for misconduct so committed out of school, which has a direct and immediate tendency to injure the school and bring the master's authority into contempt. *Lander v. Seaver*, 32 Vt. 114.

109. **Excessive punishment.** In trespass for an assault and battery, the declaration averred that the defendant with a club, fists, and a rawhide, struck the plaintiff a great number of violent blows, and threw him down, and kicked and wounded him, and tore his clothes. The plea was, that the defendant was a school-master and the plaintiff his pupil, and that the plaintiff was saucy and contumacious and refused to obey the lawful commands of the defendant, and thereupon the defendant moderately corrected him therefor, which are the same trespasses, &c. *Held*, on demurrer, that the plea was no justification of the acts of severity charged. *Hathaway v. Rice*, 19 Vt. 102.

110. If the punishment inflicted by a school-master upon his pupil be *clearly* excessive, he is liable for such excess, although he acted from good motives, and in his own judgment considered the punishment necessary and not excessive. *Lander v. Seaver*, 32 Vt. 114; and see *Hathaway v. Rice*.

111. **Malice—Evidence.** Upon the simple question whether the punishment of a pupil by his school-master was excessive, evidence that

the master's previous ordinary management of his school had always been mild and moderate, is not admissible in his behalf. But if the claim be that the master acted maliciously and wantonly, from an evil heart, such evidence would be admissible to rebut such intent. *Lander v. Seaver*.

112. Upon the question whether a school-master acted maliciously in the punishment of a pupil with a raw-hide, the master may show, as rebutting such charge, that a raw-hide was accustomed to be used in other schools in the vicinity. *Id.*

113. Whether a raw-hide is a proper instrument of punishment in a school, is a question for the jury. *Id.*

114. **Wages.** A school teacher hired for a definite term who leaves during the term without sufficient cause, cannot recover for part service. *Clark v. School Dist. Pawlet*, 29 Vt. 217.

115. In an action for wages as teacher the declaration need not aver that the plaintiff had obtained a certificate. This is matter of evidence pertaining to the remedy. *Doyan v. School Dist. Montgomery*, 35 Vt. 520; and see *Kent v. Lincoln*, 32 Vt. 591.

116. Under the general issue and notice of defense that "the plaintiff was incompetent to manage the said school," certain particular instances of mismanagement in the government of the school may be shown. *Holden v. School Dist. Shrewsbury*, 38 Vt. 529.

117. In an action by a school-master to recover damages for being wrongfully dismissed by the prudential committee of the school district;—*Held*, that evidence was inadmissible for the defense, that the scholars and their parents were dissatisfied with the plaintiff, and that the inhabitants of the district had voted to dismiss him. To justify such dismissal, actual incapacity or unfaithfulness of the teacher must be shown. *Paul v. School Dist. Hartland*, 28 Vt. 575.

118. The plaintiff, a certificated school-master, was duly hired to teach school for three months. He taught six weeks, when most of the district became dissatisfied and only one or two scholars attended, and parts of the stove were removed from the school house so that the school had to be closed. He was requested by the prudential committee to hold himself in readiness to go on with the school for the remainder of the term, which he did, and could get no other employment. The school house was not put in condition for continuing the school. In suit for wages brought after the close of the term;—*Held*, that the plaintiff could recover for the full term. *Bromley v. School Dist. Tinmouth*, 47 Vt. 381.

119. The contract between a teacher and a school district stipulated, "that she should leave



if the school was not satisfactory." *Held*, that this did not warrant her dismissal on account of her personal unpopularity and prejudice against her among the inhabitants of the district, or for any reason other than a dissatisfaction with the school. *Richardson v. School Dist. Westminster*, 88 Vt. 602.

120. A school teacher made a proposition, to be used at a school meeting, to settle a disputed claim against the district for \$20. The district, at such meeting, voted to settle with her, "if it could be done for \$20," but made no effort to do so, nor communicated to her the acceptance of her proposal. *Held*, that she was not bound by her offer. *Ib.*

121. An order of a school district committee on its treasurer is not payment of the debt of the district to a teacher, unless received as such, or unless the teacher has in some way availed himself of it. *Ib.*

### SCIRE FACIAS.

1. **Nature and characteristics of remedy.** A writ of *scire facias* is a judicial writ founded upon the record, and must be signed by a judge or the clerk of the court where the record is, and to which the writ is returnable. *Sherwood v. Pearl*, 1 Tyl. 819. *Walsh v. Hasewell*, 11 Vt. 85.

2. A *scire facias* is a judicial writ, and issues from the court where the record is. Thus, a recognizance taken by an inferior court or magistrate, becomes a record in the court where the suit or proceeding in which it is taken is finally determined—as, the county, or supreme court—and a *scire facias* thereon issues from such court, irrespective of the amount of the recognizance. *Carlton v. Young*, 1 Aik. 332. *Shumway v. Sargeant*, 27 Vt. 440.

3. *Scire facias* can be brought to that court only in which the judgment was rendered, and where the record is. *Phelps v. Mott*, Brayt. 191. *Treasurer, &c., v. Erwin*, *Ib.* 218. *Hoit v. Bradley*, 1 D. Chip. 262.

4. *Scire facias* does not lie before the county court upon a recognizance taken by a justice for the appearance of a respondent from day to day. The action must be debt. *Treasurer, &c., v. Erwin*.

5. A *scire facias* to the county court on the judgment of a justice, under the statute, must set out such facts as show the jurisdiction of the court under the statute. *Phelps v. Mott*, Brayt. 191.

6. A writ of *scire facias* upon a recognizance may issue as an attachment. *Treasurer v. Moore*, 1 Tyl. 329.

7. The statute authorizes an appeal from a

judgment rendered on *scire facias*, as well as on any other writ. *Gibson v. Gay*, 10 Vt. 326.

8. **Continuation of former suit.** *Scire facias* upon a judgment to procure an execution is not an original suit, but only a continuation of the former suit, and execution issues upon the former judgment. *State Treasurer v. Foster*, 7 Vt. 52.

9. A *scire facias* upon a judgment is not regarded as an original suit, but, in one sense, a continuation of the former action; and, therefore, does not lie before one justice to enforce a judgment rendered by another. *Gibson v. Davis*, 22 Vt. 374. (Changed by G. S. c. 31, s. 75, where the first justice has died, or is out of office.)

10. On *scire facias* to revive a judgment, no damages or interest are recoverable. *Hall v. Hall*, 8 Vt. 156. (Changed by G. S. c. 33, s. 74.)

11. A *scire facias* against a trustee, under a statute of the State of Maine, was held to be a continuation of the original action; and that, he having been regularly a party to that action, the jurisdiction of that court to render judgment by default on the *scire facias* against him, was not lost by his removal out of the State so that service of the *scire facias* could not be made upon him; and, in an action of debt on such judgment in this State, the judgment was held conclusive. *Burns v. Belknap*, 22 Vt. 419. 26 Vt. 450.

12. **Execution apparently satisfied.** The terms of the statute authorizing a *scire facias* where an execution is apparently satisfied by a levy upon property, and which "did not belong to the debtor," embrace cases in which the debtor had no such title to the property as could be made available to the levying creditor; as, where it was held under an attachment, not known to the creditor, in favor of a third person, by which the levy and sale were defeated. (G. S. c. 47, s. 43.) *Baxter v. Shaw*, 28 Vt. 569.

13. A *scire facias* in common form upon a judgment, to obtain a new execution, was held amendable by adding an averment that an apparent satisfaction of a former execution was produced by a sale of property which turned out not to belong to the debtor. *Ib.*

14. A sold certain property on his execution against B. C, claiming the property, sued A therefor, but, while the suit was pending, agreed with A to discontinue it and release his claim. This suit was discontinued, but C afterwards brought another suit against A and recovered the value of the property; whereupon A sued C upon the agreement to discontinue and recovered back of him the same amount which he had recovered of A. Upon *scire facias* against B for an *alias* execution, on the ground of failure of title in the property sold on the execution;—*Held*, that A was entitled to recover,—

for that B was a stranger to the recovery had by A against C. *Maak v. Nichols*, 5 Vt. 200.

15. **Defective levy.** *Scire facias* to obtain a new execution, where a former one was defectively levied, is not the appropriate remedy, but a petition under the statute. *Royce v. Strong*, 11 Vt. 248.

See BAIL; RECOGNIZANCE; SHERIFF.

### SEAL.

1. As to deeds, charters, &c., the seal must be of wax, or wafer; something which may be impressed with an instrument used as and for a seal; and *held* that a scroll or circle made with a pen and the word "seal" written within it, was not a seal; and that an instrument of conveyance with such attachment to the signature was not a deed, not being *sealed*. *Beardsley v. Knight*, 4 Vt. 471.

2. Corporations act by their seal, and public documents are evidenced by a seal. In these cases, the impression of the seal may be made directly on paper, without the intervention of the wafer or wax, as it is the particular impression made by the stamp which is recognized as the seal of the corporation or public office. *Id.*

3. Public seals do not require, for their validity, wafer or wax. Such seals impressed upon the paper itself are sufficient; as, a notarial seal. *Bank of Manchester v. Slason*, 18 Vt. 334.

4. Where an award was required to be sealed, the arbitrators produced an award signed by each, but with only one seal, and that attached at the left hand of the signatures. The award did not conclude with, "witness our hands and seals, &c." *Held*, nevertheless, that from its purpose and tenor it was obvious that the arbitrators intended and understood this to be a sealed instrument, and that each had adopted this seal as his own seal. *Cheney v. Gates*, 12 Vt. 565.

5. Where an instrument is signed by several parties and has but one seal attached, the question whether the one seal was adopted and stands as the seal of each is one of fact, and may be determined from the paper itself and the nature of the transaction. *University of Vt. v. Joslyn*, 21 Vt. 52.

### SEDUCTION.

1. Trespass is the appropriate action to recover for the injury of seduction. It is of itself a substantive ground for such action.

*Hubbell v. Wheeler*, 2 Aik. 359. *Haynes v. Sinclair*, 23 Vt. 103.

2. *Quære*, whether, in an action for the seduction of the plaintiff's daughter, he may, in the opening of his case, give evidence of a promise of marriage by the defendant. By *D. Kellogg, J.*: "I think the weight of authority is against it." *Haynes v. Sinclair*.

3. *Held*, that it was error to charge, that evidence of promise of marriage between the parties tended to prove the fact of seduction. *Id.*

4. In such action, evidence of the general character and standing of the daughter, and of the plaintiff and his family, is not admissible, in the absence of impeaching evidence by the defendant. *Id.*

5. Nor is evidence of the probable expense of supporting the illegitimate child which came of the seduction, admissible. *Id.*

### SET-OFF.

#### I. AT LAW.

1. *Mutuality of the respective demands.*
2. *Nature of the demands pleadable.*
3. *Declaration on book account in set-off.*
4. *Pleadings and practice.*

#### II. IN CHANCERY.

##### I. AT LAW.

1. *Mutuality of the respective demands.*

1. To an action by the administrator of an estate represented insolvent, the defendant may plead in set-off counter demands, though the same have been presented to the commissioners, and this whether they have been allowed, or disallowed, by the commissioners. *Olcott v. Morey*, 1 Tyl. 198.

2. In an action against two upon their joint note;—*Held*, that the individual demands of either, and of each, and both, could be pleaded in set-off. *Ashley v. Willard*, 2 Tyl. 391.

3. On an appeal by an heir or creditor from an allowance by commissioners of a claim against the estate, the appellant may in the name of the executor plead an off-set thereto. *Parkhill v. Parkhill*, Brayt. 195.

4. In an action brought against two and a *non est inventus* return as to one;—*Held*, that the one on whom service was made, and who appeared, could plead in set-off a demand in favor of both, and recover judgment in his own name for the balance. *Mott v. Mott*, 5 Vt. 111.

5. *Held*, under like circumstances, that the defendant on whom service was made and who appeared could plead in set-off a demand in

favor of himself alone. *Snow v. Conant*, 8 Vt. 301. (Note. In *Adams v. Bliss*, 16 Vt. p. 42, it is said, that these two cases are opposed to each other, and that one or the other cannot be recognized as authority; and that the question remains yet to be decided.)

6. The right to plead in set-off under the statute can never be maintained and pursued to any practical purpose at law, unless the demands are legally mutual. *Leavenworth v. Lapham*, 5 Vt. 204. 16 Vt. 42.

7. In a suit against two, the defendants pleaded in set-off the note of the plaintiff to a third person or bearer, alleged to have been assigned to the defendants, and notice thereof given to the plaintiff, before the bringing of this suit. The proof was, that the note bore two indorsements, one in blank and one specially to one of the defendants, and that the notice of the assignment was given by this defendant, that he was the owner of the note. Held, that the plea was not sustained, and the set-off was not allowed. *Bragg v. Fletcher*, 20 Vt. 85.

8. Pleas in set-off are only allowed between the actual parties to the suit. *Adams v. Bliss*, 16 Vt. 39. *Phelps v. Bulkeley*, 20 Vt. 17.

9. The statute which authorized an indorsee of a promissory note to maintain an action in his own name, secured to the defendant a right to plead in set-off demands against the original payee. Since the repeal of that statute, in 1836, this cannot be done, although the plaintiff, suing as bearer or indorsee, holds the note merely in trust for the payee; as, for purposes of collection only. *Id.*

10. A, the administrator of B, loaned money of B's estate to the defendant, and took his note therefor payable to A as administrator of B's estate. A died and the plaintiff was appointed his administrator, and also administrator *de bonis non* of B's estate. The plaintiff brought suit upon the note as administrator of A's estate and recovered judgment. On motion, the defendant was allowed to set off a judgment of the commissioners in his favor against the estate of A;—such judgments, although rendered in different courts, being in substance mutual, and made so by the acts of the parties. *Rix v. Nevins*, 26 Vt. 384.

11. In an action brought by an administrator for a debt accruing after the death of the intestate, the defendant cannot set off a debt due to him from the intestate in his lifetime. *Aiken v. Bridgman*, 37 Vt. 249.

12. Notice. A had an account against B. B became the assignee by indorsement of a note against A and gave A notice thereof. Held, that B's claim became perfected by the notice, as a set-off to the claim of A, which could not be defeated by the subsequent assignment of A's account to C; and that notice to

C was not necessary. *Keyes v. Waters*, 18 Vt. 479.

## 2. Nature of the demands pleadable.

13. To be perfected before suit. Money paid to the plaintiff's use since the commencement of a suit, though by reason of a liability incurred for the plaintiff before the suit, cannot be pleaded in set-off. *Carpenter v. Coit*, 1 D. Chip. 88. *Houston v. Fellows*, 27 Vt. 634.

14. Unliquidated claim. Before the statute of 1818 (Slade's Stat. 109, s. 1), uncertain damages arising from a breach of contract could not be pleaded in set-off. *Haynes v. White*, Brayt. 219. *Rollins v. Walker*, *Id.* 222.

15. By the statute of set-off (G. S. c. 39, s. 1), "in any action founded on contract, express or implied," the indebtedness of the plaintiff to the defendant, "on contract, express or implied," may be pleaded in set-off. "Such plea shall be in the nature of a declaration, and may contain as many counts as the nature of the case shall require." (*Id.* s. 2.) Under this statute, the matter in set-off is not required to be liquidated, as at common law; but the plea is a mere declaration, and may cover any matter of contract, not expressly excepted in the statute. *Hubbard v. Fisher*, 25 Vt. 539. *Keyes v. W. Vt. Slate Co.*, 34 Vt. 81. *Thompson v. Congdon*, 43 Vt. 398. 45 Vt. 68.

16. Tort. The defendant delivered his horses to the plaintiff to be kept at an agreed price, without other agreement as to their return. The plaintiff wrongfully refused to redeliver them on demand. Held, that such refusal was a conversion and a tort, and not the subject of a declaration in set-off, as being a breach of an implied contract. *Hudson v. Nute*, 45 Vt. 66.

## 3. Declaration on book account in set-off.

17. Under the statute as existing in 1825, the maker of a note, sued by the indorsee, could file his declaration of book account in set-off, for an account against the payee existing before notice of the indorsement. *Martin v. Trobridge*, 1 Vt. 477. *S. C.* 3 Vt. 9.

18. The defendant cannot file a declaration in account in set-off, under G. S. c. 39, s. 10, but only a declaration in book account. If so filed, it may be dismissed on motion, even at a subsequent term and after a judgment thereon to account. *Tobias v. McGregor*, 19 Vt. 118.

19. A declaration on book in set-off, and the proceedings under it, are branches of the original action, and not a distinct action, or entry. *Cross v. Haskins*, 13 Vt. 540. *Tobias v. McGregor*.

20. Where a declaration on book is filed

in set-off, the amount of the debt only, as reported by the auditors, is to be pleaded in set-off;—all costs are taxed against the party in arrear. *Dyer v. Burdick*, Brayt. 222.

21. B owed D upon note, and also a balance on book. D brought suit upon the note, and also an action of book account. To the action on the note D filed a declaration in set-off on book. *Held*, that his book account could not be applied on the note, since the balance of account was against him, and D was allowed judgment in each suit. *Davis v. Barton*, 8 Vt. 246.

22. The balance in favor of either party is to be carried into the action, and judgment to be for the ultimate balance. Thus, where the plaintiff ultimately failed to sustain his original declaration, he was allowed judgment in the action for the balance found in his favor by the auditor; but costs only in that proceeding in which he was successful. *Cross v. Haskins*, 18 Vt. 536; and see *Stearns v. Stearns*, 30 Vt. 218.

23. The plaintiff brought his action of assumpsit and the defendant filed his declaration on book account in set-off. Before the auditor, the plaintiff brought in all his claims embraced in the action, and they, with the defendant's accounts, were there adjusted and a balance reported for the defendant. *Held*, that the plaintiff's claims had become *res adjudicata*, and could not be again considered; and that the plaintiff was estopped from claiming that they were not proper matters to be adjusted by the auditor in book account; and judgment for the balance found by the auditor was rendered for the defendant. *Herrick v. Richardson*, 17 Vt. 375.

24. Where a declaration in set-off on book account is filed, all sums due at the time of the audit are to be adjusted, as in ordinary cases, and the balance so found due and recovered may be set off, although a portion of the account accrued after the commencement of the principal suit; and this, notwithstanding G. S. c. 89, s. 5, the amount being an entire thing, and the balance being the thing pleadable. *Thetford v. Hubbard*, 23 Vt. 440.

#### 4. Pleadings and practice.

25. **Pleading.** The amount recovered in a declaration on book in set-off, and a tender before suit of the balance of the plaintiff's demand, may be joined in the same plea in bar. *Martin v. Trobridge*, 1 Vt. 477.

26. Counts of different natures may be joined in a plea in set-off; as, assumpsit, and debt on judgment. *Burton v. Brush*, 4 Vt. 467.

27. A plea in set-off may be joined with a plea of *non est factum*, and pleas in bar. *Johnson v. Muzzy*, 42 Vt. 708.

28. **Practice—Judgment for sum in arrear.** The statutes of this State regulating offsets have materially changed the rules of the common law. In case of off-sets or mutual off-sets pleaded, as the jury are required to "find, generally, such sum as shall appear to be in arrear from either party," the off-set may form the basis of a separate judgment, if the original suit fail; and, it seems, that the defendant may, in such case, insist, notwithstanding such failure, that the cause proceed to trial and judgment on the declaration in set-off. *Stearns v. Stearns*, 30 Vt. 218.

29. A claimant before commissioners of an estate appealed from a set-off allowed against his claim, and in the county court filed a declaration on book. Before the filing of the auditor's report, the administrator filed a declaration in assumpsit in set-off. The auditor reported nothing due the plaintiff on book. *Held*, that the defendant was entitled, nevertheless, to have the case proceed to trial and judgment upon the declaration in set-off *Ib*; and see *Cross v. Haskins*, 18 Vt. 536. *Herrick v. Richardson*, 17 Vt. 375.

30. **Set-off of mutual judgments on motion.** Courts of common law have an equitable jurisdiction, derived from the general jurisdiction of a court over its suitors, to set off mutual judgments although rendered in different courts, and although the nominal parties of record are different but the real parties the same, whenever such set-off is equitable. *Conable v. Bucklin*, 2 Aik. 221. *Riz v. Nevins*, 26 Vt. 384; and see *Sellick v. Munson*, 2 Vt. 18, note.

## II. IN CHANCERY.

31. Courts of equity exercised jurisdiction on the subject of set-off before the statutes of set-off existed. Consequently, the jurisdiction is not based upon such statutes. It would exist without them, and would not be affected by their repeal. *Blake v. Langdon*, 19 Vt. 485.

32. Where the orator neglected to present his claims against an insolvent estate for allowance, in reliance upon an agreement of the administrator that they should be allowed in set-off to a claim of the estate against him;—*Held*, that the orator was entitled, in chancery, to have his claims so applied in set-off to the extent of the dividend payable by the estate. *Nims v. Rood*, 11 Vt. 96.

33. It is not a valid objection to a set-off in equity, that the nominal parties to the contract are not strictly mutual, if the real parties upon whom the burden is ultimately to fall are the same. *Smith v. Wainwright*, 24 Vt. 97. *Ferris v. Burton*, 1 Vt. 489. *Foot v. Kelokum*, 15 Vt. 258. *Downer v. Dana*, 17 Vt. 518. *Blake v. Langdon*, 19 Vt. 485.

34. In order to the application of a set-off in chancery upon bill for that purpose, the claim must be liquidated; and for this purpose the party may be referred to a court of law, and the cause retained for application of the set-off when the amount is determined. This is the usual course. *Smith v. Wainwright*, *Nims v. Rood*, 11 Vt. 96. *Foot v. Ketchum*. (See G. S. c. 29, s. 27.)

35. The assignee of a note brought suit on it in the names of the two payees. The defendant filed a declaration in set-off as against one of the payees, to whom the note belonged and from whom the assignee claimed. The assignee appeared and defended before the auditor who heard and reported the accounts, and the report was accepted by the county court. On a chancery appeal, the court *held* and treated this adjustment by the auditor as a sufficient liquidation of the defendant's account to make it the basis of an equitable set-off as against such assignee. *Foot v. Ketchum*.

See MORTGAGE, 14, *et seq.*

## SHERIFF.

### I. IN GENERAL. II. RELATIONS OF SHERIFF AND DEPUTY SHERIFF.

#### I. IN GENERAL.

1. **His recognizance.** A sheriff's recognizance taken according to the requirements of the act of 1797 before the *first side judge* of the county court, in the absence of the *chief judge*, was *held* valid, though the constitution prescribed the *first judge*. *State Treasurer v. Kelsey*, 4 Vt. 371. 29 Vt. 104. 36 Vt. 371.

2. Under the statute of 1839 requiring sheriffs' recognizances to be taken before "the first judge of the county court;"—*Held*, that this referred to the first local judge of the county, and not to a judge of the supreme court, or a circuit judge, who was *ex officio* the chief judge of the county court—that is, of the court as a legal tribunal when acting in the aggregate, as such; and that such recognizance taken before A B, "first assistant judge of the county court," was well taken—the one first named on the voting tickets and in the returns and record of the election being styled the *first*, and the other the *second*, assistant judge. (20 N. Y. R. 252.) *Wing v. Gleason*, 36 Vt. 371. *Taylor v. Nichols*, 29 Vt. 104.

3. The amended constitution of 1850 provided that sheriffs should give security, &c., before one of the judges of the supreme court, or the two judges of the county court, &c., "in

such manner and in such sums as shall be directed by the legislature." *Held*, that this clearly contemplated future legislation to perfect and carry it out, before it could become effectual and operative; and that it did not, of itself and by its own force, operate to repeal or change a then existing statute providing that such security should be given before "the first judge of the county court." *Id.*

4. Since the statute of 1797, the remedy in behalf of an individual upon a sheriff's official bond, or recognizance, is that given by the statute, viz.: a *scire facias*, and this remedy is exclusive. *Held*, that debt in the name of the county treasurer would not lie. *Fuller v. Holmes*, 1 Aik. 111.

5. By the statutes as existing in 1826, the commitment of a delinquent sheriff to jail upon the State treasurer's extent, did not lay the foundation for a *scire facias* against the sheriff's bail. *State Treasurer v. Holmes*, 2 Aik. 48.

6. *Scire facias* cannot be maintained against the sureties on the recognizance of a deceased sheriff, until the liability of the sheriff and the extent of it have been established by an allowance against his estate, and that remedy has been exhausted; and this is so, although such estate is entirely insolvent. *Tute v. James*, 46 Vt. 60.

7. The judgment rendered against a sheriff for an official default, except where rendered upon default, is as conclusive against his sureties in a *scire facias* upon the official recognizance, as it is against him. (G. S. c. 30, s. 70.) *Bradley v. Chamberlin*, 35 Vt. 277.

8. **Extent against.** An extent against a sheriff need not be directed to the high bailiff, though the letter of the statute is so, when the sheriff is out of office when it issues. *State Treasurer v. Weeks*, 4 Vt. 215.

9. The State treasurer may issue one extent against a sheriff for distinct defaults in levying two separate extents against different constables in different years, the sums being distinctly stated in each. *Id.*

10. The remedy given by statute to the State treasurer to issue an extent against a sheriff, for his default in the service of an extent against a delinquent constable, is not exclusive. It does not preclude an action at law against the sheriff for the same default; nor can his bail object that no extent was issued. *State Treasurer v. Kelsey*, 4 Vt. 371. 10 Vt. 568.

11. **Certain powers.** A sheriff, or deputy sheriff, is not obliged to show his precept to the person to be arrested by it, nor to the bystanders. *State v. Caldwell*, 2 Tyl. 212.

12. A sheriff or deputy sheriff, as such, has no authority to impanel and take private charge of a justice jury. *Hosford v. Allen*, 1 Vt. 50.

13. A sheriff, or deputy sheriff, capturing a criminal under an offer of a reward, but having no process for the arrest, is entitled to the reward, the same as though he were not a peace officer. *Davis v. Munson*, 48 Vt. 676. *Russell v. Stewart*, 44 Vt. 170.

14. But if he have such process for service, he cannot recover any extra or additional reward for his services in making the arrest within his jurisdiction, though stipulated for; but for such services beyond his jurisdiction, he may. *Brown v. Godfrey*, 38 Vt. 120.

15. The sheriff of another State cannot pursue and retake in this State a prisoner who has escaped from his custody in such other State. *Bromley v. Hutchins*, 8 Vt. 194.

16. **Escape—Liability for.** Any departure of a prisoner, committed on final process, from the jail, i. e., the house, by consent of the sheriff, though there be a voluntary return before action brought, is an escape for which the sheriff is liable. *Wait v. Dana*, Brayt. 87. 12 Vt. 614.

17. If a sheriff voluntarily permits a prisoner in execution to escape, he cannot retake him, though the creditor may. In such case, the creditor may sue the officer for the escape, or he may sue the judgment. *Farnsworth v. Tilton*, 1 D. Chip. 297.

18. The sheriff, as keeper of the jail to which is committed a debtor from another county, is not liable for a negligent escape of such debtor. *Chipman v. Sawyer*, 1 Tyl. 88. *S. C.* 2 Tyl. 61.

19. A former sheriff is not liable for the escape of a prisoner after his term of office has expired, though the prisoner was committed during his term, provided he regularly delivered over the prisoner to his successor. *Day v. Sweetser*, 2 Tyl. 233.

20. The creditor must charge in execution and legally demand his debtor, committed to jail on *meane* process, within fifteen days after final judgment, or he will lose all claim upon the sheriff, whether the debtor has previously escaped, or not. *Id.*

21. **Damages for escape.** In an action against a sheriff for an escape on *meane* process, the defendant, according to the statute, gave evidence that the escaped prisoner was poor and without property. The plaintiff then offered to prove that the act for which the prisoner was sued was willful and malicious, and therefore he would be entitled to a close-jail execution; and that before the escape some persons, in behalf of the prisoner, had offered a certain sum on condition that the plaintiff would discharge him. *Held*, that the evidence was not admissible. *Middlebury v. Haight*, 1 Vt. 423. See *G. S. c. 121, s. 17*.

22. In an action against a sheriff for the escape of a prisoner committed to jail on execu-

tion for debt;—*Held*, that at common law, independent of the statute, he might show in mitigation of damages the insolvency of the prisoner, though such escape was voluntary. *Wait v. Dana*, Brayt. 87; and although the prisoner was not entitled to take the poor debtor's oath. *State Treasurer v. Weeks*, 4 Vt. 215.

23. **Subrogation.** In an action against a sheriff for an escape on *meane* process, the court required, as a condition of judgment, that the defendant should be allowed the benefit of the judgment against the debtor. *Oliver v. Chamberlin*, 1 D. Chip. 41. *S. C. N. Chip.* 26. 9 Vt. 294; and see *State Treasurer v. Holmes*, 4 Vt. 110.

## II. RELATIONS OF SHERIFF AND DEPUTY SHERIFF.

24. **Liability for default of deputy.** The acts of a sheriff's deputy are, in law, the acts of the sheriff; and he alone can sue or be sued for any matter relating to the execution of the duties of his office merely. *Smith v. Joiner*, 1 D. Chip. 62. 1 Aik. 264.

25. For a misfeasance, a deputy sheriff is liable as well as the sheriff; but for a non-feasance, or neglect of duty, no action lies against the deputy, but against the sheriff only—as, for neglect of the deputy to pay over money collected by him upon an execution. *Hutchinson v. Parkhurst*, 1 Aik. 258. 28 Vt. 141; or for neglect to properly keep property attached, whereby it suffered damage. *Abbott v. Kimball*, 19 Vt. 551. *Hale v. Huntley*, 21 Vt. 147; or was stolen. *Buck v. Ashley*, 37 Vt. 475.

26. So long as the sheriff remains liable, it would seem that for mere official neglect the deputy is not also liable. *Redfield, C. J.*, in *Gleason v. Briggs*, 28 Vt. 142.

27. The acts of a deputy sheriff are to be regarded as the acts of the sheriff, not in the sense of either agency or identity; but rather in the sense of official relation and of responsibility cast by law upon the sheriff for the acts of the deputy; not in the sense that what the deputy does is done by the sheriff, but that for what he does the sheriff is made responsible, the same as if he had officially done the same thing. *Flanagan v. Hoyt*, 36 Vt. 569. *Barrett, J.*

28. A sheriff is responsible to an attaching creditor who has duly charged the property in execution, for the default of his deputy in taking due care of the property attached by him, whereby it became lessened in value; as, also, for the proceeds of such property sold on credit by arrangement of the several attaching creditors and debtor, which came into the hands of such deputy while the lien created by the attachment existed (*Seaver v. Pierce*, 42 Vt.

325), though such default happened after the sheriff had gone out of office, and his deputy had become the deputy of another sheriff. *Stimpson v. Pierce*, 42 Vt. 334.

29. A sheriff remains liable for the default of his deputy, although he and his deputy both go out of office before the bringing of suit. *Ib. Coburn v. Chamberlin*, 31 Vt. 326.

30. Under G. S. c. 52, ss. 10, 12, providing for the survival of actions "for damages done to real or personal estate";—*Held*, that an action on the case against a sheriff for the default of his deputy in the service of an execution, whereby the creditor lost his debt, survived in behalf of the administrator of the creditor. *Dana v. Lull*, 21 Vt. 383; so, also, against the administrator of the sheriff. *Bellows v. Allen*, 22 Vt. 108;—giving to the statute the same construction as that of 4 Ed. III. c. 7; and see *Winhall v. Sawyer*, 45 Vt. 406.

31. **Evidence—Admission of deputy.** In an action against a sheriff for the neglect of his deputy to return an execution, a receipt signed by the deputy, acknowledging that he received the execution for collection, is evidence of that fact for the plaintiff. *Nye v. Kellam*, 18 Vt. 594.

32. The admissions of a deputy sheriff are evidence against the sheriff, in an action against him or his sureties, for the default of such deputy; and may be proved by any other witness as well as by the deputy, even when he is a witness. *Lyman v. Lull*, 20 Vt. 349.

33. **Appointment of deputy.** That one was a deputy sheriff may be proved by the record of his deputation in the county clerk's office. *Briggs v. Taylor*, 35 Vt. 57.

34. **Record of deputation.** Where a deputy sheriff duly lodged with the county clerk for record his deputation and certificate of his oath of office, and the same was so received by the clerk, and was afterwards copied upon the record by the clerk;—*Held*, that the record, being only for the purpose of notice, and not of creating a title, was constructively deemed to exist from the time of lodging the instrument for record, and that the intervening acts of the deputy, as such, were valid under the statute. *Ferris v. Smith*, 24 Vt. 27. 25 Vt. 284. G. S. c. 12, s. 5.

35. **When deputy may sue.** A deputy sheriff may sue in his own name, in trespass or trover, for a conversion of property attached by him. *Stanton v. Hodges*, 6 Vt. 64.

36. A deputy sheriff who attaches personal property and takes a receipt for it in his own name, has such a special interest in it that he may sue in trover or assumpsit on his receipt. *West v. Thompson*, 27 Vt. 613. *Spencer v. Williams*, 2 Vt. 209; and see *Miller v. Gould*, 2 Tyl. 439.

37. An action in such case also lies in the

name of the sheriff. *Davis v. Miller*, 1 Vt. 9. *Pettes v. Marsh*, 15 Vt. 454.

38. **Deputy's contract.** A deputy sheriff can make no contract that will render the sheriff liable for the breach of it. The sheriff is holden for the official neglects, only, of his deputy. *Wetherbee v. Foster*, 5 Vt. 136. *Tomlinson v. Wheeler*, 1 Aik. 194.

39. **Interference by creditor.** A sheriff is not liable, as for a default of his deputy, for not collecting and returning an execution, or paying over the proceeds of a sale thereon, when by the direction or assent of the creditor the sale was upon a credit, instead of for cash. *Kimball v. Perry*, 15 Vt. 414. *Bellows v. Allen*, 23 Vt. 169. See 42 Vt. 325.

40. In an action against a sheriff for neglect of his deputy in not executing a writ of execution, the plaintiff put in evidence the deputy's receipt, in which he acknowledged the receipt of this and eighteen other executions, "to collect and account for according to law." *Held*, that parol evidence was admissible, for the defendant, of a subsisting agreement between the plaintiff and the deputy, that the deputy should not commit any of the plaintiff's debtors in execution without express direction of the plaintiff. *Dawner v. Bowen*, 12 Vt. 452.

41. A sheriff is not excused to an attaching creditor for the default of his deputy in keeping property attached, because such creditor or other parties may have taken it into his, or their, possession on receipt given to the deputy, where the property has been restored to the possession of the deputy under the attachment. *Stimpson v. Pierce*, 42 Vt. 334.

42. A deputy sheriff attached the property of S upon a writ against him declaring upon a promissory note, and sold the property upon the attachment, as perishable, under the statute. That suit terminated in favor of S. In an action by S against the sheriff to recover the proceeds of such sale, after demand;—*Held*, that it was not competent for the defendant to prove that said note was given to defraud the creditors of S, for that the note was good between the parties to it. *Seater v. Pierce*, 42 Vt. 325.

43. *Held*, also, that the sheriff was liable for such proceeds, though the deputy by direction of S sold the property upon a credit, if the deputy received the proceeds during the pendency of that suit, or before the lien was discharged by a judgment in favor of S; but that this fact must appear affirmatively. *Ib.*

44. *Held*, also, that the defendant was not chargeable with interest until after demand, if not appearing that he had any previous knowledge of the discharge of the lien. *Ib.*

See JAIL.

## SLANDER.

## I. ORAL.

## II. WRITTEN, OR LIBEL.

## I. ORAL.

1. **What words are, or are not, actionable.** Words charging a simple assault and battery are not actionable *per se*; as, that "He snaked his mother out of doors by the hair of her head; it was the day before she died." *Billings v. Wing*, 7 Vt. 489.

2. Words to be actionable of themselves must charge an offense not only punishable corporeally, but which implies moral turpitude. Words charging the stealing of property of a value less than seven dollars are actionable;—the offense being punishable by fine or imprisonment, and the words imputing an infamous crime involving moral turpitude. *Redway v. Gray*, 81 Vt. 292.

3. In an action for slander of a minister of the gospel in his profession, the words charged and proved were: "Mr. S (the plaintiff) said the blood of Christ had nothing to do with our salvation more than the blood of a hog." *Held*, that these words were actionable; and that testimony to prove that the plaintiff denied the divinity and atonement of Christ, but spoke of Him as a highly intellectual and moral being and perfect, but still a created being, a creature, so that there was no more virtue in His blood than in the blood of any creature as an atonement, was not admissible, either in justification or mitigation. *Skinner v. Grant*, 12 Vt. 456.

4. **Privilege.** No action lies for any thing said, written, or published in the ordinary course of judicial proceedings, and which comes within the ordinary scope of the forms and proceedings therein, however groundless or malicious the suit may be, even if the process of the court is sought as the mere cloak of malice and slander; and this defense is available under the general issue, but may be specially pleaded. *Torrey v. Field*, 10 Vt. 858, 414.

5. **Prima facie**, a party, or his counsel, is privileged for everything spoken in court. In order to sustain an action of slander therefor, the plaintiff must show that the words spoken were not pertinent to the matter then in progress, and that they were spoken maliciously, and with a view to defame him. If pertinent, however malicious the motive, or if spoken *bona fide*, believing them to be pertinent, although not so, no action of slander will lie therefor. *Mower v. Watson*, 11 Vt. 536.

6. There is a class of cases which form an exception to the general rule, that malice is to be presumed, as matter of law, from defamatory

words actionable *per se*. Such are cases of giving the character of servants; confidential advice for some legitimate purpose; communications to persons who ask for information and have a right or interest to know. Such occasions do not necessarily justify the words, nor, on the other hand, is malice to be inferred by law, but must be found as matter of fact by the jury. *Peck, J.*, in *Nott v. Stoddard*, 38 Vt. 82.

7. A, at the instance of the plaintiff, inquired of the defendant as to the report that he had charged the plaintiff with stealing wood. The defendant replied, that it was so; that he saw it himself—and went on stating the circumstances. In an action therefor, for slander;—*Held*, that if the plaintiff caused the inquiry to be made as a trick to induce the defendant to utter a slander, he could not make the words thus elicited a ground of action. But if the inquiry was made in good faith, and merely to ascertain whether the defendant had made such a charge, then the action would lie for such words, if spoken maliciously. But in such case, malice is not implied by law, but must be found as a fact by the jury. *Id.*

8. **Particular charges.** The words, "he took a false oath," or "he swore false," do not of themselves amount to an accusation of perjury. To render such words actionable, a declaration therefor must set forth an introductory statement, or *colloquium*, alleging the occasion on which they were spoken and the proceeding to which they related—as, that they were spoken with reference to some proceeding in which an oath might lawfully be administered, and in which a false statement under oath might amount to legal perjury, and that the plaintiff was legally sworn, or testified upon oath. There must also be an *innuendo* showing the injurious sense in which the words were uttered—as, that the defendant intended to accuse the plaintiff of the crime of perjury. *Sanderson v. Hubbard*, 14 Vt. 462. 38 Vt. 188. *Wood v. Scott*, 18 Vt. 42.

9. Words charging that the plaintiff burned the house of his wife, in which he lived, impute no crime and are not actionable. *Redway v. Gray*, 81 Vt. 292.

10. Before the Stat. of 1868, No. 22 (G. S. c. 118, s. 5), it was *held* that words charging that the plaintiff burned his own buildings with intent to defraud an insurance company which had insured them, were not actionable. *Id.*

11. It is not actionable to say that the plaintiff went to a certain place for the purpose of persuading a woman to commit adultery with him;—these words not implying the actual commission of the crime. *Dickey v. Andros*, 33 Vt. 55.

12. Spoken words charging an unmarried woman with unchaste conduct (as, to call her



a whore) are not actionable *per se*; otherwise, as to a charge of sexual connection with a married man, or of such conduct as amounts to *open and gross lewdness*; for these would subject her to corporal punishment for a crime involving moral turpitude. *Underhill v. Welton*, 32 Vt. 40.

13. But such words are actionable, if some special pecuniary damage has resulted therefrom; and it was *held* sufficient to aver and prove that by reason of grief and anxiety occasioned by the charge, the plaintiff *lost time*, and that the effect upon her mind or body was such as to render her *less capable* of attending to her daily business. *Id.*

14. Words uttered in Canada charging the plaintiff with having administered poison with intent to kill, or *injure* a person (not stating the extent of the injury—as, to do great bodily harm);—*Held*, not to be assumed as actionable, in lack of proof that they were so by the law of Canada. *Langdon v. Young*, 33 Vt. 136.

15. By G. S. c. 113, s. 39, the willful and malicious girdling or destroying of another's fruit trees of a value exceeding seven dollars, is punishable by imprisonment in the State prison, or by fine, or both. *Held*, that such offense involves moral turpitude, and that words charging such offense are slanderous, and actionable *per se*. *Murray v. McAllister*, 38 Vt. 167.

16. Words charging that one is a bastard are not actionable *per se*. *Hoar v. Ward*, 47 Vt. 657.

17. **How to be understood.** In slander, the words charged should be understood in the most innocent sense, unless there be averments giving them other and sinister meaning. Thus, where the words alleged were that the defendant told W that he (W) had *intercourse* with the plaintiff, Martha, meaning that she had committed adultery with W, this allegation without colloquium or other averment, was *held* to impute no crime. *Merritt v. Dearth*, 48 Vt. 65.

18. The form in which a slander is expressed is quite immaterial. The words, "C *acknowledged* to me that he swore to a lie, &c.," with proper colloquium and innuendoes, are actionable, where the speaker intended to communicate the slanderous *idea* and have it believed. *Cass v. Anderson* 33 Vt. 182.

19. **Declaration.** The words constituting the slanderous charge must be set forth in the declaration. An omission so to do is not cured by verdict; as, where the averment was that the defendant "did charge the plaintiff with the crime of perjury." *Haselton v. Wear*, 8 Vt. 480. 32 Vt. 707.

20. In an action by husband and wife for a slander imputing adultery of the wife, the declaration must aver that they were husband

and wife at the time of speaking the words. *Ryan v. Madden*, 13 Vt. 51.

21. It is no objection to the declaration that it sets forth a libel as inducement, where it counts only upon the spoken slander. *Hoyt v. Smith*, 32 Vt. 304.

22. It is proper to include in a single count words spoken at different times, and to different persons, in relation to the same subject, as well as to make several counts. *Id.*

23. There is a material distinction between an inducement, introduction, or *colloquium*, and an *innuendo*. The office of the former is, to set forth the occasion and circumstances of the publication, and to allege all extrinsic facts which are necessary to be taken in connection with the words spoken, in order to complete the sense; while the latter has no other use than simply to ascertain the application of previous expressions to particular persons or things. "It means no more than the words *id est, scilicet*, or *meaning*, or *aforsaid*, as explanatory of a subject matter sufficiently expressed before; as, such an one, *meaning* the defendant, or such a subject, *meaning* the subject in question. But as an innuendo is only used as a word of explanation, it cannot extend the sense of the expressions in the libel (or of the words spoken) beyond their own meaning, unless something is [previously] put upon the record for it to explain." (Cowp. 684.) Hence, if the words are not actionable with a mere explanation of the persons or things intended by them, they cannot be made so by an innuendo; for an innuendo is only a word of explanation, and never of addition or extension. *Fitzsimmons v. Cutler*, 1 Aik. 33. *Taft v. Howard*, 1 D. Chip. 275. *Ryan v. Madden*, 13 Vt. 51. *Wood v. Scott*, 13 Vt. 42. *Sanderson v. Hubbard*, 14 Vt. 463. *Nichols v. Packard*, 16 Vt. 83. *Holton v. Muzzy*, 30 Vt. 365. *Smith v. Hollister*, 32 Vt. 695. *State v. Atkins*, 43 Vt. 252.

24. It is not the office of an innuendo to extend, but simply to explain the meaning of the words charged. When these are of doubtful signification, it is for the pleader to allege in what sense they were used, and for the jury to find the truth of the allegation. *Nichols v. Packard*, 16 Vt. 83.

25. In this case, the innuendo was *held* not to enlarge the meaning of the words spoken. *Murray v. McAllister*, 38 Vt. 167.

26. In slander for words as actionable *per se*, the pleader must aver clearly and distinctly, in the colloquium and prefatory averments, the crime intended to be imputed, and in the innuendo, the crime pointed at and insinuated. It is not sufficient to designate it as a *crime*, and leave it to the court to ascertain whether a definite crime may be fairly deduced. *Hoar v. Ward*, 47 Vt. 657.

27. A declaration that sets forth that the defendant, to or in the hearing of others, called the plaintiff a thief, is good, without other colloquium than that the words were spoken of the plaintiff. *Sabin v. Angell*, 46 Vt. 740.

28. Where the declaration counts for different slanders at different times, a general averment of special damage "by means of the committing of which several grievances," is not sufficient, where one of the alleged slanders is not actionable. *Hoar v. Ward*, 47 Vt. 657.

29. **Pleas and evidence.** The truth of the words spoken cannot be given in evidence under the general issue. *Barns v. Webb*, 1 Tyl. 17.

30. In justifying, the plea must justify the same words contained in the declaration, or at least so many of them as are actionable. It is not enough to justify the sentiment contained in the words. *Skinner v. Grant*, 12 Vt. 456. 82 Vt. 707.

31. Where the words charged are divisible without materially changing the sense, or constitute two distinct charges or slanders against the plaintiff, the defendant may justify one, and rely on the general issue in defense of the other. *Nott v. Stoddard*, 38 Vt. 25.

32. Where the words charged are ambiguous, and are actionable by force of the meaning assigned to them in the innuendo, it is not sufficient for the defendant to justify the very words merely, but he must justify them in the sense alleged in the declaration. This applies to a notice, as well as to a plea. *Id.*

33. Where the plaintiff gives a definition of the words in the innuendo, he is bound by the definition given, even though he may thereby limit the meaning as expressed in the colloquium. *Kimmis v. Stiles*, 44 Vt. 351.

34. In an action for spoken slander, the true rule to be gathered from all the cases is, that the substance of the alleged charge must be proved in substantially the same words as laid in the declaration; that any variation in the form of expression merely is not material; but the words alleged cannot be proved by showing that the defendant expressed the same meaning but in different words. *Smith v. Hollister*, 82 Vt. 695. 8 Vt. 482. 15 Vt. 249.

35. A deputy sheriff having private charge of a justice jury, acts therein under his special appointment and oath for that particular service, and not in virtue of his general office, the statute devolving that duty primarily upon the town constable. Hence, in an action of slander for charging him with misconduct on such occasion, in his capacity or office as deputy sheriff;—*Held*, that there was a fatal variance. *Hoarford v. Allen*, 1 Vt. 50.

36. The declaration averred that the defendant charged the plaintiff with the commission of a certain crime. The evidence was that the

defendant said he supposed the plaintiff was guilty, &c. *Held* to be a variance. *Dickey v. Andros*, 82 Vt. 55.

37. In slander for words charging the plaintiff with perjury, if the defendant pleads in justification the truth of the charge, he must, in order to sustain his plea, establish it by proof sufficient to sustain an indictment for perjury. *Dwinella v. Aikin*, 2 Tyl. 75.

38. It is no justification in this action, that the defendant, after speaking the words and before suit, disclosed to the plaintiff the author of the slander. The name of the author must be disclosed with the words, and at the time when they were spoken; nor can one safely repeat them as coming from another, unless he does this in good faith, that is, believes them to be true. *Skinner v. Grant*, 12 Vt. 456.

39. Where a count in slander contains words actionable, coupled with others not actionable, but spoken at the same time, the latter shall be considered as merely in aggravation, and the finding of entire damages on the whole count will be good. *Chipman v. Cook*, 2 Tyl. 456.

40. In an action of slander for charging the plaintiff with having stolen the defendant's sheep, the defendant, to mitigate the damages, put in evidence the record of a judgment in his favor in an action of trespass by the plaintiff for taking away the same sheep. *Held*, that the plaintiff might thereupon, for the purpose of showing malice and enhancing the damages, give any legal evidence, whether circumstantial or not, that the defendant knew the sheep were not his, and had good reason to believe they belonged to the plaintiff, and knew his charges were false. *Bullock v. Cloyes*, 4 Vt. 304.

41. The defendant should be held to have used the words spoken in such sense as he expected the hearers to understand them, and as they did fairly understand them. Thus where the words charged theft of an article which, in fact, had been loaned or sold to the plaintiff, but of which loan or sale the hearers of the words had no knowledge;—*Held*, that this fact could not be used as showing that the charge was of an impossible offense, or not seriously made; and that it was not admissible in mitigation of damages, unless as tending to prove a quarrel between the parties, and that the words were spoken in heat of passion, or under excitement. *Smith v. Miles*, 15 Vt. 245.

42. **Damages.** Where the words are actionable *per se*, evidence of the effect of the slander upon the plaintiff, to the extent of the direct and natural consequences of the defamatory words spoken, is admissible. *Nott v. Stoddard*, 38 Vt. 25.

43. Evidence is admissible, on the question of damages, that rumors and reports were abroad after the publication of the slander, that

the defendant had made the charges stated in the declaration, as showing the extent of the necessary consequences of his wrongful act. *Id.* 44 Vt. 144.

44. *Held*, that in this action charges of a character similar to, but other than, those set out in the declaration, may be proved, not as a substantive ground of recovery, but as tending to show malice. *Cavanaugh v. Austin*, 42 Vt. 576.

45. *Mitigation*. Common report is never a sufficient justification for publishing slanderous matter, but may be received in mitigation of damages. The effect, as to justification, of giving the name of the informant at the time of speaking the slanderous words, or the name and very words of the author of a libel repeated,—discussed. *Torrey v. Field*, 10 Vt. 353, 412.

46. In this action, the defendant may prove under the general issue, in mitigation of damages, the general bad character of the plaintiff in respect to the offense imputed, but not particular instances of misconduct, nor particular rumors—as, where the words spoken imputed perjury, that the general character of the plaintiff, in respect to being a perjured man, was bad; that his general character was that of a dangerous witness and his statements under oath as a witness not to be relied upon. *Bowen v. Hall*, 20 Vt. 232. *Bowditch v. Peckham*, 1 D. Chip. 145.

47. So, where the words spoken imputed the charge of adultery;—that the plaintiff, before the speaking of the words, was commonly reputed to be an *unchaste and licentious man*. *Bridgman v. Hopkins*, 34 Vt. 532.

48. And this may be done, although, in addition to the general issue, there be a plea justifying the truth of the words. *Bowen v. Hall*, 20 Vt. 232.

49. The defendant may, under the general issue without notice, in order to rebut the presumption of malice and in mitigation of damages, give proof of such facts and circumstances as show that he had reason to believe and did believe, when he spoke the words, that they were true, although such evidence may tend to prove the truth of the words. He cannot, in such case, under pretence of mitigating the damages, go into evidence that really proves the charge to be true, but must concede that his evidence does not support it. *Hutchinson v. Wheeler*, 35 Vt. 330.

50. In an action for slanderous words charging that the plaintiff was a thief, judgment was given for the plaintiff on demurrer to the declaration. On trial for the assessment of damages, the court excluded evidence offered by the defendant to show (1), that he, in speaking the words, had reference to a transaction which did not amount to larceny, but not offering to show that those who heard the words so understood or could have so understood them;

and (2), evidence of previous difficulties between the parties, and the state of feeling between them. *Held* correct. *Sabin v. Angell*, 46 Vt. 740.

51. *Conduct of defendant*. In an action for slander, certain witnesses for the plaintiff, residing in another State, testified to the speaking of the words alleged. The plaintiff was then allowed to prove by the same witnesses, that the defendant had endeavored by solicitations, money and threats, to induce them to decline attending court, or testifying against him. *Held*, that such evidence was admissible, not to prove malice, but as tending to show the defendant's knowledge that the truth would operate against him, and to confirm the witnesses as to the facts testified to by them. *Kirkaldie v. Paige*, 17 Vt. 256. *Hebard, J.*, dissenting. (*Law Rep.* 5, Q. B. 314.) *Note*.—It is stated in brief of counsel (p. 259) that this testimony was introduced after an attempt to impeach those witnesses.

52. *Arrest of judgment*. Judgment was arrested for a mistaken use of the pronoun *he* for *I*, in setting out, in the declaration, the words spoken. *Bowditch v. Peckham*, 1 D. Chip. 144.

53. In an action for slander, the innuendoes, “meaning to insinuate and falsely represent”—“meaning to insinuate and be understood”—or, “meaning and intending to represent,” “that the plaintiff had stolen the money aforesaid,” are tantamount to a direct charge of larceny, and are sufficient on motion in arrest. *Hoyt v. Smith*, 32 Vt. 304.

54. A declaration in slander for words charging perjury was *held* good on motion in arrest, although the judicial proceeding was referred to in the colloquium argumentatively and by way of recital; and although the fact that the plaintiff was sworn was only inferable from the averment that the words were uttered concerning the plaintiff and “his testimony given as a witness on that trial.” *Cass v. Anderson*, 33 Vt. 182.

55. In an action for slander, after a *colloquium* that the plaintiff had testified as a witness on a certain trial, the words charged were: “You are a liar and I can prove it. You swore to a lie, and I can prove it,” “meaning thereby that the plaintiff swore in said court *falsely*.” *Held*, on motion in arrest, that these words were not actionable *per se*, and that the *innuendo* was fatally defective in not alleging that the defendant intended by the words to impute the crime of perjury. *Kimmis v. Stiles*, 44 Vt. 851.

56. In slander for words alleged to impute adultery, judgment was arrested for want of sufficient averments in the declaration, that the party or parties to the transaction were married to other parties at the time of the supposed offense. *Merritt v. Dearth*, 48 Vt. 65.

## II. WRITTEN, OR LIBEL.

57. In an action for libel, parol proof of contents is admissible in case of loss of the libelous paper. *Gates v. Bowker*, 18 Vt. 23.

58. Under a declaration for libel, "in the words following, to wit,"—the precise words must be proved. A variance herein was allowed to be amended. *Harris v. Lawrence*, 1 Tyl. 156. *Olin v. Chipman*, *Ib.* 167. 2 Tyl. 148.

59. An action for libel lies against two, if the offense be a joint act done by both. *Harris v. Huntington*, 2 Tyl. 129.

60. An action for a libel is an action for "slandering words," in the meaning of the statute restricting costs in actions therefor. *Harris v. Lawrence*, 1 Tyl. 164. *Parsons v. Young*, 2 Vt. 434.

61. No action lies for libel upon a petition for redress of grievances, whether the subject matter of the petition be true or false, simply on its being preferred to the legislature, or disclosed to any of its members. *Harris v. Huntington*, 2 Tyl. 129.

62. It is a libel to publish of the plaintiff that he had, for the purpose of injuring the defendant, put in circulation a false report that the defendant had abused his family in a scandalous manner, by placing his grown daughter upon a rail *a la cavalier*, &c. Distinction taken between spoken and written slander. *Colbey v. Reynolds*, 6 Vt. 489.

63. In an action for libel, the defendant may plead to a part, definitely pointing it out; but if he attempts to recite the writing wholly, or in part, *in hæc verba*, and there is the omission, or substitution, or addition of a single word, there is a variance, and the plea is ill. *Torrey v. Field*, 10 Vt. 353.

64. In an action for libel, a plea averring in general that the matters set forth in the publication are true, is ill. The particular facts relied upon as constituting the charge must be set forth specifically, that the court may judge whether the facts warrant the charge made. *Ib.*

65. A plea justifying the words as true, must aver the truth of the "very charge;" and it is not sufficient to plead and prove the plaintiff guilty of a similar offense, or even of one more flagrant. *Ib.* 408.

66. It must put in issue the very fact which his words charge. *Holton v. Muzzy*, 30 Vt. 376.

67. In an action for libel, the defendant pleaded the general issue, and gave notice of special matter in justification. *Held*, that where the publication contains a direct and specific libelous charge, and the truth of the charge is relied upon in defense, the defendant is limited and confined in his proof to that very

issue; and the matter of justification, to be of any avail or admissible in evidence, must answer substantially, if not exactly, the substance of the libel declared upon, in the sense of the prefatory averments and innuendoes of the declaration. *Gregory v. Atkins*, 42 Vt. 287.

68. In such case, where the plaintiff does not claim to recover under so broad a construction of the libel as the evidence offered in justification implies, but only for charges of particular acts of misconduct, or acts of misconduct of the character charged in the publication, evidence of acts outside such specific charges should be excluded. *Ib.*

69. In an action for libel, the court charged the jury that the publication "was clearly a libel, if published in the sense charged in the declaration." *Held* to be correct; and that where there is no ambiguity in the language, as in a case where there is an unequivocal charge accusing one of an infamous crime, or of conduct calculated to bring him into disgrace, and which is injurious and affects him in his situation and station, whether libelous or not, is a question of law. The facts being ascertained, the legal quality of the publication is for the court. *Ib.*

70. Where the language is susceptible of a double meaning, one innocent and harmless, the other libelous and injurious, the sense is always for the jury to find, as well as to find whether the innuendoes of the declaration, explanatory of the meaning, are justified by the words; and it is in this view that the question, whether a libel or not, is for the jury. *Ib.*

71. The defendant wrote and published concerning the plaintiff a libelous letter, commencing, "I have been told," &c. The defendant offered evidence that he had been requested by his correspondent to find out certain facts about the plaintiff and to write the result of his inquiries in that respect; and that, according to such request, he made such inquiries previous to writing the letter. The court, against objection, admitted the evidence as bearing upon the point of the motive and intention, or alleged malice, with which the defendant wrote and sent the letter. *Held*, that this was error; (1), that the evidence did not go to the point that the matters stated in the letter were ascertained on such inquiry; (2), that the letter did not give the name of the author of the report; (3), that the request did not call for or justify any such response—the libel carrying on its face conclusive evidence of the most virulent malice. *Bond v. Kendall*, 36 Vt. 741.

72. Indictment. In an indictment for libel, the substance of the publication set forth was, that E attended a political convention while his wife lay dead in his house—with reflections and comments, based upon this sup-

posed fact, which if false were libelous; but it was not alleged in the indictment that any political convention was held on the day stated, or while Mrs. E lay dead at home. *Held*, on demurrer, that the indictment, for want of such prefatory averment, was insufficient, and was not aided by an innuendo ("meaning that the said E was attending a political convention all day.") *State v. Atkins*, 43 Vt. 252.

### SLAVE.

No inhabitant of this State can hold a person as a slave therein. A bill of sale of a slave executed in another State, though binding there, ceases to operate here when the master becomes an inhabitant of this State. *Selectmen v. Jacob*, 2 Tyl. 192. (1802.)

### SMALL-POX.

1. The selectmen of a town whose inhabitants are exposed to the spreading of small-pox, may, under the statute of 1797 (Slade's Stat. 498), for the purpose of preventing the spreading of the disease, procure the inoculation for kine-pox of those exposed, and a town tax assessed to defray the expenses therefor is valid. *Haesen v. Strong*, 2 Vt. 427.

2. A town which provides physicians, &c., for one infected with small-pox, may, under G. S. c. 99, s. 3, maintain an action for the expenses directly against the town where such person has a settlement, in case that person is not of sufficient ability to pay; notwithstanding he is a minor, and has a father bound to support him, who is of ability to pay. *Brattleboro v. Stratton*, 24 Vt. 306.

3. Certain duties are imposed and certain powers conferred on selectmen, but none on the town, as such, under the small-pox act (G. S. c. 99); and the town is not liable for the acts or default of its selectmen in that behalf. *White v. Marshfield*, 48 Vt. 20; and see *State v. Burlington*, 36 Vt. 521.

### SOLDIER'S BOUNTY.

1. **Statute.** Independent of any special statute, towns have no authority to vote bounties to soldiers. No such statute authorizes the voting of bounties to drafted men, who commuted. *Davis v. Putney*, 43 Vt. 582. *Whitney v. Athens*. *Id.* 584.

2. G. S. c. 15, s. 95, does not authorize towns to vote money to be paid to soldiers from

such towns in the U. S. army. The stat. of 1862 (G. S. 118, s. 1), embraced only volunteers. The authority to vote money to drafted men was first given by stat. of 1868, No. 2. *Burnham v. Chelsea*, 43 Vt. 69.

3. **Constitutional.** The act of 1862 (G. S. 118), authorizing towns to vote money to such soldiers as had before volunteered from such town, is constitutional; and the town, under a vote of that purport, is liable to such volunteer who has been applied upon the quota of the town, as upon a promise based upon the consideration of past services. *Butler v. Putney*, 43 Vt. 481.

4. The act of 1863, No. 2, authorizing towns to vote money to drafted men who had gone personally into service from such town, or had furnished an accepted substitute, is constitutional. *Laughton v. Putney*, 43 Vt. 485.

5. **Consideration.** Such service by a drafted man, going in reduction of the town quota, is a sufficient consideration to sustain the promise to pay a bounty therefor expressed in a subsequent vote of the town. *Swift v. Elmore*, 44 Vt. 87.

6. The same law applied to the case of a drafted man, who had procured a substitute at considerable expense. *Rosebrooks v. Guildhall*, *Id.* 90.

7. **Muster in.** An enlistment of a soldier is not perfected by signing an enlistment contract, but by being accepted and mustered into the service; and when the question is who first enlisted, the date is to be reckoned from the mustering in. *Steinberg v. Eden*, 41 Vt. 187. *Hill v. Eden*, 41 Vt. 195. *Jackman v. New Haven*, 42 Vt. 591.

8. **Adjutant-General's office.** The plaintiff re-enlisted in the field as a soldier Dec. 15, and was mustered in Dec. 16. Dec. 17, the defendant town voted to pay a bounty to each volunteer to fill a certain quota. Dec. 20, the plaintiff, having heard of this vote, procured his enlistment to be put to the credit of the town on said quota, and notice thereof was given to the Adjutant General of the State before such quota was filled. The town, having received no notice of the enlistment, filled its quota otherwise. *Held*, that the plaintiff could recover the bounty voted. *Gale v. Jamaica*, 39 Vt. 610.

9. The books and records in the office of the Adjutant-General of the State, and not the date of the muster-in, control as to who apply on the quota of a town under a given call, so as to entitle them to a bounty under the vote of the town to pay a bounty to those who should enlist and be credited to the town on its quota, under such call. *Bucklin v. Sudbury*, 43 Vt. 700. *Spalding v. Waitsfield*, 45 Vt. 20. *Moore v. Warren*, 45 Vt. 199.

10. Where the vote of a town offered a

bounty to such persons as should enlist before a day named "and be accepted on the quota of the town" under a particular call;—*Held* (overruling *Jackman v. New Haven*, 42 Vt. 591), that without actual acceptance and application on that quota in the office of the Adjutant-General of the State, the plaintiff, though applied on a subsequent quota, could not recover the bounty. *Bucklin v. Sudbury*. *Peck, J.*, dissenting.

11. **Express undertaking.** No case has yet gone so far as *professedly* to hold, that anything short of an express undertaking will make a town legally bound to pay a bounty to a soldier. *Barrett, J.*, in *Davis v. St. Albans*, 42 Vt. 590.

12. An unauthorized promise of the selectmen that the town would pay a soldier such bounty as the town should pay others on future calls, if he would let his name remain to the credit of the town, does not bind the town, though the town did pay bounties to others on future calls, and though the soldier, relying upon this promise, allowed his name to remain to the credit of the town, and he applied on the town's quota on future calls, and served through the war. *Wrisley v. Waterbury*, 42 Vt. 228.

13. **Past service.** The vote of a town to pay a soldier a bounty in consideration of a past enlistment and application upon the town's quota, is binding, and its legal effect cannot be defeated by a subsequent rescission of the vote. *Seymour v. Marlboro*, 40 Vt. 171.

14. Where a soldier, without request of a town, enlisted to its credit and applied upon its quota, and the town afterwards voted to pay a bounty to a class which embraced such soldier;—*Held*, that the service rendered by giving the town such credit was a sufficient consideration to make the promise contained in the vote a binding contract. *Cox v. Mount Tabor*, 41 Vt. 28.

15. **Rescission of vote.** *Held*, also, that the town could not by a subsequent vote rescind such contract. *Ib.* *Haven v. Ludlow*, 41 Vt. 418. 40 Vt. 171.

16. A soldier had enlisted under the selectmen of a town, duly authorized recruiting agents, and had been mustered into service and applied to the town's assigned quota, upon the promise of a bounty for which the selectmen had given him a town order. Under a vote of the town to pay volunteers "gone into the service of the U. S.," &c.;—*Held*, that the plaintiff could recover. *Pottle v. Maidstone*, 39 Vt. 70.

17. The plaintiff re-enlisted in the field and had himself credited to the defendant town, relying upon the assurance of an authorized recruiting agent of the town, that he would receive such pay as the town paid other soldiers. The town afterwards voted to pay each re-enlisted veteran \$500, &c. *Held*, that the plaintiff could

recover according to the vote. *Haven v. Ludlow*, 41 Vt. 418. (*Stiles v. Danville*, 42 Vt. 282.)

18. **The vote.** Under the vote of a town offering a bounty to such as should "enlist" before a certain date;—*Held*, that this embraced the case of one who had already enlisted before the passage of the vote under an expectation of receiving such bounty as the town should pay, and who was afterwards mustered into service to the credit of the town on its quota before the date fixed, he then having the right of determining to what town he should be credited; that his "enlistment," in the sense and spirit of the vote, became complete by the muster-in, and credit to the town's quota. *Johnson v. Newfane*, 40 Vt. 9.

19. The language of the town vote was "to pay to each re-enlisted veteran who has re-enlisted for three years \$500 \* \* excepting commissioned officers, and those who have died leaving no families, and deserters." The plaintiff, being within the terms of the vote, after demand of the bounty and refusal and during his term of service, brought his action which came on for trial after he had served out his full term. *Held*, that his right of action was perfect when the suit was brought, and his right to recover perfect at the time of trial, and that he could recover. *Haven v. Ludlow*, 41 Vt. 418.

20. **General offer.** A soldier, by complying with all the terms and conditions of a town vote constituting a general offer of a bounty to enlisting soldiers, may recover the bounty offered, although he did not enlist in reliance upon the vote, nor was influenced by it to enlist. *Davis v. Landgrove*, 43 Vt. 442. *Butler v. Putney*, *Ib.* 481. *Hill v. Eden*, 41 Vt. 195. *Jackman v. New Haven*, 42 Vt. 591.

21. Under an open offer by vote of a town to pay bounties to those who should enlist and be mustered into service to fill a particular quota, they who first comply with the terms of the vote, in number sufficient to fill the quota, exhaust the offer. The true date of the muster, and not the date of the muster-roll [which was dated back], was *held* to govern, under the vote. *Hunkins v. Johnson*, 45 Vt. 131.

22. A vote of a town to pay a specified bounty to each person who should enlist as a soldier to fill the town's quota, is a general and direct offer from the town to such person as should so enlist, and becomes a binding contract by such enlistment and muster into service, and no contract with or assent of the selectmen is necessary. *Jackman v. New Haven*, 42 Vt. 591. *Gale v. Jamaica*, 39 Vt. 610. *Steinberg v. Eden*, 41 Vt. 187. *Hill v. Eden*, 41 Vt. 195.

23. Nor will his claim be affected by the neglect of the Adjutant-General, or of the federal authorities, to set down his enlistment to

the credit of the town in its proper order, or to give the town notice; nor by the mere omission of the soldier to notify the town of his enlistment. *Steinberg v. Eden*, *Hill v. Eden*. *Jackman v. New Haven*. But see *Bucklin v. Sudbury*, 43 Vt. 700.

24. The warning for a town meeting was: "To see whether the town will vote bounties to supply the quota of said town under the recent call, \* \* for 300,000 men to serve in the war. In case the town shall vote to pay such bounties, to raise and provide means for the same." The vote was: "That the selectmen be instructed to borrow a sum not exceeding \$3,000 for the purpose of paying \$300 each to volunteers that may hereafter enlist for the war under the recent call, \* \* payment to be made such enlisted men when mustered into the service of the United States." *Held*, (1), that there was no such difference between the warning and the vote, as to render the vote inoperative; (2), that the only discretion left to the selectmen was, as to the amount of money they should borrow; (3), that the vote was such a general offer as the soldier might comply with, and thereby entitle himself to the benefit of its provisions, either with or without the intervention of a contract with the selectmen. *Mudgett v. Johnson*, 43 Vt. 423. *Hunkins v. Johnson*, 45 Vt. 131.

25. **Vote merely confirming authority to contract.** The vote of a town, "to direct the selectmen to pay three men the sum of \$300 each, as volunteer soldiers," to fill a given quota, was *held* not to be a general open offer, but to contemplate the personal participation of the selectmen in the procurement and designation of the men. *Slack v. Craftsbury*, 43 Vt. 657.

26. Under a town vote authorizing the selectmen to enlist men to be credited on the town's quota, and to pay such men enlisted a sum not exceeding \$400;—*Held*, that to entitle an enlisted man to recover a bounty under this vote, he must show that the selectmen agreed to pay him a bounty. *James v. Starksboro*, 42 Vt. 602. *Hicks v. Lyndon*, 42 Vt. 606. *Johnson v. Bolton*, 43 Vt. 303. *Chase v. Middlesex*, 43 Vt. 679. *Poquet v. North Hero*, 44 Vt. 91. 45 Vt. 275. *Guyette v. Bolton*, 46 Vt. 228.

27. A vote "that the selectmen be and are authorized to pay a bounty not exceeding \$300 to each volunteer, &c.," is not an open and general offer, even though the selectmen had agreed among themselves to pay each volunteer \$300; but requires the offer or promise of the selectmen to the volunteer, in order to the making of a contract, though the volunteer may have enlisted relying upon getting the \$300. *Johnson v. Bolton*, 43 Vt. 303. 46 Vt. 228.

28. The vote of a town to pay each volunteer soldier a bounty "not exceeding \$500,"

does not constitute an open offer, but requires some negotiation with the town officers to perfect the contract by fixing the sum. *Blodgett v. Springfield*, 43 Vt. 626.

29. Under a warning "to see if the town will authorize their selectmen to pay a bounty to volunteers to fill the quota of the town," a vote to instruct the selectmen "to pay \$325 for each volunteer to fill our quota," was *held* to refer only to the then present call of the government for volunteers; and that the plaintiff to recover the bounty must show a contract with the town, assented to by at least two of the selectmen. *Scott v. Cabot*, 44 Vt. 167. See *Eddy v. Landgrove*, 44 Vt. 465.

30. It was voted in town meeting, that a bounty be paid to each soldier who had re-enlisted to the credit of the town, or to such of his representatives, in case of his decease without family, as the selectmen in their discretion should deem most just and equitable. *Held*, that the administrator of the estate of a deceased soldier, so enlisting, must show, in order to recover the bounty, that the selectmen had exercised their discretion and determined that the bounty should be paid to such administrator. *Collins v. Burlington*, 44 Vt. 16.

31. **Concluding the contract.** The defendant town authorized its selectmen to offer a bounty of \$225, to each volunteer to fill its quota under a certain call. Afterwards, the orderly sergeant of the plaintiff's company in the field, in behalf of another member of the same company, wrote to R, one of the defendant's selectmen, inquiring what bounty the town would pay for volunteers, and R replied that the town would pay \$250. The plaintiff heard R's letter read in presence of his company, and, relying upon the statement thereof, and expecting to receive the bounty, re-enlisted to the credit of the defendant, reserving the right, as re-enlisted men had the privilege to do, of changing his credit, before muster, to any other town. Before muster, the plaintiff hearing that the town of S was paying a larger bounty, directed the proper officer to change his credit to S; but this was never done, and the plaintiff served to the close of the war, supposing he was credited to S. The plaintiff gave the defendant no notice of his enlistment to its credit until after his discharge; but the defendant had the benefit of his credit. *Held*, (1), that these facts tended to prove a contract between the plaintiff and the defendant; (2), that the plaintiff's attempt to get his credit changed, not perfected, did not prejudice his right of recovery; (3), that the fact stated in the exceptions, that "the defendant received the benefit of the plaintiff's credit," tended to prove that he applied upon the quota named in the vote, in the absence of evidence that he applied on any other quota, or that the town

had another quota; (4), that earlier notice of the plaintiff's enlistment was not material, since it did not appear that the town suffered any detriment by the delay. *Chandler v. Bristol*, 45 Vt. 880.

32. S and R, two of the three selectmen of the defendant town, went together to the plaintiff to procure him to enlist to apply on the town's quota. S was permitted by R to negotiate with the plaintiff in behalf of the town for the board of selectmen, and the contract was made between the plaintiff and S. *Held*, that R must be taken to have approved the hiring, and the price agreed to be paid by S; and that the town, having availed itself of the credit of the plaintiff in pursuance of the contract, and the contract having been performed on his part, could not repudiate the stipulation as to price, because it was larger than R and the third selectman understood it to be. *Earle v. Wallingford*, 44 Vt. 867.

33. The selectmen were authorized by town vote to hire men to fill the quota of the town, at the best advantage; and they made contracts for this purpose separately. M, one of the selectmen, contracted with the plaintiff to pay him for his enlistment \$500 and as much more as the town should pay any other recruit. The town did afterwards pay some others \$700. Before such contract, the selectmen agreed together that they would pay only \$500 to any recruit; but the plaintiff had no knowledge of this. M and one other of the selectmen afterwards were present and acted officially and took part in the plaintiff's muster into service, such other selectman supposing the contract was for only \$500. *Held*, that such other selectman must be taken to have known what he ought to have known, and what M knew, and what the plaintiff had good reason to suppose was known to both; and that the official participation of the two selectmen in mustering the plaintiff into the service was, under the circumstances, a ratification of the contract. *Tarbell v. Plymouth*, 39 Vt. 429.

34. Where the selectmen of the defendant town, having authority from the town, requested the plaintiff, then in the field, to re-enlist to the credit of the town, and offered him a certain bounty therefor, and he did so, relying upon such promise, and gave the town notice thereof in reasonable time, and continued in the service;—*Held*, that he was entitled to recover such bounty, although, but without his fault, he was not mustered into service under such re-enlistment for two or three months thereafter, and in the meantime the town had filled its quota otherwise. *Mann v. Fairlee*, 44 Vt. 672.

35. Where a town put its defense to an action to recover a soldier's bounty on the ground of a fraudulent representation, or con-

cealment of a physical defect which occasioned the discharge of the soldier before service, but after he had been mustered in and applied on the town's quota, the court charged, that for the defense to prevail, the jury must be satisfied that the plaintiff knew something material about his health or soundness which he misrepresented or concealed, for the purpose of inducing the town to enlist him. *Held* correct; but *semble*, if the defense had been put on the ground of an express warranty, such charge as to the *scienter* might have been erroneous. *Richardson v. Concord*, 40 Vt. 207.

36. The right of a soldier to recover a town bounty, where his case falls within the terms of the vote, is not affected by the fact that others, standing in the same position with himself, are mustered in at the same time to the credit of the town, more than enough to fill the quota. *Kittredge v. Walden*, 40 Vt. 211.

37. Desertion. The desertion of a substitute, after his enlistment and muster into the United States service, is not a bar to an action for a town bounty offered in favor of the party furnishing the substitute. *Rogers v. Shelburn*, 42 Vt. 550.

38. Nor does such desertion of a volunteer bar his action against a town for the bounty offered. His contract with the town was, not that he would perform three years' service as a soldier, but that he would enter into a contract with the United States so to do, and be mustered into service under that contract to the credit of the town; and the town gets the benefit it is to receive, by his application on its quota, and has no more interest in the fact of his desertion than in the desertion of any other soldier in the service. *Bingham v. Springfield*, 41 Vt. 32. (Altered by Stat. 1864, p. 26, a. 8.)

39. A town voted to pay a bounty to such veteran soldiers as had re-enlisted to the credit of the town, and had not been paid a bounty, excepting such as had deserted. The plaintiff had so re-enlisted and deserted before the passage of the vote, but afterwards returned under the President's proclamation of pardon and served to the close of the war and was honorably discharged. *Held*, that he could not recover under the vote. *Barnes v. Rutland*, 42 Vt. 622.

40. The plaintiff was duly drafted as a soldier and was notified thereof, and when and where to appear in response thereto. He purposely neglected to report on the day ordered, and on the evening of that day was arrested, and the next morning was taken to the provost marshal's office, was examined and accepted as a soldier and was put to the credit of the defendant town. He was then committed to prison and kept ten days, and then was sent forward to the draft rendezvous and thence to



the front, but under charges for desertion, in accordance with the regulations of the War Department in cases of such neglect to report. These made him liable to punishment under the acts of Congress, which provided that any drafted man who should fail to report after due notice shall be "deemed a deserter." No further proceedings were had upon the charges and the plaintiff served until the war closed, and was then mustered out. Stat. 1864, No. 6, s. 3, provides, that "no action shall be had or sustained against any town by a soldier, for such bounty or pay, where said soldier has deserted the service." In an action to recover a bounty duly voted by the defendant town to drafted men;—*Held*, by a majority of the court, that the plaintiff could not recover; and that common law courts have jurisdiction of this question of desertion, when raised in defense to such a suit. (Case distinguished from *Hulen v. Reilly*, 53 Penn. 112.) *Harvey v. Peacham*, 42 Vt. 287.

41. The plaintiff enlisted for the town of G and became entitled to a bounty of \$800 when mustered in. Induced by the offer of \$600 paid him by the town of L, he deserted G and, with the fraudulent connivance of the agents of L, got himself mustered in to the credit of L upon its quota; but the mustering-in officer, on the application of the agents of G, withdrew his credit from L and set it to G, and he was compelled to serve out his time. *Held*, that having performed his contract with G, though by compulsion, the plaintiff could recover the bounty promised by G. *Bonnett v. Guildhall*, 38 Vt. 232.

42. *Infant*. A minor having enlisted into the military service of the government with the consent of his father, is entitled, as against his father, to receive and control such compensation as he is entitled to from the government, or otherwise, under his enlistment contract, as also the town bounty paid by the town as an inducement to enter into the enlistment contract, and to be credited to the quota of the town. *Baker v. Baker*, 41 Vt. 55.

43. This consent to the enlistment is a virtual emancipation or discharge of the minor from all obligations of service or obedience to the father, so long, at least, as the enlistment contract exists. *Id. Stiles v. Danville*, 42 Vt. 282.

44. *Construction of vote*. The vote of a town "to pay the veteran soldiers" a bounty, without further specification of what veteran soldiers, was interpreted to apply to those veterans whose service stood to the credit of that town. *Cox v. Mount Tabor*, 41 Vt. 28.

45. The plaintiff on enlistment was induced to set his name to the credit of the defendant town, upon the promise of the selectmen that the town would pay him as much bounty as it

should vote to others. The town afterwards voted to pay \$300 to each of eleven men to fill the deficiency of its quota. *Held*, that the vote excluded the plaintiff, and he could not recover. *Hartwell v. Newark*, 41 Vt. 337.

46. The warning of a town meeting was "to see what action the town will take in regard to the expected draft soon to be made," &c., and "to see whether the town will vote to pay bounties to volunteers; if so, what bounties." At an adjourned meeting under this warning, the town voted, "to pay each man liable to draft who has furnished a substitute," &c., "\$600." *Held* (by a majority), that the warning was sufficient to authorize the vote. *Hickok v. Shelburn*, 41 Vt. 409. *Rogers v. Shelburn*, 42 Vt. 550.

47. A man liable to draft furnished and paid a substitute who was enlisted and mustered into service to the credit of the defendant town upon the request of the agents of the town and their assurance that the town "would do what was right about it." The town subsequently voted to pay each man liable to draft who had furnished a substitute \$600. In an action to recover the bounty, *held* (by a majority), that under Stat. 1862, No. 88, such vote was authorized;—and *held*, that a recovery could be had under the common count in assumpsit for money paid to the use of the town. *Id.*

48. *Construction of town votes in soldier's bounty case*. *Wood v. Springfield*, 43 Vt. 617.

49. A town having 16 men assessed as its quota of the then last call, under a warning, "(3d.) to see if the town will raise money to pay bounties to soldiers who may enlist to fill our quota on said call, and how much"; "(4th.) to see if the town will vote and pay bounties to re-enlisted soldiers who have not been paid bounties,"—*voted*, under the 3d article, to pay each volunteer a sum named "as town bounty, when mustered into the service of the United States, to the amount of the quota of the town" under that call; and, "*voted* to pass over the 4th article of the warning." The plaintiff had before this re-enlisted in the field to the credit of the town, and was one of a surplus of five men furnished by the town who had been applied to no quota, but stood as credits in reduction of the present quota, reducing it to 11 men, which the town knew. *Held*, that the plaintiff could not recover a bounty under the votes; that the quota referred to in the 3d vote meant such reduced quota, and did not embrace the plaintiff; that his case fell within the 4th article of the warning, and that the vote "to pass over" that article, was equivalent to a vote to dismiss it, or to reject the proposition; and that a promise by one of the selectmen, who was recruiting officer, to pay such bounty, never being voted, did not bind the town. *Livingston v. Albany*, 40 Vt. 666.

50. A town having a quota to fill, passed a vote to pay a specified bounty to each volunteer who should enlist on that quota. The plaintiff, being then in service, re-enlisted and was mustered in before said quota was filled, but no notice of such enlistment was given or received by the town until after said quota was ordered to be filled, and was filled by the town and the bounties paid as voted. The plaintiff was in fact applied upon a subsequent quota of the town, for which the town had not voted a bounty. Upon these facts alone, *held*, that the plaintiff could not recover the bounty voted. *Witherell v. Fletcher*, 42 Vt. 409.

51. A soldier who had been discharged and afterwards re-enlisted, cannot claim a bounty under a town vote afterwards passed to pay a bounty to veterans "re-enlisted in the field." *Sargent v. Ludlow*, 42 Vt. 726.

52. A vote "to raise \$325 on the grand list for each volunteer to fill the quota of the town under the last call, &c," construed not to apply to a deficiency under former calls. *Hatch v. Fairfield*, 43 Vt. 321.

53. A vote "to raise \$1000 for each white volunteer to fill the quota of the town under the call, &c., of July 18, 1864," construed to apply only to such as should thereafter enlist to complete the quota, which was, and was known to be, partly filled by previous enlistments. *Ib.*

54. A town voted "to instruct the selectmen to pay each enlisted man \$200 when he shall be mustered into the service of the United States, up to the number of 18." The plaintiff was one of the first of the 18 mustered into service and applied on the town's quota. *Held*, that he was entitled to recover the \$200—although he enlisted without expectation of the bounty and without the procurement of the selectmen; and although the selectmen had contracted with 18 others for their enlistment; and although the town subsequent to the plaintiff's enlistment instructed the selectmen not to pay a class of which the plaintiff was one; and although the selectmen notified the plaintiff before he was mustered in, that they would not pay him. *Chase v. Middlesex*, 43 Vt. 679.

55. Where the application for a town meeting was, "to see what course the town will take to fill the quota of men required of the town of Waterbury under the last two calls of the general government for soldiers;" and the warning, reciting the terms of this call, was, "to see if the town will pay any additional bounty to volunteers from said town, and, if any, how much, or what action they will take upon the subject;" and the vote was, "to pay each volunteer from this town a bounty of \$300, when mustered into the United States service";—*Held*, that this bounty was confined to such as should enlist under the call or calls made before the date of that vote. *Wristley v. Water-*

*bury*, 42 Vt. 228. *Jones v. Waterbury*, 44 Vt. 113.

56. The defendant town voted to pay a bounty of \$300 to each man who should enlist into the *old* regiments, to fill the town's quota under a given call. The plaintiff enlisted into a *new* regiment, but was actually applied on the quota named in the vote. *Held*, that this was not a compliance with the conditions expressed, and that the plaintiff could not recover the bounty. *Carley v. Highgate*, 45 Vt. 273.

57. The warning of a town meeting was: "To see if the town will raise a sum of money to encourage enlistments in said town." The vote was: "That the sum of \$300 be paid to each of such volunteers as may be enlisted and mustered into service under the call of the President for 300,000 men, Oct. 17, 1863, provided the quota is not filled; and in case the quota is filled, then the further sum of \$200, to the number of 29 men." The plaintiff re-enlisted in the field to the credit of the town, Dec. 16, 1863, and was mustered in the same day, but without knowledge of such vote, and not acting upon the faith of it. His muster roll was not received at the Adjutant-General's office till between Jan. 17 and 21, 1864. On and before Dec. 25, 1863, the selectmen had enlisted and caused to be mustered in the full quota of the town, and, until several weeks after and after the bounties had been paid, it was not known that the plaintiff had enlisted. The plaintiff was in fact one of the first twenty-two who enlisted after the passage of the vote and one of the first six who were mustered in. *Held*, (1), that the warning did not confine the enlistments to such as should be made within the territorial limits of the town; (2), that the plaintiff was not entitled to the \$300 bounty voted. *Davis v. Windsor*, 46 Vt. 210.

58. **Particular contracts.** The plaintiff enlisted as a soldier for three years to the credit of the defendant town, for a bounty of \$530, and the further agreement of the town to pay him as much more as they should pay for any other three years' man—the agent asserting that he should fill the quota only with three years' men. The agent afterwards filled the quota with one year men, and paid one of them \$625. *Held*, that the plaintiff could recover this difference. *Burbee v. Winhall*, 41 Vt. 694.

59. Where a town had voted to pay recruits, when enlisted, \$200, and the plaintiff enlisted upon the payment of the \$200 and the further promise by the selectmen, that if the town should pay more than \$200 bounty to any men under that call, they would pay all alike, and the town afterwards duly authorized the selectmen to enlist four other men required to fill its quota, and to use their discretion in paying them bounties, and the four men were enlisted

and the selectmen paid three of them \$400 each;—*Held*, that as the plaintiff knew of the extent of the authority of the selectmen, they did not make themselves personally liable to him for any increase of bounty in consequence of having transcended their authority from the town; but *held*, also, that the testimony tended to prove a personal undertaking on the part of the selectmen and should have been submitted to the jury. *Leet v. Shedd*, 42 Vt. 277.

60. A town that fills its quota, in good faith, is not bound to pay a bounty to others who may have enlisted and been mustered in at an earlier date, where the town had no notice of such enlistments, and they were not applied on the quota. This has been repeatedly adjudged. *Atwood v. Lincoln*, 44 Vt. 332. 46 Vt. 213.

61. Where the selectmen were authorized by vote of the town to procure volunteers and to pay certain bounties, one of them wrote a letter (not official) to a soldier in the field, informing him that the town was paying certain bounties to such as should re-enlist to its credit and be applied on its quota. The plaintiff on hearing this letter read in camp re-enlisted and was mustered to the credit of the town, he relying upon the information contained in the letter and expecting the bounty. He immediately gave notice to the selectmen of such re-enlistment and that he expected the bounty. *Held*, that these facts did not constitute a contract with the town, and that the plaintiff could not recover. *Sanders v. Bolton*, 47 Vt. 276.

*Soldiers voting*—see STATUTE, 20.

### SPECIFIC PERFORMANCE.

1. **Part performance—Statute of frauds.** The ground for decreeing specific performance of a contract falling within the statute of frauds, where there has been part performance, is that of fraud; not that kind of fraud which consists merely in the non-performance of a promise, but something more (as illustrated). *Meach v. Perry*, 1 D. Chip. 182.

2. To a bill for a specific performance of a parol contract for the sale of lands, the defendant may avail himself of the statute of frauds, either by plea or demurrer, except in certain cases; as, where the bill alleges part performance, &c. *Id.*

3. The objection to a bill for the specific performance of a parol contract, that it is within the statute of frauds, should be taken by plea, or in the answer; otherwise, it is waived. *Adams v. Patrick*, 30 Vt. 516. 46 Vt. 151.

4. Equity will not refuse to decree specific performance of a parol contract in part performed, and so work a forfeiture of the con-

tract, because of some failure in the performance not incurred through gross negligence or bad faith, and where compensation in damages can be made to the defendant; but will provide in the decree for the satisfaction of such damages. *Id.*

5. **Discretion.** A court of equity has a discretion in decreeing a specific performance of a contract, and will not do it where it will be useless and nugatory to the complainant to have it done. *Id.*

6. Nor, where it is not in the power of the defendant to perform it; as, to convey a right which has already been conveyed to another. *Conant v. Bellows Falls Canal Co.*, 29 Vt. 263.

7. **Instance.** The orator purchased land of the defendant by verbal contract, and paid him the price, upon the defendant's promise that he would execute a proper deed the next morning and leave it in the town clerk's office for record. The defendant surrendered possession, and, although the orator did not take actual possession, yet supposing that the deed had been executed and left as agreed, he sold and got pay for the land, and executed a warranty deed thereof to the purchaser. On a bill for a specific performance, the court decreed a conveyance by the defendant. *Stark v. Wilder*, 36 Vt. 752.

### STATUTE.

- I. ENACTMENT.
- II. CONSTITUTIONALITY AND VALIDITY.
- III. CONSTRUCTION, OPERATION AND EFFECT.
- IV. REPEAL, AND EFFECT THEREOF.

#### I. ENACTMENT.

1. **Old constitution.** When the Governor and Council suspended the passage of a bill until the next session of the legislature, and at the next session it was passed without amendment;—*Held*, that it became a law without again sending it to the Governor and Council. *Easterbrook v. Low*, 2 Vt. 135.

2. **Joint resolution.** A joint resolution of the two houses of the General Assembly, but without the approval of the Governor, has not the character of a legal enactment. The Governor, under the constitution, is a co-ordinate branch of the government and a necessary party to all acts of legislation. *Kellogg v. State Treasurer*, 44 Vt. 356.

3. **At what time a statute takes effect.** A statute which takes effect from its passage goes into operation on the day on which it is approved; and this has relation to the first moment of that day. The statute repealing the U. S. bankrupt act of 1841 was approved March

8, 1843. *Held*, that a petition in bankruptcy filed on that day came too late and must be dismissed. *In re Howes* (U. S. D. C.), 21 Vt. 619. *In re Welman* (U. S. D. C.), 20 Vt. 653.

4. **How this must appear.** The time when a statute, which is approved and signed by the executive, takes effect, must appear, and can properly appear only, from the statute itself. *Id.*

## II. CONSTITUTIONALITY AND VALIDITY.

5. **Valid.** A statute purporting to legalize a defective proprietary division of the lands of a town, was *held* valid. *Forbes v. Smith*, 1 Tyl. 88.

6. A special statute authorizing, but not compelling, one of two administrators (the other being absent in the military service of the United States), to convey the lands of the estate to creditors in payment of debts at an appraisal, with a deduction of not exceeding 25 per cent., was *held* constitutional, and such deed valid. *Langdon v. Strong*, 2 Vt. 284.

7. **Invalid — as assuming judicial powers.** An act of the legislature directing that a particular deposition taken should be read in a certain cause, was *held* unconstitutional and void, as an attempt to exercise judicial powers; as retrospective; and rather in the nature of a legislative sentence, order, or decree, than a law. *Dupy v. Wickwire*, 1 D. Chip. 287. 2 Vt. 256.

8. — **as taking away vested rights.** The judgment of the commissioners of claims against an estate, not appealed from, is a final judgment which fixes the rights of the parties; and a special act of the legislature, allowing a further time for appeal after the expiration of the time limited by the general law, is unconstitutional and also, on general principles, void. *Bates v. Kimball*, 2 D. Chip. 77. *Staniford v. Barry*, 1 Aik. 314. 2 Aik. 294. 2 Vt. 257.

9. An act of the legislature authorizing the probate court, in a particular case, to renew a commission of claims after the time limited by the general law for such renewal, was *held* void—as not general in its operation; as retrospective in its effect; as taking away rights vested by the general law, and giving rights extinguished by the same general law. *Brudford v. Brooks*, 2 Aik. 284.

10. A statute allowing an appeal from the decisions of road commissioners, already made, was *held* unconstitutional and void as to those persons to whom damages and costs had been awarded. *Williams, J.*, dissenting. *Hill v. Sunderland*, 3 Vt. 507. 19 Vt. 90.

11. A special act of the legislature discharging a debtor from imprisonment on execution, or freeing his body from arrest for a certain time, is not authorized by the constitution of

this State. It does not partake of the character of a law, and, on the general principles of law, is void, and is no protection in an action for an escape. *Ward v. Barnard*, 1 Aik. 121. *Keith v. Harrington*, 2 Aik. 298. 2 Vt. 174. *Lyman v. Mower*, 2 Vt. 517. *Kendall v. Dodge*, 3 Vt. 360.

12. A private act of the legislature releasing a jail bond, where the condition was already broken, was *held* unconstitutional. *Starr v. Robinson*, 1 D. Chip. 257. 2 Vt. 257.

13. **Retrospective, but affecting remedy only.** The statute of 1830, authorizing the county courts to grant relief to persons imprisoned on executions for torts, applies to those in prison when the statute was enacted, and is constitutional. *Sommers v. Johnson*, 4 Vt. 278.

14. The statute of 1818 (G. S. c. 40, s. 14) applies to leases made before the passage of the statute; which only gives a new and more simple remedy for an existing right, and is constitutional. *Maidstone v. Stevens*, 7 Vt. 487.

15. The betterment acts, though retrospective, are not for this reason unconstitutional. *Brown v. Storm*, 4 Vt. 87.

16. **Claim against State.** A petitioner under the act of 1831 was *held* to have no claim against the State “legally, or in analogy to the principles of law, or according to the principles of justice and equity,” for money which he had been compelled to pay as surety for one in jail, who, having obtained a suspension act, departed from the liberties, though said act was afterwards adjudged unconstitutional. *Davison v. State*, 4 Vt. 285.

17. **Statute impairing grant or contract.** The legislature can pass no act impairing the rights or privileges of a corporation and opposed to the original grant, without its consent; as, that a turnpike corporation, previously chartered, shall allow a certain class of persons to pass toll free. *Pingry v. Washburn*, 1 Aik. 264. 27 Vt. 152.

18. A grant of land by a State legislature, though made for the purpose of public instruction, is a contract which the State has no power to impair by subsequent legislation. *Grammar School v. Burt*, 11 Vt. 632.

19. **Turnpike supervision.** The act of 1806, authorizing the appointment of turnpike inspectors, and placing turnpike companies under their supervision to order repairs made, gates to be opened, &c., was *held* constitutional as applied to companies chartered before the passage of that act; and that the inspectors might order such repairs as were necessary at the time of the order, not going beyond the charter, without regard to the state of the road as first made and accepted by the authorities named in the charter. *State v. Boerworth*, 18 Vt. 402. 27 Vt. 152.

**20. Soldiers' voting.** The act of Nov. 11, 1863 (Laws of 1863, No. 5), providing for soldiers voting without the State, was held unconstitutional as respects the voting for governor, lieutenant-governor and treasurer; and that, under the State constitution, the right of voting for these officers can only be exercised within the State in the "freeman's meetings" to be held within the towns on the first Tuesday of September in each year; but that so much of the act as authorizes such voting for members of Congress, and electors of President and Vice-President, is not contrary to any provision of the constitution of this State, or of the United States. *Opinions of the judges*, 37 Vt. 665.

**21. Right of trial by jury.** Any statute which destroys or materially impairs the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury, is unconstitutional. *Held*, that the act of 1856, No. 6, providing for a compulsory reference of actions, was for this cause unconstitutional. *Plimpton v. Somerset*, 33 Vt. 283.

**22.** The denial of the right of trial by jury to the trustee of an absconding debtor, is not inconsistent with the constitution of this State, or of the United States. *Huntington v. Bishop*, 5 Vt. 186.

**23.** The tenth article of the State Bill of Rights has reference to that class of criminal offenses usually denominated high crimes, the punishment of which affects life, liberty and reputation, and exposes the offender to infamous corporal suffering, at the least, and has no application to those minor offenses which chiefly concern the regulation of the internal police of the State. *Redfield, C. J.*, in *State v. Conlin*, 27 Vt. 318. *In re Dougherty*, 27 Vt. 325. *State v. Freeman*, 27 Vt. 526. See *infra*, 24.

**24.** Article 10 of the Bill of Rights, which provides "that in all prosecutions for criminal offenses, a person hath a right to \* \* a speedy public trial by an impartial jury of the country," applies to all prosecutions for crimes or misdemeanors, in the trial of which "the issue in fact is proper for the cognizance of a jury," according to Article 12. It applies to minor offenses, such as violations of the statute prohibiting the sale or manufacture of intoxicating drinks. [G. S. c. 94.] *Dicta contra* in *State v. Conlin*, &c., *supra*, disapproved. *State v. Peterson*, 41 Vt. 504.

**25.** The word "jury" as thus used in the constitution means a common law jury of twelve men. *Id.*

**26.** The provision of the charter of the city of Burlington, which professes to confer final jurisdiction upon the recorder's court to try and determine criminal cases within the juris-

diction of a justice of the peace to try and determine, without provision for a trial by such jury of twelve men, is unconstitutional. *Id.*

**27.** It is not a violation of the right of trial by jury under the constitution, to provide for a mode of trial without jury, or by a jury of less than twelve men, where an appeal is allowed to a court where a trial by a common law jury can be had. *Id. Lincoln v. Smith*, 27 Vt. 361.

See CONSTITUTIONAL LAW.

### III. CONSTRUCTION, OPERATION, AND EFFECT.

**28. Practical construction.** The contemporaneous and long established practical construction of a statute may have the force of a judicial determination. *Boyden v. Brookline*, 8 Vt. 284.

**29. Terms of former statute employed in new.** Where terms or modes of expression are employed in a new statute which had acquired a definite meaning and application in a previous statute on the same subject, or one analogous to it, they are generally supposed to be used in the same sense; and in settling the construction of such new statute, regard should be had to the known and established interpretation of the old. *Whitcomb v. Rood*, 20 Vt. 49.

**30. Terms of English statute.** Where an English statute which has received a fixed and well-known construction, is adopted in this State, we take it with the construction which it had received; and this, upon the ground that such was the implied intention of the legislature. *Adams v. Field*, 21 Vt. 258.

**31. Words yielding to spirit.** In construing a particular statute (G. S. c. 126, s. 52) the court say: "The necessity of the case compels us to include them [certain officers not named], at the expense of forcing the construction of the words of the act, in order to avoid so gross an absurdity as the literal interpretation would lead us into." *Henry v. Tilson*, 17 Vt. 479.

**32.** In construing statutes, the terms of a proviso may be limited by the general scope of the enacting clause. So done, where the proviso was in terms repugnant to the enacting clause. *State Treasurer v. Clark*, 19 Vt. 129.

**33.** Under those rules for the construction of statutes which look to the whole and every part of a statute and the apparent intention derived from the whole, to the subject matter, to the effects and consequences, and to the reason and spirit of the law, the court held themselves at liberty to, and did, disregard the letter of a statute, and attach to it that meaning which the legislature really intended, where the words of the statute were admitted to be plain

and unambiguous to the contrary, but where they were directly repugnant to the whole spirit and intent of all legislation on the same subject and in the same act, and seemed to involve an absurdity. *Ryegate v. Wardsboro*, 30 Vt. 746.

34. Where a statute is strongly derogatory to common right, no case can be brought within it except such as comes within its terms with imperative necessity. *Farnsworth v. Goodhue*, 48 Vt. 209.

35. **Whether prospective, or retrospective.** It is an elementary principle, that all laws are to commence *in futuro*, and operate *prospectively*; and no one can question the correctness of the position, as a general rule, that no statute is to be so construed as to have a retrospective operation beyond the time of its enactment, unless the language is too explicit to admit of any other construction. *Bennett, J., in Briggs v. Hubbard*, 19 Vt. 90. *Lowry v. Keyes*, 14 Vt. 74. *Wires v. Farr*, 25 Vt. 41. *Richardson v. Cook*, 37 Vt. 599. *Sturgis v. Hull*, 48 Vt. 302.

36. But where such intent is apparent, and a retrospective operation of the act would not impair an existing right or inflict any wrong; or, if such intent be not manifested by the form and language of the enactment, still, if the just results would constitute a reason for giving it such operation, and it be not restrained in this respect by some provision of it, such reason would be permitted to operate, and the act have a retrospective effect. *Barrett, J., in Hine v. Pomeroy*, 39 Vt. 223.

37. By R. S. c. 33, s. 9, it was provided that a judgment of a justice might in certain cases be vacated on petition to the county court, but not unless presented at the first or second term after the rendition of such judgment. By act of 1843, that limitation was repealed, and the act provided that no such petition should be sustained "unless brought within *two years* next after the justice judgment." *Held*, that although it was the intent of the act of 1843 that it should be so far retrospective as to reach a case upon which the previous statute had not then fully run, it did not embrace a case where the remedy was fully barred by the revised statutes when the statute of 1843 was enacted. *Briggs v. Hubbard*, 19 Vt. 86.

38. A statute providing, or merely affecting, the remedy, may apply to causes of action already existing, as well as to those thereafter to accrue. Whether it does so apply, is to be determined from the language of the act, and from the reason of the thing. *Held*, that G. S. c. 30, s. 73, applied to past defaults of a sheriff —it concerning the remedy only. *Hine v. Pomeroy*, 39 Vt. 211.

39. So *held* as to Stat. of 1850, in relation to invalid and informal levies of execution. *Pratt*

*v. Jones*, 25 Vt. 303; and to Stat. of 1837, on same subject. *Bell v. Roberts*, 13 Vt. 582.

40. But *held contra*, as to act of 1872, No. 54, as to the effect of a past judgment to account in an action of account. *Sturgis v. Hull*, 48 Vt. 302.

41. **Conjunctive and disjunctive clauses.** It is not uncommon, in construing a statute, to take a conjunctive clause in a disjunctive sense, where it is obvious such was the intention of the legislature. "Law and equity," was construed as, law or equity. *Barker v. Esty*, 19 Vt. 181.

42. Construction of the marriage act, where the word *or* connects clauses of a sentence, and not words only. *Ellis v. Hull*, 2 Aik. 41. *Campbell v. Shattuck*, 2 Aik. 109.

43. **Directory, or mandatory.** A statute cannot be construed to be merely directory, in opposition to its own direct negative terms. *Warner v. Stockwell*, 9 Vt. 9. 17 Vt. 77.

44. As to when a statute is directory merely, see *Holland v. Osgood*, 8 Vt. 276. *Corliss v. Corliss*, 8 Vt. 373. *Briggs v. Georgia*, 15 Vt. 61. *Crosby v. School Dist. Readsboro*, 35 Vt. 623, 630.

45. It is said, that the word "may" in a public statute means *must*. But the law has made no new lexicon in this class of cases to give exceptional meaning to words; the intent and purpose of the legislature is the true guide and criterion of construction, whether to impose a positive and absolute duty, or merely to give a discretionary power. The word "may" means *must* or *shall*, only in cases where the public interest or rights are concerned, and where the public or third persons have a claim, *de jure*, that the power should be exercised. *Kellogg v. State Treasurer*, 44 Vt. 356.

46. The joint resolution of the general assembly of 1870, "authorizing" the State Treasurer to pay in coin certain State bonds issued before the passage of the "legal tender act,"—construed as permissive only, and intended to enable the treasurer to conform to the law as then interpreted by the courts, and so long as that interpretation prevailed, and no more. *Ib.*

47. Where the terms of a statute leave room for any administrative discretion to be exercised, it cannot be interpreted to be mandatory. And a statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute. *Free Press Assoc. v. Nichols*, 45 Vt. 7.

48. Statute of 1867, No. 61, "An act relating to State printing," construed and applied. *Ib.*

49. **Remedial.** A statute which gives to a party aggrieved a right to recover cumulative

damages—as, double damages and costs—or a fixed compensation for an injury, though denominated a forfeiture, is treated as a remedial and not a penal statute. *Burnett v. Ward*, 43 Vt. 80. *Newman v. Waite*, 43 Vt. 587. *Spaulding v. Cook*, 48 Vt. 145. See USURY, 36, 37.

**50. Prohibitory.** Where a statute prohibits a thing to be done, an act done in contravention of the prohibition must be adjudged inoperative and void, if the statute cannot be otherwise made effectual to accomplish the object intended by its enactment. *Bank of Rutland v. Parsons*, 21 Vt. 199. *Nelson v. Denison*, 17 Vt. 73.

**51. —by implication.** Where a statute imposes a penalty for doing an act, it impliedly prohibits the act and makes it illegal, and no right of action can be based upon such illegal act, in favor of a party to it. *Territt v. Bartlett*, 21 Vt. 184. *Bancroft v. Dumas*, *Id.* 456. *Converse v. Foster*, 32 Vt. 828. *Howe v. Stewart*, 40 Vt. 145. There is no difference between such a statute and one which expressly prohibits the act and imposes a penalty. *Aiken v. Blaisdell*, 41 Vt. 655.

**52. Statute construing former one.** A statute which in form declares what construction or application shall be given to a former statute, has no other effect than to change the law from the date of the passage of the last act, and does not affect a past suit or transaction. *Johnson v. Dexter*, 37 Vt. 641.

**53.** A statute amending a prior one by declaring that it shall be amended so as to read in a given manner, has no retroactive effect, but is to be treated as a new enactment as to any new provisions; and as to such part as is copied without change, this is not to be considered as repealed and again enacted, but to have been the law. *Kelsey v. Kendall*, 48 Vt. 24.

**54. Statute form.** A form prescribed by statute must be followed in every essential particular; but not every verbal variance, either in the omission or addition of words, will vitiate. If the matter intended appears with sufficient certainty from the whole instrument, the purpose of the statute is answered. [Applied to a warning-out process]. *Shrewsbury v. Mount Holly*, 2 Vt. 220.

**55. Compilation.** The several acts of the compilation of 1797 are not to be considered as prior and subsequent acts, but as passed simultaneously and constituting parts of one general system. *Ashley v. Harrington*, 1 D. Chip. 348. 8 Vt. 93.

#### IV. REPEAL, AND EFFECT THEREOF.

**56. Repeal by implication.** A subsequent statute revising the whole subject matter of a former one, and evidently intended as a substi-

tute for it, operates to repeal it, although without express words to that effect. *Farr v. Brackett*, 30 Vt. 344. *Giddings v. Cox*, 31 Vt. 607. *Haynes v. Bourn*, 42 Vt. 690.

**57.** To repeal a statute by implication, there must be such a positive repugnancy between the provisions of the new law and the old, that they cannot stand together, or be consistently reconciled. *Ide v. Story*, 47 Vt. 62.

**58.** A statute entitled as “in amendment of” a former statute, and which enacts that the former statute “shall read as follows,” and then recites the former statute, omitting one of its provisions, was held to be a substitute for the former and to be a repeal of it, so far as it differed from the act last passed—that is, the omitted part stood repealed. *Barnet v. Woodbury*, 40 Vt. 266.

**59. Effect on pending suit.** The repeal, without a saving clause, of a statute authorizing a penal action, ends an action upon it pending, and the action will be dismissed on motion. *Sumner v. Cummings*, 23 Vt. 427.

**60.** The repeal of a statute prescribing a particular mode of trial, will not operate to abrogate the proceedings already had under it, but they will be preserved and united with proceedings under the new statute, unless in cases where that is clearly impracticable. *Danforth v. Smith*, 23 Vt. 247.

**61.** The statute of 1851 (G. S. c. 4, s. 19), providing that the repeal of a statute shall not operate to defeat actions brought upon such statute, applies to all cases which depend upon such statutes for their form and vitality;—as, the statute of 1850 in relation to invalid and informal levies of execution (*Pratt v. Jones*, 25 Vt. 308); and G. S. c. 30, s. 73, in relation to suits against the sureties of sheriffs (*Hine v. Pomeroy*, 39 Vt. 211); and it is not limited in its effect to cases of formal repeal in literal terms, but applies to cases where the provisions on which such actions depend have ceased to be operative by reason of other enactments. *Hine v. Pomeroy*.

**62.** The repeal of the statute requiring *ex parte* depositions to be filed 30 days before being offered in evidence, was held to make such a deposition admissible, though not filed, where it had been taken more than 30 days before the term. *Armstrong v. Griswold*, 28 Vt. 376.

**63. —on rights fixed.** A right acquired under a statute while in force—as, a settlement—does not cease by a repeal of the statute. *Starksboro v. Hinesburgh*, 13 Vt. 215.

**64.** The statute of 1820 provided that no person employed in the practice of physic and surgery, &c., “shall hereafter have any right to make any demand for the same, or shall be entitled to the benefit of law for the collection of his fees,” &c., unless licensed, &c. *Held*,

that the repeal of this act did not enable one unlicensed to recover for medical services rendered before the repeal. *Warner v. Saxby*, 13 Vt. 146.

### SUBSCRIPTION.

1. A subscription made to the University of Vermont for the purpose of erecting college buildings, accepted by the corporation and upon the faith of which expense has been incurred, was held to be upon sufficient consideration, and mutual, and binding. *University v. Buell*, 2 Vt. 48. 9 Vt. 293. 24 Vt. 196.

2. The defendant signed a subscription paper for the erection of certain college buildings, promising to pay "\$50, in labor or materials, at his option, another season." Held, that no special demand of payment or notice was necessary, where the defendant had knowledge that the work was going on. *Id.*

3. In an action upon a subscription for a college, it was held to be a good defense that the subscription was obtained by false representations, and by the procuring of other apparent but unreal subscriptions, as an inducement for others to subscribe, &c. *Middlebury College v. Loomis*, 1 Vt. 189. *Same v. Williamson*, 1 Vt. 212.

4. In an action on the defendant's subscription for the building of a meeting house;—Held, that he could not prove in defense, that the plaintiff's agent procured such subscription upon the verbal assurance that he wanted the defendant's signature to influence others to sign, and that if he would sign he should never be called on to pay. *Blodgett v. Morrill*, 20 Vt. 509. 24 Vt. 477.

5. And held, that it was not a defense that a subscription upon the same paper, previous to the defendant's, had been obtained by like assurances. *Id.*

6. Where subscriptions were made to a college to create a permanent fund for its support, conditioned that a certain amount should be subscribed in order to the subscriptions becoming binding, and that if the college should receive a sum beyond that, then the subscriptions should be reduced *pro rata*;—Held, that a reduction of the subscriptions below the minimum named, by the votes and acts of the college, or the substitution of land for cash payments, operated to release any subscriber not assenting thereto. *Middlebury College, v. Williamson*, 1 Vt. 212.

7. The defendant, with others, signed a subscription paper agreeing to pay the sum set against their names respectively to the treasurer of the State, towards the building of a State House at Montpelier, where they resided.

The act for the building of the State House was conditioned upon the inhabitants of Montpelier paying into the treasury a certain sum. The State House was built. Held, that the defendant's contract was not void, as being either without consideration, or against public policy, and that an action lay thereon in the name either of the treasurer, or (by statute) of the State. *State Treasurer v. Cross*, 9 Vt. 269. 24 Vt. 196.

8. Where the subscriptions to a subscription paper for the building of a meeting house were made payable to the treasurer of a certain religious society, but (as construed) independent of the society;—Held, that the subscriptions should be understood not as promises to the society, but to the plaintiff who was treasurer, as a trustee for the subscribers; and that an action thereon lay in his name. *Blodgett v. Morrill*, 20 Vt. 509. 3 Vt. 233.

9. The defendant, with others, signed a subscription paper by which he agreed to pay the plaintiffs, an incorporated academy, \$100, for the purpose of enabling the plaintiffs to pay the debts of the academy, provided that the sum of \$20,000 should be subscribed by a day named. The plaintiffs procured the full sum to be subscribed by the day named, and incurred expenses in so doing. Held, that the agreement disclosed a sufficient consideration; that the relation of the defendant to the other subscribers and to the plaintiff estopped him from denying the obligation of his subscription, and that he was liable in an action thereon. *Troy Academy v. Nelson*, 24 Vt. 189.

10. Defendant subscribed \$25, to help plaintiffs rebuild their mill, upon condition that their creditors would "sign a paper not to embarrass or molest them for three years." Their creditors signed a paper agreeing to forbear, if plaintiffs would pay them in certain instalments commencing within the three years and extending beyond, and would not file a petition in bankruptcy. The defendant afterwards, not knowing but the condition of his subscription had been complied with, paid \$10 upon it and promised to pay the balance. He afterwards sued to recover back the \$10 paid and judgment was rendered against him. In an action to recover the balance of the subscription;—Held, (1), that the condition had not been complied with; (2), that the payment of part, under the circumstances, was not a waiver, and the promise to pay the balance was without consideration; (3), that said judgment was not conclusive upon his rights in this case. Judgment for defendant. *Felt v. Davis*, 48 Vt. 506.



## SUNDAY.

1. **Sunday contract.** A contract for the sale or exchange of horses, made in the usual way and under the circumstances which usually attend those transactions, is a "secular labor and employment," prohibited by the statute to be performed on the Lord's day, and if concluded on that day, is therefore void; and a warranty given in such trade cannot be enforced. *Lyon v. Strong*, 6 Vt. 219. *Mattocks, J.*, dissenting.

2. A promissory note made upon Sunday, not being a work of necessity or charity, is void, although done in consummation of a previous contract. *Lovejoy v. Whipple*, 18 Vt. 379.

3. If a promissory note is signed and absolutely and unconditionally delivered to the payee, or his agent, on Sunday, no recovery can be had upon it without a subsequent promise to pay it, or acknowledgment of it as a subsisting obligation. *Goss v. Whitney*, 27 Vt. 273.

4. If made upon Sunday, but not delivered until upon a subsequent secular day, it is valid, taking effect only upon delivery. *Id. Lovejoy v. Whipple*, 18 Vt. 379.

5. A contract made upon Sunday in another State is no violation of the statute of this State, and is not so far *contra bonos mores* at common law, that it cannot be enforced in this State. *Adams v. Gay*, 19 Vt. 358.

6. **Ratification.** Contracts made upon Sunday are not tainted with any general illegality; they are illegal only as to the time in which they are entered into. It is not sufficient to avoid them, that they have grown out of a transaction upon Sunday; they must be finally closed on that day; and although closed on that day, yet if affirmed upon a subsequent day, they then become valid. *Id.*

7. Where a contract, made upon Sunday, remains executory upon both sides, it is simply void until subsequently affirmed by mutual consent. Where either party has done anything under it, he may demand restitution of the thing delivered, or where that is impracticable, compensation, and thus put the other

party to his election, whether to affirm or disaffirm the contract. If he declines to make restitution or compensation, this is an affirmation of the contract. *Id.*

8. Where a horse was sold on Sunday and a note given therefor on the same day;—*Held*, that the subsequent retaining of the horse without offer to return, and payments upon the note, were an affirmation and ratification of the note. *Sumner v. Jones*, 24 Vt. 317.

9. **An award.** An award made and published on Sunday, where the hearing was commenced on Saturday and prolonged until after midnight, was *held* not void; but, if void, that a subsequent promise to pay, ratified and confirmed it. *Sargeant v. Butts*, 21 Vt. 99. *Blood v. Bates*, 31 Vt. 147.

10. **Work of necessity and charity.** Healing the sick, or employing a physician so to do, upon Sunday, is a work of "necessity and charity," excepted from the prohibition of the Sabbath act (G. S. c. 93); and a contract therefor made upon Sunday is valid. *Smith v. Watson*, 14 Vt. 332.

11. Labor done in the making of maple sugar upon Sunday, "where it was necessary in order to save a great waste of sap," was *held* to be "work of necessity" under the Sabbath act. *Whitcomb v. Gilman*, 35 Vt. 297.

12. **Traveling—Town.** A town is not liable to one who is unlawfully traveling on Sunday, for an injury occasioned by the insufficiency of its highway. *Johnson v. Irasburgh*, 47 Vt. 28.

13. The necessity which will excuse one for traveling on Sunday must be real and not fancied. It is not an honest belief that a necessity for traveling exists, but the actual existence of the necessity which renders traveling on Sunday lawful. *Id.*

14. A journey on Sunday to visit one's children who are away from home is not unlawful; and the statute prohibiting travel on that day "except from necessity and charity," does not, in such case, bar a recovery for an injury received on such journey through the insufficiency of a highway. *McClary v. Lowell*, 44 Vt. 116.

## T.

## TAXES.

- I. POWER TO TAX; NATURE OF TAX.
- II. TAXABLE PERSONS AND PROPERTY.
- III. VOTING AND ASSESSING TAXES.
- IV. COLLECTING.
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- V. REMEDIES FOR WRONGFUL TAXATION.
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  - 5. *Other requirements—bond, oath, &c.*
  - 6. *The purchaser—right acquired, &c.*

## I. POWER TO TAX; NATURE OF TAX.

1. **Grant from State.** It is only where exemption from taxation forms a condition or consideration of a grant from the State, that the legislature is, by the constitution, deprived of the power to tax the thing granted; that is, where so to do would impair the obligation of the contract. *Herriek v. Randolph*, 18 Vt. 525. 27 Vt. 146.

2. **Situs of property.** The doctrine that the *situs* of personal property follows the domicile of the owner, is subject to the limitation, that the State within whose jurisdiction it is actually situate has as entire dominion over it, while therein, in point of sovereignty and jurisdiction, as it has over immovables situate there; and this extends to the power of taxation, &c. *Catlin v. Hull*, 21 Vt. 152.

3. *H*, a resident of New York, inherited from his father, who at his death was a resident citizen of this State, personal estate consisting of debts due from solvent debtors resident in this State, evidenced by promissory notes; and he appointed the plaintiff, a resident of this State, his agent, upon a salary, to manage the property, with discretionary power to collect and re-loan and keep on interest. *Held*, (1), that such property was embraced in Stat. 1844, No. 9, for purposes of taxation, as personal estate "held in trust" by "an agent," and

was properly set in the list to the plaintiff as "agent" of *H*; (2), that the legislature had the right to tax property so situated. *Id.*

4. The owner of the stocks of other States of the United States, residing in this State, may be legally assessed and taxed therefor in this State. *Webb v. Burlington*, 28 Vt. 188.

5. **Delegation of power—By-law.** Under a village corporation act empowering the corporation to make by-laws relating to their common and the shade and ornamental trees thereon, and to raise taxes to carry into effect any legal vote or by-law, a tax laid, according to a vote, for building a fence around and inclosing the common, was sustained. *Hutchinson v. Pratt*, 11 Vt. 402.

6. **Terms—"Public taxes."** The charter of the town of Wheelock, granted by the State, conveying the territory to the President of Dartmouth College, provided that the lands should be free and exempt from *public taxes*, so long, &c. *Held*, that this was not an exemption from local municipal taxes, such as town, parish, district and village taxes, assessed upon and to be expended for the use and immediate benefit of the particular municipality. *Morgan v. Cree*, 46 Vt. 773.

7. **Tax not "a contract debt."** A tax is not a contract express or implied, nor properly a debt. *Johnson v. Howard*, 41 Vt. 122. *Webster v. Seymour*, 8 Vt. 140.

8. The acts of congress exempting a soldier from arrest for any "debt or contract," do not protect him from arrest for non-payment of a tax upon taxable property set in the list against him, before his enlistment. *Webster v. Seymour*.

9. A town, summoned as trustee, cannot apply upon its indebtedness to the principal defendant an unpaid town tax against him. *Johnson v. Howard*, 41 Vt. 122.

10. The State, town, &c., to which a tax is payable is not a *creditor* in such sense as that the doctrine of *fraud in law*, as to change of possession of chattels sold, applies. *Daniels v. Nelson*, 41 Vt. 161.

11. The assessment of a tax does not create a debt that can be enforced by suit, and the tax does not draw interest, either before or after demand of payment. *Shaw v. Peckett*, 26 Vt. 482. (1851.)

12. Where the collector arrested a tax-payer for the purpose of enforcing payment of interest upon the tax;—*Held*, that the arrest was illegal, for that no interest was chargeable upon taxes, although the tax-payer, in this case, had

neglected and refused for more than five years after demand made, to pay the tax, and had been out of the State. *Ib.*

13. When an "incumbrance." In case of a non-resident proprietor, taxes become an incumbrance upon the land when the constable has made a list of the land and the taxes assessed thereon, and deposited the same in the town clerk's office for record, according to C. S. c. 81, s. 24. *Hutchins v. Moody*, 84 Vt. 438.

## II. TAXABLE PERSONS AND PROPERTY.

14. **Idiot.** Under the listing law as existing in 1836,—*Held*, that an idiot was not subject to be assessed and taxed for money on hand, or due. *Hunt v. Lee*, 10 Vt. 297. 14 Vt. 346.

15. **Town of residence.** Under a statute requiring personal property to be set in the list and taxed in the town where the owner resides;—*Held*, that such a tax assessed in any other town is illegal and void *ab initio*, for want of jurisdiction; and that the collector is liable in trespass or trover for enforcing the collection of it; and this is so, although the owner gave his list in such town, specifying such property for taxation—he not consenting to the final enforcement of the tax. *Blood v. Sayre*, 17 Vt. 609.

16. On the question of residence for the purposes of taxation, the plaintiff, for the purpose of showing that he was not taxable in the defendant town on the 1st of April, proved that his name was in the grand list of another town (B) for that year, and listed at \$3000 for money on hand and debts due, and that he paid taxes thereon for that year. *Held*, that it was competent for the defendant to prove that the plaintiff was not assessed by the listers of town B, but that they took his list as he offered it, and upon his own proposition. *Mann v. Clark*, 83 Vt. 55.

17. The plaintiff, then residing in Randolph, during the winter of 1854-5 hired a farm in Braintree for one year from the 1st day of April following, with the view of living there the next season. In March, 1855, he moved all his wood and furniture, and most of his provisions, from Randolph to this farm. A former occupant, whose term expired March 31, was not ready to leave on that day, and did not leave until April 3d. March 31st (Saturday), the plaintiff took his wife and family, his cow, the remainder of his provisions and a few cooking utensils, and leaving Randolph and not intending to return there, went to the house of his brother-in-law in Brookfield, near the farm which he had hired, and remained there until April 4, when he moved to the farm and lived there for the remainder of the year. *Held*, that his residence began at Braintree when it ended at Randolph, and that he was subject to assess-

ment and taxation as a resident of Braintree on the first day of April, 1855. *Ib.*

18. *Held*, that where the right to tax a person in a particular town is the question, the burden is upon the town, claiming the right, to prove that such person was legally set in the list and taxable in such town. *Hurlburt v. Green*, 41 Vt. 490. S. C. 42 Vt. 316.

19. Where it appeared that a person was taxable either in town A, or in town B, and the evidence as to which town was equally balanced;—*Held*, that it was error to charge that the fact that he was not listed in town B and had not returned a list anywhere, furnished an intendment in favor of town A [claiming the tax], on the ground that it is the policy of the law that every man shall pay a tax somewhere. *Ib.* 41 Vt. 490.

20. But where the question was one of domicile, whether for purposes of taxation the plaintiff was an inhabitant of town A, where he was taxed, or of town B, and the plaintiff, at the trial, claimed that he was an inhabitant of town B;—*Held*, that it was competent to prove, as bearing upon the question of intent as to domicile, and as an answer to his present claim of domicile in town B, that he returned no list in town B, and was not taxed there. S. C. 42 Vt. 316.

21. *Held*, in a trustee suit under G. S. c. 84, s. 34, by a tax collector to collect a tax, that neither the fact that the defendant's name was set in the list of the town claiming the tax, nor the decision of the listers in setting his name in the list, was any evidence to prove the defendant's residence for the purpose of taxation. *Gregory v. Bugbee*, 42 Vt. 480.

22. **Ownership April 1.** By G. S. c. 83, s. 9, real estate is to be set in the grand list to the person who shall be the owner or possessor thereof on the first day of April in each year. *Held*, that a farm was properly set in the list for 1865 to one who was once the owner, and who had been in possession and occupation of the farm for many years including the year 1865, it having been listed to him and he having paid the taxes without objection down to 1865, although the legal title stood in another by such possessor's deed executed in 1857, and recorded in 1863. *Bemis v. Phelps*, 41 Vt. 1.

23. The subsequent act of 1863, No. 18, s. 1, requiring real and personal estate to be set in the list to the last owner on the first day of April in each year, applies only to cases where the ownership of the estate changes on that day. *Ib.*

24. **Exemption.** Act of 1870, No. 78, exempting certain manufacturing establishments from taxation. See *Westmore Lumber Co. v. Orne*, 48 Vt. 90.

## III. VOTING AND ASSESSING TAXES.

**25. The vote.** A vote in school (or town) meeting, to raise a tax not exceeding a specified sum, is valid, although it leaves a discretion as to the amount to be raised within the limitation fixed. *Brown v. Hoadley*, 12 Vt. 472. 23 Vt. 420; and see *Adams v. Hyde*, 27 Vt. 221.

**26.** If, after a portion of a tax properly voted has been voluntarily paid under the inducement of a discount, new and unforeseen circumstances render it unnecessary to use the the entire amount voted for the purpose for which it was voted, the town may then properly vote to have the unpaid taxes fully collected and to refund the surplus to the taxpayers *pro rata*; or it may collect the tax and treat it as funds in the treasury to be used in payment of any other legal obligation of the town. *Bellows v. Weeks*, 41 Vt. 590.

**27.** Where the granting of a State tax was averred in pleading,—*Held*, that such averment need not be specifically proved, the laying of the tax being by general law, of which the court will take notice. *Downer v. Woodbury*, 19 Vt. 329.

**28.** A tax voted on the first day of March, or at any time thereafter within one year, cannot be lawfully voted, or assessed, upon any other grand list than the one then to be completed on the 15th day of May following. (G. S. c. 84, ss. 66, 67.) *Alger v. Curry*, 38 Vt. 382. *Capron v. Raintick*, 44 Vt. 515. *Allen v. Burlington*, 45 Vt. 202.

**29. Assessment.** The assessment of a tax must be made on the list in legal existence at the time when it is voted; and if made on any other, the tax is wholly void, and no one can justify under it. *Waters v. Daines*, 4 Vt. 601. *Collamer v. Drury*, 16 Vt. 574. 29 Vt. 195.

**30. Requisites of grand list.** The law requires all taxable property to be put into the list of each year; and in this respect there is no difference between real and personal estate. Each list must be complete and perfect in itself without reference to any former list; and no taxes can be legally assessed, either for real or personal property, unless such property be inserted in the current list for the year. *Downing v. Roberts*, 21 Vt. 441.

**31.** A list is not complete and cannot form the basis of a legal tax, until the alterations required by the county and State committees are made; and *held*, that where the listers of a town omitted to make the alterations required by such committees, but, on the contrary, made arbitrary additions thereto, the list was void. *Henry v. Chester*, 15 Vt. 460. (1843.) 24 Vt. 418.

**32.** The grand list of a town is not perfected as a basis for taxation, unless signed, certified and sworn to by the listers, as provided by G.

S. c. 83, s. 36. *Reed v. Chandler*, 32 Vt. 265. 39 Vt. 342.

**33.** A grand list is not rendered invalid, because the fact that the proper oath was taken by the listers is not evidenced by the certificate of a magistrate annexed to the certificate of the listers. It is sufficient if the oath was in fact administered; and the certificate of the listers to the list, which was in form of an oath to the truth of the matters certified, and was signed by them, was *held* to be sufficient evidence that the certificate was properly sworn to. *Blodgett v. Holbrook*, 39 Vt. 336.

**34.** It is not essential to the validity of a grand list, that it should *appear upon the list* at what time it was completed and lodged in the town clerk's office. *Id.*

**35.** A grand list is not invalid because sworn to by the listers according to the form prescribed for the years of appraisal of real estate, instead of the form prescribed for other years [which last was the form appropriate to this case]. *Id.*

**36.** If the quinquennial appraisal of real estate is not sworn to by the listers, it is void as a basis of taxation; and a subsequent annual list, made, certified, and sworn to, only according to the statute in relation to such lists, does not cure the defect, since there is no certificate of appraisal. *Houghton v. Hall*, 47 Vt. 333.

**37.** Where by statute the grand list was required to be completed and returned as finished *on or before* a certain day;—*Held*, that it became the basis for taxation *on* that day. *Moss v. Hinds*, 29 Vt. 188.

**38.** Where the time within which listers are required by law to complete and return the list to the town clerk's office has elapsed, and the list has been so returned, it then becomes the basis of taxation for the ensuing year, and neither the listers, nor the selectmen, nor any other person, has thereafter any legal power to alter or add to it. *Downing v. Roberts*, 21 Vt. 441. *Bellows v. Weeks*, 41 Vt. 590.

**39.** Any such alteration, made by a stranger, would not invalidate the list, nor have any effect to change it, but only the alteration would be nugatory and void. So, also, *semble*, if made by the listers. *Bellows v. Weeks*.

**40.** Alterations made in the grand list of the several towns by the equalizing committee of the legislature, affect only State taxes. *Spear v. Braintree*, 24 Vt. 414. (1852.) *Barnes v. Oviatt*, 47 Vt. 316. (1875.)

**41.** Mere circumstantial errors or mistakes, or defect in the detail of items in the making up of a list, like an error of computation in assessing a tax, do not render the list or the tax void, when they are accidental, or made *bona fide*. *Spear v. Braintree*, 24 Vt. 414. *Henry v. Chester*, 15 Vt. 460.

**42.** An omission by the listers to set down

In the grand list the quantity of real estate owned or occupied by the party taxed, does not render the list void, nor give the owner an action without showing that the neglect has worked him some loss or injury. The statute, as respects him, is directory merely. (G. S. c. 88, s. 20.) *Bellows Falls Canal Co. v. Rockingham*, 87 Vt. 623.

43. Property all connected together, not divided into separate parcels, the listers may properly set in the list in one gross sum, under any appropriate name or description; or they may divide it up separately, giving the value of each building by itself. *Id.*

44. **Lost grand list.** The existence and contents of a grand list, lost or destroyed, may be proved by parol. *Spear v. Tilson*, 24 Vt. 420.

45. **Presumption.** A grand list, being made by sworn officers appointed for that purpose and being regular upon the face of it, is presumed to be correct until the contrary is shown. *Wilson v. Seavey*, 38 Vt. 221. *Macomber v. Center*, 44 Vt. 285.

46. Where the grand list, the vote of the town laying the tax, and the tax bill and warrant are regular upon their face, the tax is *prima facie* a legal tax. *Macomber v. Center*. *Briggs v. Whipple*, 7 Vt. 15.

47. **Legalizing list, &c., by legislature.** It is competent for the legislature, by special act, to legalize a town grand list and the taxes assessed thereon, when such list is irregular and invalid;—as, where it was made up or altered out of due time, and without authority. *Bellows v. Weeks*, 41 Vt. 590.

48. A grand list not sworn to by the listers is invalid as a basis of taxation; and the legalization of such list by act of the legislature, does not validate taxes previously assessed thereon [so as to make a collector and his bail liable for not collecting them before the list was so legalized]. *Tunbridge v. Smith*, 48 Vt. 648.

49. **Assessment for money on hand, &c.** Under G. S. c. 88, ss. 27, 28, the selectmen, on an "appeal" from an assessment by the listers, cannot raise the assessment. The "appeal" is only an application for relief. *Leach v. Blakely*, 34 Vt. 134.

50. It is not a valid objection to a certificate of assessment, that one selectman wrote the names of all the selectmen in the signature thereto, he being directed so to do by the others, and all having acted in concert in making the assessment. *Bellows v. Weeks*, 41 Vt. 590. See *Haven v. Hobbs*, 1 Vt. 238.

51. The notice of assessment for money on hand, &c., by the listers, under act of 1866, No. 14, must be given each year, or such assessment is void. It is not enough to adopt the assessment of a previous year on which the party paid taxes, unless notice be given, *Dean v. Aiken*, 48 Vt. 541.

52. It is not the duty of listers to notify persons whom they assess for bank stock—as is required by G. S. c. 88, s. 27, in respect to assessments for money on hand, &c. *Clement v. Hale*, 47 Vt. 680.

*Taxing water power*, see WATER COURSE, 57.

#### IV. COLLECTING.

##### 1. *The rate bill and warrant.*

53. **Their sufficiency.** It is not essential to the validity of a tax warrant, that any certificate be annexed to the tax bill (or rate bill), further than to indicate that it is a tax bill (G. S. c. 15, s. 46); and the collector's authority under the warrant is not controlled by any statements in such certificate as to the time the tax was voted; when it is payable, &c. *Weeks v. Batchelder*, 41 Vt. 817. *Read v. Jamaica*, 40 Vt. 629. See also *Bellows v. Weeks*, 41 Vt. 604. *Goodwin v. Perkins*, 39 Vt. 598.

54. A direction in the warrant for the collection of a town tax, that it be paid to the selectmen, instead of the treasurer (*Clemons v. Lewis*, 36 Vt. 678), or such direction in the vote laying the tax (*Alger v. Curry*, 40 Vt. 487), does not invalidate the tax. *Id.*

55. In an action against a town to recover back taxes paid to the collector "under protest," the plaintiff objected to the sufficiency of the collector's warrant, because, in following a former statute form, it gave the collector no authority to levy upon lands. *Held* (the collector not offering to use the warrant for the purpose of such a levy), that such defect afforded no ground for a recovery. *Read v. Jamaica*, 40 Vt. 629.

56. The selectmen should annex to the rate bill of a State school tax assessed by them, a warrant for its collection, as in case of taxes imposed by the town; and without such warrant a collector cannot justify a seizure for such tax. This is by implication of G. S. c. 23, s. 80, &c. *Wilson v. Seavey*, 38 Vt. 221.

57. Where a tax is laid payable in installments, the more proper way is to put the whole tax in one rate bill. Where this is done, the rate bill is not invalid because two former ones had been before issued, one for each installment of the tax. *Eddy v. Wilson*, 43 Vt. 362.

58. The warrant for the collection of a State tax need not be attached to the rate bill of the State tax. *Bellows v. Weeks*, 41 Vt. 590.

59. A tax warrant which was sufficient when issued and served is not invalidated by a subsequent alteration of it by the magistrate; and the fact and character of the alteration may be shown, and how it was before it was altered. *Goodwin v. Perkins*, 39 Vt. 598.

60. It is no objection to a town tax warrant,

that it is signed by a justice of the peace who is also one of the selectmen to whom, by the vote laying the tax, the tax is directed to be paid. *Alger v. Curry*, 40 Vt. 437.

61. An error in the date of a warrant for the collection of a tax, does not avoid it. The true date of its execution, if necessary, may be proved; and it will take effect from that time. *Bellows v. Weeks*, 41 Vt. 590.

62. A warrant for the collection of highway taxes was held insufficient to justify an arrest, where the only command was, that on neglect to pay, &c., "you are to proceed with him or them as the law directs." *Flint v. Whitney*, 28 Vt. 680.

63. Who may serve warrant. A State treasurer's tax warrant directed to a person named as "collector and constable," &c., such person being at the time dead, may be served by a constable and collector afterwards elected. *Wilson v. Seacey*, 38 Vt. 221.

64. Under G. S. c. 84, s. 58, the selectmen may appoint a person to collect unpaid taxes, when the collector has permanently removed from the town, and so has "become disabled." *Clement v. Hale*, 47 Vt. 680.

## 2. Powers and duties of collector.

65. For a tax assessed against a *feme sole*, who afterwards marries, the property of the husband cannot be distrained, though it be such as he acquired by the marriage. *Sumner v. Pinney*, 81 Vt. 717. (Altered by G. S. c. 84, s. 16.)

66. A tax collector is not obliged to go against the real estate for the taxes assessed upon that. *Shaw v. Peckett*, 25 Vt. 423.

67. Distress. A distress for taxes is in the nature of an execution. Beasts of the plough are not exempt. *Sherwin v. Bugbee*, 16 Vt. 489.

68. In order to make a distress of property for non-payment of taxes, so as to create a lien, it is necessary, as in case of an attachment, that the collector should, either by himself or servant, take and maintain the actual custody and control of the property. *Dodge v. Way*, 18 Vt. 457.

69. G. S. c. 84, ss. 10, 11, requiring a collector of taxes to keep the distress four days and then to advertise for six days before sale, does not confine him within this time for advertisement and sale, but the same may be done within a reasonable time thereafter. A seizure on the 5th, advertisement on the 13th, and sale on the 21st of the same month, were held sufficient. *Clemons v. Lewis*, 36 Vt. 673.

70. A tax collector is not obliged to keep a distress four days before posting it for sale, provided the time of sale is fixed full ten days

from the taking. *Harriman v. School Dist. Orange*, 35 Vt. 311.

71. Where property was distrained for a tax Feb. 21, and posted on the 25th for sale March 8, and then sold, making 10 days from time of seizure to time of sale;—*Held*, that this was a compliance with the statute, requiring the property to be kept four days, and posted six days. *Alger v. Curry*, 40 Vt. 437.

72. The right of a tax collector to adjourn an advertised sale rests in the exercise of a sound discretion, and is the same as that of any officer as to property taken on execution; an irregularity in this respect does not make him a trespasser *ab initio*. *Spear v. Tilton*, 24 Vt. 420. *Wheelock v. Archer*, 26 Vt. 380.

73. It cannot be determined upon demurrer, that a barn, where property was posted and sold upon a tax warrant, was not "a public place" as it may well be such, in fact. *Alger v. Curry*, 40 Vt. 437; and see *Austin v. Soule*, 36 Vt. 645. *Drake v. Mooney*, 31 Vt. 617.

74. Where a tax collector makes a proper demand for the payment of the tax, and the person taxed distinctly refuses to pay;—*Held*, that it is not necessary, before the collector makes distress therefor, to give notice of the time and place that he will attend to receive the tax, as generally required by statute. *Downer v. Woodbury*, 19 Vt. 329. *Wheelock v. Archer*, 26 Vt. 380. *Hurlbert v. Green*, 42 Vt. 316.

75. After a tax collector has properly levied his warrant for refusal to pay the tax, he is justified in further proceedings under his warrant, although the delinquent promise that he will pay the tax that week if the collector will not remove the property distrained. *Wheelock v. Archer*.

76. Taking body. To make a tax-collector liable in trespass for taking the body instead of the property of the delinquent, there must be some distinct offer of some specific property. Nor is the collector obliged to delay; to wait, and to go some distance for the property. *Flint v. Whitney*, 28 Vt. 680.

77. Fees. Where the collector of a tax had duly demanded payment of the tax, and afterwards performed travel for the purpose of making a distress;—*Held*, that he was entitled to traveling fees in addition to the tax, and that a tender of the amount of the tax only was not sufficient to prevent a distress. *Joslyn v. Tracy*, 19 Vt. 569.

78. Sale—Motive. A tax collector, at a sale, announced that he had sold enough to satisfy the tax and costs, and should sell no more; but he then called back the dispersing audience and made further sales, but not beyond the true amount of the tax and costs. *Held* correct, and that his motive, as ill will towards

the delinquent, was of no importance. *Woodcock v. Bolster*, 35 Vt. 632.

**79. Receipt.** A collector of taxes is under no obligation to give a receipt for taxes paid him; and a refusal to pay unless a receipt be given is equivalent to an absolute refusal. Custom cannot vary this. *Stiles v. Hitchcock*, 47 Vt. 419.

### 3. Justification by collector.

**80. General rule.** A tax bill and warrant, though regular upon their face, do not of themselves justify the collector in enforcing them; but the legality of all the previous proceedings must be shown. *Collamer v. Drury*, 16 Vt. 574. *Downing v. Roberts*, 21 Vt. 441. *Read v. Jamaica*, 40 Vt. 632. *Chipman, C. J.*, in *Wilcox v. Sherwin*, 1 D. Chip. 82. *Bates v. Haseltine*, 1 Vt. 81. *Waters v. Daines*, 4 Vt. 601.

**81.** In order for a collector of taxes to justify under his tax bill and warrant, he must aver and prove that the plaintiff had a list in the town. This cannot be inferred from the fact that the party's name is in the tax bill; and in this respect there is no difference between the case of a State tax, and a town tax. *Downer v. Woodbury*, 19 Vt. 329. 16 Vt. 574.

**82. Pleadings.** A plea justifying a distress for taxes must set forth all the facts necessary to constitute a legal vote of the tax, a legal list, a legal assessment, and legal proceedings in the collection. These must be expressly set forth in full detail. *Shaw v. Peckett*, 25 Vt. 423.

**83.** A plea of justification by a collector under a rate bill and warrant to collect a town tax, need not set forth the purposes for which the tax was voted. It will be presumed to have been voted for a lawful purpose. *Briggs v. Whipple*, 7 Vt. 15.

**84.** Or, if set forth in general terms merely, and that be a purpose for which the town may raise money, it is sufficient. *Clemons v. Lewis*, 36 Vt. 673.

**85.** That the treasurer "issued his extent in due form of law, dated," &c., is a sufficient averment, on general demurrer, that the extent was signed by him. *State Treasurer v. Weeks*, 4 Vt. 215.

**86.** Where a plea set forth a warrant, annexed to a rate bill, as directed to the defendant, as surveyor, by A B, a justice of the peace;—*Held*, that this implied, and was a sufficient averment, that the warrant was signed by such justice. *Andrews v. Chase*, 5 Vt. 409.

**87. —and evidence.** Under the replication *de injuria* to the defendant's plea justifying his taking of the plaintiff's property as collector

of taxes under a rate bill and warrant, in which plea the defendant averred that he gave the bond required by statute, but without setting forth the bond, or making proof of it;—*Held*, that it was sufficient proof of this averment, that the defendant acted as collector. *Downer v. Woodbury*, 19 Vt. 329.

**88.** Where a collector justifies under a rate-bill and warrant, the production of the grand list of the year for which the tax was assessed, although not the year for the general appraisal of real estate, and although the taxes in question were all upon real estate, is sufficient evidence that the real estate was duly appraised and set in the list, without producing the grand list of the year of the last general appraisal. *Wilson v. Seavey*, 38 Vt. 221.

**89.** In trespass *de bonis*, the defendant justified under a tax bill and warrant, his plea averring that the plaintiff had a list. Replication, *de injuria*. *Held*, that the grand list, made in proper form and duly authenticated, was sufficient proof of that averment. *Braley v. Burnham*, 47 Vt. 717.

**90. Kind of evidence—Return.** A tax warrant is not returnable process. Hence the collector's return written thereon is not an official act, nor evidence in his favor of his doings; but the same are provable by parol. *Hathaway v. Goodrich*, 5 Vt. 65. *Henry v. Tilton*, 17 Vt. 479. *Spear v. Tilton*, 24 Vt. 420. *Flint v. Whitney*, 28 Vt. 680.

**91. Certificate of doings on copy.** Public ministerial officers must set forth the acts done by them, that the court, and not themselves, may judge of their sufficiency. Under the act requiring a collector of taxes to certify upon the copy of his warrant of commitment of a delinquent tax-payer "his doings thereon in relation to such delinquent." *Held*, that a general statement on such copy, that "after legally notifying him of the time and place when and where the collector would be to receive the tax," &c., was not sufficient to show that he had given the delinquent the six days, notice required by law. *Henry v. Tilton*, 19 Vt. 447.

**92.** The omission of a tax collector, on committing a delinquent to jail, "to certify his doings in relation to such delinquent" on the copy of his warrant left with the jailer, cannot be supplied by other proof, at the trial, that he had, in fact, proceeded regularly. *Flint v. Whitney*, 28 Vt. 680. Nor can any defect in such certificate be so supplied. *Henry v. Tilton*.

### 4. Collector's liability.

**93.** For the non-collection of taxes illegally assessed, neither the collector, nor the sureties on his bond, are liable, though he has given a

receipt for the tax-bills, wherein he agrees "to collect and pay over." But for the misappropriation of all monies collected, he and they are liable. *Tunbridge v. Smith*, 48 Vt. 648.

94. Town, as well as State taxes, are payable in money only. If a collector receives of a tax payer a town order and applies it as payment of a town tax, the order is not thereby paid, but the order becomes his and he can transfer it, leaving himself liable to the town for the amount of such tax. *Saunyer v. Springfield*, 40 Vt. 305.

95. A collector of taxes took the money collected on a tax bill of one year, and paid therewith to the treasurer his arrears of a previous year, and directed the treasurer so to apply the money;—neither the treasurer nor any other officer of the town knowing how he obtained it. In an action against the sureties upon the collector's bond of the second year;—*Held*, that this misapplication was the sole fault of the collector, and that the sureties were not thereby released, *pro tanto*. *Lyndon v. Miller*, 36 Vt. 329.

96. A tax collector's bond to the town, so far as relates to the State tax, is a bond of indemnity simply. *Middlebury v. Nixon*, 1 Vt. 282.

97. In an action upon a tax collector's official bond for neglect to collect and pay taxes, a prior demand of payment need not be averred, or proved; nor, in case of State taxes, that an extent has been issued. *Ib*.

98. In assigning breaches of such bond, the various circumstances of the tax, time of payment ordered, to whom, &c., must be averred *Ib*.

99. In an action by a town against its collector of taxes and his sureties upon their bond for faithful performance, and to indemnify the town;—*Held*, that the receipt of the collector acknowledging to have received from the selectmen the tax bill, stating the amount, to collect and account for, was sufficient *prima facie* evidence of the facts stated therein, and that the tax-bill was a legal one. *Charlotte v. Webb*, 7 Vt. 88.

100. And *held*, in such case, that an extent issued by the State treasurer against the town was satisfactory evidence against the defendants of the regularity of the previous proceedings which warranted it. *Ib*.

101. In such action for neglect to collect and account for taxes,—*Held*, that the rule of damages was the amount of the rate-bill not paid over. *Ib*.

102. **Extent.** In a petition of the selectmen to a justice for an extent against a delinquent collector, and in the extent issued, the year in which the tax was laid was erroneously stated. There being no other misdescription, *held*, that the proceedings were not invali-

dated thereby. *Clark v. Lathrop*, 88 Vt. 140.

## V. REMEDIES FOR WRONGFUL TAXATION.

### 1. *Against the town.*

103. **Payment under protest.** The payment of an illegal tax, under protest, when a collection of the tax is threatened and payment is made for that reason, is not to be treated as a voluntary payment, although the collector may not have had a warrant to his tax bill. *Babcock v. Granville*, 44 Vt. 325. *Henry v. Chester*, 15 Vt. 460.

104. Where one, under express protest, pays a tax assessed against him, although before any warrant has been issued against him for the collection of it, this is not such a voluntary payment as to preclude him from recovering back the tax so paid, if illegal, if he so paid because, otherwise, he expected and had a right to expect that in due course the warrant would be issued and the collection be enforced, with costs. *Allen v. Burlington*, 45 Vt. 202.

105. **Action.** The power given by G. S. c. 15, s. 66, to the board of civil authority to abate taxes, does not prevent the ordinary remedies for illegal taxation; as, assumpsit to recover back money paid upon an illegal tax. *Babcock v. Granville*, 44 Vt. 325.

106. **Extent of recovery.** Where the plaintiff had been compelled to pay taxes assessed upon a void list;—*Held*, that, in an action of assumpsit against the town for money had and received, he could recover the full amount paid as town taxes which went into the town treasury. *Henry v. Chester*, 15 Vt. 460.

107. In assumpsit against a town to recover back money paid as taxes, and wrongfully collected, the plaintiff cannot recover what the town has collected as agent and paid over—as, State taxes—but only what has gone to the town's use—town taxes. *Spear v. Braintree*, 24 Vt. 414. *Vt. Central R. Co. v. Burlington*, 28 Vt. 198. *Slack v. Norwich*, 32 Vt. 818.

108. In assumpsit or case to recover of a town for an excess of taxes paid by reason of a circumstantial, or accidental, error in the list or assessment;—*Held*, that the plaintiff cannot recover where the error operates to his advantage; nor beyond what, on the whole, is his actual damage. *Spear v. Braintree*, 24 Vt. 414. *Fairbanks v. Kittredge*, 24 Vt. 9.

109. **Burden of proof.** In an action against a town to recover back money paid as taxes, the burden of proof is on the plaintiff to show that the taxes were illegally collected. *B. F. Canal Co. v. Rockingham*, 87 Vt. 623.

110. **Appeal.** An action of assumpsit before a justice, brought against a town,



demanding only ten dollars damages, and so in the *ad damnum*, is not appealable under G. S. c. 81, s. 70, by a plea that the money which the plaintiff is seeking to recover was collected of him by the constable of the town, upon a legal rate-bill and warrant duly issued, &c. *May v. Jamaica*, 37 Vt. 23. (Changed by Stat. 1868, No. 23.)

## 2. Against selectmen, and listers.

**111. Selectmen.** The selectmen are liable in trespass for property distrained and sold in satisfaction of an illegal tax assessed by them; and where such illegal tax is so blended with others, though legal in themselves, as that they cannot be separated, the whole proceeding is void, and no deduction from a full recovery can be made. *Drew v. Davis*, 10 Vt. 506.

**112.** Under section 18 of the listing act of Nov. 17, 1825, the duties of the selectmen were purely ministerial, and they were bound to accept the sworn disclosure of the party assessed for money on hand, and could not require him to answer as to particulars; and were then bound to certify such disclosure to the town clerk. For their neglect so to certify to the town clerk,—*Held*, that the selectmen were liable. *Kellogg v. Higgins*, 11 Vt. 240.

**113.** The selectmen refused to receive the plaintiff's disclosure of his money subject to assessment, but he afterwards agreed to meet them at a time appointed and transact the business. He neglected to appear, and there was no subsequent refusal to receive his disclosure. *Held*, that this agreement and his neglect to appear operated as a waiver, and released or discharged any right of action he might have had for the original refusal. *Cooley v. Aiken*, 15 Vt. 322.

**114. Listers.** Listers are liable in an action on the case to the party injured by any illegal act of theirs, where they act ministerially in the making up of the grand list. *Fairbanks v. Kittredge*, 24 Vt. 9. 27 Vt. 654.

**115.** As, where they list a man or his property not taxable; or in a town where not taxable. *Henry v. Edson*, 2 Vt. 499.

**116.** Or, an eleemosynary corporation not taxable. *Congregational Socy. v. Ashley*, 10 Vt. 241.

**117.** So, for neglect to return assessments and two folds to the town clerk by the day fixed by statute, whereby the party was deprived of his appeal to the selectmen. *Howard v. Shumway*, 18 Vt. 358.

**118.** So, for listing property in the wrong school district, whereby the party, or the school district entitled to the tax, has suffered damage. *Fairbanks v. Kittredge*, 24 Vt. 9. *School District, St. Johnsbury v. Kittredge*, 27 Vt. 650.

**119.** A list is not rendered void by any

error of judgment in the listers as to a matter within their jurisdiction; nor are the listers liable therefor, in such case, where they act *bona fide* and with reasonable care. *Henry v. Chester*, 15 Vt. 460. *Stearns v. Miller*, 25 Vt. 20. *Wilson v. Marsh*, 34 Vt. 352.

**120.** In many things the acts of listers so far partake of a judicial character, that they incur no personal responsibility when not actuated by malice. This is so as to appraisals and assessments which they are commissioned to make; as, also, whenever it is the evident intention of the law that they shall act solely upon their own judgment and discretion. *Royce, C. J., in Fairbanks v. Kittredge*, 24 Vt. 9.

**121.** Having jurisdiction of the person and subject-matter, they are not responsible for any error of judgment in making assessments for money on hand, debts due, &c., unless actuated by malice or corruption. *Fuller v. Gould*, 20 Vt. 648.

**122.** In relation to some of the duties of listers, they involve so much of matter of judgment and discretion, and partake so much of the nature and character of judicial proceedings, that their judgment, exercised in good faith and without malice, is conclusive in their favor. But in relation to setting real estate in the list to the owner, or person liable to pay taxes thereon, so far as it relates to the persons to whom it is to be set and the number of acres, the listers are bound to act in good faith and with common care, skill and prudence. If they so act, they are not liable for mistakes, oversights, or inaccuracies; otherwise, they are liable to the party injured. *Wilson v. Marsh*, 34 Vt. 352. *Stearns v. Miller*, 25 Vt. 20.

**123.** Listers are liable to a party injured for their omission of express and obvious matter-of-fact duties. They are liable for all other injurious misconduct in their office, even in matters of discretion, where it can be shown that they acted *mala fide*. *Redfield, C. J., in Stearns v. Miller*.

**124.** In an action against listers for wrongfully setting personal estate in the list, where the listers had jurisdiction and no appeal was taken to the selectmen;—*Held*, that the proceedings were conclusive, unless, by clear proof, the listers were shown to have acted corruptly. *Id.* 44 Vt. 329.

**125.** Where listers left in the town clerk's office, within the time required by the statute, an abstract of the plaintiff's list containing the assessment complained of, properly certified, and containing a general notice of hearing;—*Held*, that the plaintiff's only remedy for an over-assessment was by the statute appeal, unless he could show by irrefragable evidence that the listers made such assessment from motives of corruption, or express malice towards the plaintiff, *Id.*

126. In an action against listers for wrongfully appraising and setting in the plaintiff's list more land than he owned, it is sufficient to aver and prove that they did the act knowing it to be false. It is not necessary to allege that they did it maliciously and corruptly. *Id.*

127. Where listers, in the exercise of good faith and acting according to their best judgment, set in the list one who has removed from the town with his property, upon their belief that such removal was for the purpose of avoiding taxation or of changing it to another town (G. S. c. 83, s. 48), their action is of a judicial character, and they are not liable for an erroneous judgment therein. *Davis v. Strong*, 31 Vt. 332. *Aldis, J.*, dissenting; and see *Universalist Society v. Leach*, 35 Vt. 108.

128. The court cannot say, as matter of law, that listers were lacking in due diligence in the making of a list, where they erroneously set lands to the mortgagor, instead of the mortgagee in possession. This is a question of fact for the jury upon the circumstances. *Wilson v. Marsh*, 34 Vt. 352.

129. Form of action. Case, and not trespass, was held to be the proper action against listers for wrongfully setting the plaintiff and his property in the list of a town where he and his property were not taxable, and of which he was not an inhabitant;—upon which list taxes were assessed which he had been compelled to pay, upon arrest by the tax collector. *Henry v. Edson*, 2 Vt. 490.

## VI. SALE OF LANDS FOR TAXES; TAX TITLES.

### 1. General rules.

130. A collector of proprietors' taxes must pursue his power strictly, however difficult, and perform all pre-requisites, which stand as conditions precedent to his right of selling. Otherwise, his sales are invalid. *Underhill v. Smith*, N. Chip. 81.

131. Sales for land taxes are proceedings *in invitum*. It is a mode of transferring title by operation of law without the agency of the owner, and is also in the nature of a forfeiture. Therefore, the proceedings are, as conditions precedent, to be strictly, perhaps literally, followed. *Spear v. Ditty*, 9 Vt. 282. 17 Vt. 100.

132. Courts have been, generally, somewhat astute in requiring such strict compliance. *Bennett, J.*, in *Carpenter v. Sawyer*, 17 Vt. 124—citing *Mead v. Mallet*, 1 D. Chip. 239. *Culver v. Hayden*, 1 Vt. 359. *Richardson v. Dorr*, 5 Vt. 16. *Spear v. Ditty*, 9 Vt. 282. *Sumner v. Sherman*, 13 Vt. 609; and see *Taylor v. French*, 19 Vt. 49. *Lane v. James*, 25 Vt. 481.

133. A tax sale under the act of 1831,

granting a tax on each acre of land in Essex county for the purpose of building a jail, was held valid against sundry objections. General principles announced—as, that the court should not be too astute in finding defects, or surmounting them, &c. *Bellows v. Elliot*, 12 Vt. 569.

134. It is a condition precedent to the passing of any title by a tax collector's deed, that the proceedings of the officers, who have anything to do with assessing or collecting the tax, or recording the proceedings, whether to be performed before or after the sale, should be in strict and literal compliance with the requirements of the statute. *Judevine v. Jackson*, 18 Vt. 470. *Sumner v. Sherman*, 13 Vt. 609.

135. The following principles, or rules, for testing the validity of tax titles, appear to be fairly deducible from the reported cases on that subject: (1), Where the statute under which the sale is made directs a thing to be done, or prescribes the form, time, and manner of doing any thing, such thing must be done, and in the form, time and manner prescribed, or the title is invalid; and in this respect the statute must be strictly, if not literally, complied with; (2), But in determining what is required to be done, the statute must receive a reasonable construction; and where no particular form or manner of doing a thing is pointed out, any mode which effects the object with reasonable certainty is sufficient; and in judging of these matters the court is to be governed by such reasonable rules of construction, as direct them in other cases. *Hall, J.*, in *Chandler v. Spear*, 22 Vt. 888.

136. Collector's deed as evidence. A deed of the collector of a proprietors' tax, however worded, is not even *prima facie* evidence of a legal sale; but, to sustain it, all the previous proceedings must be proved regular. *Powell v. Brown*, 1 Tyl. 285.

137. A tax deed, without proof of every essential pre-requisite, is void. *Richardson v. Dorr*, 5 Vt. 9.

138. To make a good title under a tax deed, the statute requisitions must be proved to have been strictly complied with, and a general recital in the deed that the collector "has in all things pursued the directions of the statute," is no evidence thereof. *Brown v. Wright*, 17 Vt. 97 (overruling *Powell v. Brown*, 1 Tyl. 285, and *Parker v. Bizby*, 2 Tyl. 466). *Hall v. Collins*, 4 Vt. 316. *Reed v. Field*, 15 Vt. 672. *Townsend v. Downer*, 32 Vt. 190.

### 2. Rate bill and warrant.

139. In order to support a collector's deed under the 30,000 dollars' tax act (2 Tol. St. 237), the rate-bill must be produced. *Mix v. Whitlock*, 1 Tyl. 80; and must be proved to have

been deposited with the State Treasurer by Nov. 1, 1793. *S. C. 1 Tyl. 305.*

140. In a land tax sale, it is not necessary that the collector's rate bill be recorded. *Spear v. Ditty*, 8 Vt. 419.

141. Although not required in terms by the land tax act, yet it is considered that a tax bill must be furnished the collector by the committee, as showing the description of the delinquent lands, the names of the proprietors, the number of acres, and the amount of the tax; but the tax bill need not appear of record. *Isaacs v. Wiley*, 12 Vt. 674.

142. In support of a land-tax sale, it was held sufficient, *prima facie* at least, to establish that such a tax bill had been furnished to the collector as the law requires, that in his return he certified that the foregoing are true records and entries of his proceedings in the collection of the tax therein described, and this immediately followed a statement in which appeared the original grantees' names, the divisions, numbers, and the description of the lots, number of acres in the lots, and the tax. *Wing v. Hall*, 47 Vt. 182.

143. Under the statute of Oct., 1789, directing the treasurer to issue his warrant against the proprietors of certain towns to defray the expenses of surveying, the warrant must name the persons and the several sums by them to be paid. *Fellows v. Tuttle*, Brayt. 236.

144. Three persons named were empowered by act of the legislature to issue their warrant, under their hands, for the collection of a tax. Held, that the warrant signed by only two was void. *Townsend v. Gray*, 1 D. Chip. 127.

145. Where a title was made through a tax sale by a constable, as collector, and the warrant was directed to the constable of the town, without naming him;—Held, that his appointment must be proved by the record. *Broughton v. Blackman*, 1 D. Chip. 109; and see 1 D. Chip. 99. 1 Vt. 81, 87.

146. Where a land tax act requires the tax to be collected by a public officer—as, a sheriff or constable;—Held, that this is to be regarded as a duty superadded to his other duties, and that the direction of the warrant to him by his name of office, without naming him, and his proceedings and signature in such official capacity, and not as collector, are sufficient. *Chandler v. Spear*, 22 Vt. 388. *Bellows v. Elliot*, 12 Vt. 569.

147. Where the warrant to the collector of the half-penny tax of 1791 misrecited the time of the passing of the act granting the tax;—Held, that the warrant had nothing to stand upon, and that the collector's deed of land sold under it conveyed no title. *Brown v. Wright*, 17 Vt. 97.

8. *Advertisement; publication; record; certificate.*

148. In the advertisement of sale for a proprietor's tax, the land being assessed by equal rights and for equal sums, it is not necessary to annex to the name of each delinquent the sum assessed; but it is sufficient to mention the amount of the tax on each right generally, and then insert a list of the delinquents. *Wentworth v. Allen*, 1 Tyl. 226.

149. The proceedings of the collector of a particular land tax were held invalid, and his deed to convey no title: (1), Because in his advertisement he omitted to fill the blank in the prescribed form with the place of the session of the legislature when the tax was assessed; (2), because the town clerk, in recording the advertisements, omitted to state the place where the newspaper containing the advertisements was printed—these being statute requirements. *Culver v. Hayden*, 1 Vt. 359. 17 Vt. 100.

150. The advertisement of a committee to superintend the expenditure of a land-tax, under G. S. c. 98, s. 4, need not name the town where the legislature sat which laid the tax. *Wing v. Hall*, 47 Vt. 182.

151. A collector's advertisements of particular land taxes must be signed by him as "collector." *Spear v. Ditty*, 9 Vt. 282. 22 Vt. 398.

152. The making of the advertisement of his sale by the collector of a particular land tax, is an official act, and if made before he is qualified by being sworn, his sale is void; and the date appearing upon the advertisement must be taken as *prima facie* evidence, at least, of the time of making it. *Langdon v. Poor*, 20 Vt. 13.

153. Where the advertisement of sale, as recorded, described the act granting the tax as assessing it "for the purpose of making and repairing and building bridges," whereas the act was "for the purpose of making and repairing roads and building bridges";—Held, that a sale under such recorded advertisement was invalid. *Id.*

154. Otherwise, under a like act, where the word "bridges" was omitted in the advertisement;—the word roads comprehending bridges, but not *vice versa*. *Isaacs v. Wiley*, 12 Vt. 674.

155. The recording of a land tax advertisement at length as dated March 3, 1829, with a certificate that it was inserted in a certain newspaper, and also that the same advertisement, dated March 10, 1829, was inserted in certain other newspapers, was, on account of this discrepancy, held not to be a record at length of the second advertisements. *Clark v. Tucker*, 6 Vt. 181.

156. Under the land-tax act, where the collector's or committee's advertisement is the

same in all the newspapers in which they are required to be published, it is a sufficient recording of them "at length," where the town clerk records one at length, and certifies on the record that the same was inserted and published in the other papers named, giving numbers and dates. *Isaacs v. Shattuck*, 12 Vt. 668.

157. A land tax statute required that advertisements of the collector and committee should be "published in the Vermont Republican, printed at Windsor"; and the record showed that they were published in "the Vermont Republican and American Yeoman published at Windsor." *Held* sufficient. *Ib.*

158. The collector of a land tax was at the same time town clerk. In recording in the town records, the committee's advertisements and a certificate of the newspapers in which they were published, he signed the same as collector. *Held* insufficient; that he should have been signed as town clerk. *Ib.*

159. By the statute of 1807 regulating the sale of lands for taxes, the town clerk was required to record the advertisements at length. *Held*, that such record made from a copy of the same, and certified by him on the sales book of the collector, was not a compliance with the statute, and that the collector's deed conveyed no title. *Carpenter v. Sawyer*, 17 Vt. 121. 22 Vt. 398.

160. On a sale of lands for payment of town taxes, if the town clerk neglects to certify upon the record that the advertisements had been published as required by law, the collector's deed conveys no title. *Judevine v. Jackson*, 18 Vt. 470.

161. Under a land tax sale, it is not necessary that the town clerk should [formally] certify the volumes, numbers and dates of the several papers in which the committee's and collector's advertisements are published, where all these particulars appear in his record [officially stated]. *Spear v. Ditty*, 8 Vt. 419.

162. What is a sufficient certificate of the committee's and collector's advertisement on record. *Wing v. Hall*, 47 Vt. 182.

#### 4. Sale ; Return ; Record.

163. Where a collector's land tax sale was advertised to be held at a particular time and place named, and his return stated the sale as made on the day and in the town named, it will be presumed, in the absence of proof or presumption to the contrary, that the sale was made at the precise time and place specified. *Spear v. Ditty*, 8 Vt. 419.

164. *Held*, that a sheriff's deed of lands sold under the one cent per acre land tax act of 1812 conveyed no title, unless he left, within thirty days after sale, with the county clerk, if the town had not been organized, a true and

attested copy of his proceedings, and unless the same were recorded by the clerk. *Sumner v. Sherman*, 18 Vt. 609. 18 Vt. 472.

165. Where a sale of lands for a particular land tax was in fact completed on a certain day, and the collector omitted to return and have his proceedings recorded in the town clerk's office for more than 30 days thereafter;—*Held*, that the proceedings were fatally defective; and that they were not cured by a formal adjournment of the sale to a future day, and then opening and dissolving the vendue, and then returning and recording his proceeding within 30 days thereafter. *Taylor v. French*, 19 Vt. 49. (Stat. Nov. 11. 1807. R. S. c. 86, s. 12. G. S. c. 98, s. 12.) *Mead v. Mallet*, 1 D. Chip. 239.

166. Proceedings under a land tax sale were held defective, because, (1), the collector did not return and have recorded in the town clerk's office his proceedings within 30 days after completing the sale; (2), he did not sign his return; (3), there was not a full record of the advertisements; (4), the town clerk did not certify that he made a record of the advertisements, &c., from the papers themselves. *Taylor v. French*.

167. A copy of vendue sales lodged in the county clerk's office, which carried internal evidence that it was not so lodged within 30 days next after the sales, and was not attested by the collector as a true copy, as required by the tax act, was held not evidence to sustain the tax deed. *Richardson v. Dorr*, 5 Vt. 9.

168. A vendue tax deed conveys no title, unless the proceedings are recorded according to the statute requirements. *Giddings v. Smith*, 15 Vt. 344. 25 Vt. 284.

169. Under the land tax act requiring the proceedings of the committee and collector to be recorded in "the proper office for recording of deeds," it is not required that they be recorded in the book of the record of deeds. They may well be recorded upon a separate book kept for that purpose. *Isaacs v. Shattuck*, 12 Vt. 668.

170. A list of lands not redeemed tied into the book of town land records, was treated as a proper record. *Carbee v. Hopkins*, 41 Vt. 250.

171. A town clerk's certificate, at the end of a record of the entire proceedings of a tax sale of lands, in this form: "Received for record and recorded and examined April 7, 1840. Attest—John Dodge, Town Clerk,"—was held to refer to the entire record. *Ib.*

172. A town clerk cannot be allowed to amend his records of a tax sale of lands so as to affect any right fixed by the proceedings as they stand recorded. *Judevine v. Jackson*, 18 Vt. 470. *Langdon v. Poor*, 30 Vt. 13.

173. To sustain a title by tax sale, the town

clerk's certificate of the allowance of the committee's account, stating the sum, is not evidence. A copy of the record is required. *Coit v. Wells*, 2 Vt. 818.

174. Sundry objections to the sale of lands under the act of Nov. 11, 1807, laying a tax for erecting a state's prison, considered, and sale sustained, viz: (1). That the State treasurer's warrant was directed to the sheriff of the county without giving his name, and that in his proceedings he described himself as sheriff, and not as collector: (2). That the warrant merely named the towns and gores without stating that they were within his precinct, and without giving the reasons why the warrant was directed to the sheriff, rather than to the constable: (3). That there was an error in the record of the rate-bill, as to the title of the act—but the identity was apparent; also, in misstating the number of acres in some of the rights—but the amount of the tax was correctly stated; also, in the date of the sheriff's certificate—but that was set right by other parts of it: (4). That there was an error in the clerk's certificate as to the date of the record—but that was set right by parol evidence: (5). That the sale was at the county court house, instead of the town where the lands lay: (6). That the record of the town clerk did not show that the advertisement had been published;—but this act did not require a record of the publication, and the publication was proved by the production of the original newspapers: (7). That there was no evidence that the Secretary of State published the act in all the newspapers of the State, as directed by the act;—but this was merely directory and not essential to the validity of the tax; moreover, this would be presumed, as there was no evidence to the contrary. *Chandler v. Spear*, 22 Vt. 388.

##### 5. Other requirements—bond, oath, &c.

175. **Publication of act.** The publication of an act assessing a land tax is not essential to the validity of a sale under it, although the act directs such publication. *Ib.*

176. **Bond.** In land tax sales under the act of 1807, the collector must give bonds before he advertises his sales, or the sale will be invalid. *Coit v. Wells*, 2 Vt. 818. 12 Vt. 677.

177. This bond must be double the amount of the tax, which is determined by the amount of the rate bill delivered to the collector. If given for a less sum, the sale is invalid. *Spear v. Ditty*, 8 Vt. 419. 12 Vt. 676. *Oatman v. Barney*, 46 Vt. 594.

178. The bond required to be given by the collector under the particular land tax act of Nov 11, 1807, viz.: in "double the amount of the tax he is appointed to collect," is sufficient

if in double the amount of the tax bill delivered to him, though not double the whole tax assessed. *Ib.*

179. The giving of the necessary bond by the collector of a particular land tax to the committee to expend the tax, may be proved by the receipt of the committee. *Chandler v. Caswell*, 17 Vt. 580.

180. **Oath.** Where a public and sworn officer of the law, as a constable or sheriff, is made collector of a land tax, the provisions of the general land tax act requiring the collector to be sworn, do not apply. *Adams v. Jackson*, 2 Aik. 145. *Bellows v. Elliot*, 12 Vt. 569. 22 Vt. 399.

181. A warrant for the collection of a land tax recited that the tax was assessed by the legislature, at a session named, stated the appointment of the collector (naming him), and was in the usual form defining and describing his duties. Immediately following the record of the warrant was a record of the certificate of the oath, which recited that the collector, naming him, personally appeared and was duly sworn to perform the duties assigned him as collector of said tax in and by the above warrant, as the law directs. *Held*, that this answered the requirements of the statute that he should be "duly sworn,"—no form of oath being prescribed. *Wing v. Hall*, 47 Vt. 182.

182. **Committee's account.** In the expenditure of a land tax, all questions respecting the faithful expenditure of the labor, and whether or not it was expended in "the best place," were *held* to be involved in, and concluded by, the allowance of the account of the committee by the county court. *Fitch v. Flanders*, 27 Vt. 608.

183. No title can be deduced from a land tax sale and collector's deed under G. S. c. 98, s. 1, unless it appears affirmatively that the committee's account had been approved by the county court before exposure of the lands for sale. *Wing v. Hall*, 47 Vt. 182.

184. **Stats. 1787 and 1788.** The validity of the proceedings in regard to particular land taxes, under the statutes of 1787 and 1788, considered. *Brown v. Hutchinson*, 11 Vt. 569.

185. **Non-resident proprietor.** The land of H, then a resident of Vermont, was set in his grand list. Shortly afterwards, he removed to a distant State to remain permanently absent, as was supposed, leaving no personal property; but he returned to a remote town in this State before the proceedings of the constable for the collection of the taxes. *Held*, that the constable was justified in treating the lands as those of a "non-resident proprietor," for the purpose of a sale of the lands for the taxes, *provided* that he was not aware of the return of H to this State, or the circumstances were not

such as to affect him with notice thereof. *Hutchins v. Moody*, 84 Vt. 483 S. C. 87 Vt. 313.

6. *The purchaser—right acquired, &c.*

186. **Who may not purchase.** At an official sale of lands for taxes, the collector cannot personally, or through an agent, bid in the lands so as to affect the title of the owner. Such sale is absolutely void. *Chandler v. Moulton*, 33 Vt. 245; and see *Woodbury v. Parker*, 19 Vt. 353.

187. A party who is bound to pay the taxes upon land and prevent a vendue sale therefor, cannot acquire a title by such sale and conveyance, as against the right owner, but the vendue deed will be treated as void from the beginning. *Blake v. Howe*, 1 Aik. 306.

188. Where a widow conveyed, as in fee and with warranty, lands set to her as her dower, and a subsequent grantee, during her lifetime, bid in the lands on a tax sale and took a deed to himself;—*Held*, that as against the reversioner such grantee took only an estate for the life of the widow; that it was his duty to pay the tax; and that he could not set up the tax deed as against the reversioner. *Lyman v. Hollister*, 12 Vt. 407.

189. **The right acquired.** By a sale of land for taxes, the purchaser gets no greater or different right than the former owner had before the sale. He will get the land he buys, in severalty, or in common, as the former owner held it. *Willard v. Strong*, 14 Vt. 582. *Sheafe v. Wait*, 30 Vt. 735.

190. A tax collector's sale and deed of land was of so many acres of a certain lot. The lands were owned in common. *Held*, that the deed passed such an undivided interest in the lot as the number of acres sold bore to the whole number of acres in the lot. *Id.*

191. A tax laid by the legislature, in 1831, of three mills per acre on all the lands in Essex county for the building of a jail, was *held* not to be a tax against any person, nor to create any personal liability; and that the collector's deed (all the proceedings being regular) extinguished all prior claims, whether of title or possession, and gave good title to the purchaser at the tax sale. *Brown v. Austin*, 41 Vt. 262.

192. **Covenant in deed.** The collector of a particular land tax who executes a deed in his official capacity, according to the requisitions of the statute, *i. e.*, containing a general covenant of warranty, is not liable on such covenant for failure of the title. *Gibson v. Mussey*, 11 Vt. 212. 35 Vt. 353.

193. **Record of deed.** A collector's deed under the Ives vendue of 1784, lodged in the proper office in due season, but not recorded until 1827, was *held* inoperative as against a

deed of the original proprietor executed in 1797 and recorded in 1799. *Allen v. Everts*, 3 Vt. 10.

194. **Possession under tax deed.** Possession first taken and held for five years under a tax deed twenty-three years old, raises no presumption of title under the deed. *Richardson v. Dorr*, 5 Vt. 9.

195. **Liability of town.** In an action by the purchaser of land at a tax sale against a town for a default of its collector, by which no title passed by the collector's deed, but where the plaintiff had never taken possession, and there was no existing possession or seisin in another at the time of the sale and conveyance;—*Held*, that the damages recoverable were only the money paid and interest. *Saulters v. Victory*, 35 Vt. 351.

For *taxation by towns*, see TOWNS, II.;—by *school districts*, see SCHOOLS, II.

## TENANCY IN COMMON.

### I. IN LANDS.

1. *Creation by deed.*
2. *Rights and remedies of tenants as to third persons.*
3. *Rights and remedies between themselves.*

### II. IN CHATTELS.

#### I. IN LANDS.

##### 1. *Creation by deed.*

1. **Construction.** It seems, that a conveyance of a given number of acres of a lot to one man and another number to another, thus conveying the whole right to both, the intent to convey in severalty not appearing, creates a tenancy in common, with interests proportioned to the number of acres specified in the deeds. *Preston v. Robinson*, 24 Vt. 583; and see *Sheafe v. Wait*, 30 Vt. 735.

2. Where a deed was made to two persons for their own use forever, with a condition that they should pay all the grantor's debts, or the deed should be void;—*Held*, that the deed did not create a trust estate, nor express an intention to create a joint tenancy; and that therefore under the statute (G. S. c. 64, ss. 2, 3), this was a tenancy in common. *Lamb v. Clark*, 29 273.

##### 2. *Rights and remedies of tenants as to third persons.*

3. **Action by one tenant.** One tenant in common may recover the whole land in eject-

ment against a stranger to title, and hold possession both for himself and his co-tenants. *Pomeroy v. Mills*, 3 Vt. 279. *S. C. Id.* 410. *Coit v. Wells*, 2 Vt. 818. *University of Vt. v. Reynolds*, 8 Vt. 558. 10 Vt. 18. *Johnson v. Tilden*, 5 Vt. 426. *House v. Fuller*, 12 Vt. 172. *Chandler v. Spear*, 22 Vt. 408. *Robinson v. Sherwin*, 36 Vt. 69. *Park v. Pratt*, 38 Vt. 545, 550.

4. This law applies to the owner of a proprietor's right, in whole or in part, to undivided lands of a township, as against a stranger. *Pomeroy v. Mills*. *Johnson v. Tilden*. *House v. Fuller*. *Chandler v. Spear*. *University of Vt. v. Reynolds*. *Coit v. Wells*.

5. In such case, as also in trespass *qua. clau.*, he may recover the whole damages. *Hibbard v. Foster*, 24 Vt. 542. *Bigelow v. Rising*, 42 Vt. 678.

6. But in trespass to personal property, he can recover only for the damage done to his own interest. *Chandler v. Spear*, 22 Vt. 388, 408. *Briggs v. Taylor*, 35 Vt. 66.

7. The right of one tenant to recover to the extent of his interest is not affected by the fact that the right of his co-tenant is barred by the statute of limitations. *McFarland v. Stone*, 17 Vt. 165.

8. —by all.—G. S. c. 40, s. 13. Tenants in common may, by agreement and for convenience, occupy distinct portions of their common land in severalty, without affecting their ultimate rights in the whole as tenants in common. In such case, and where the possession by each is not adverse to the others, all may join in an action against a stranger for an injury to the possession of either portion. *Johnson v. Goodwin*, 27 Vt. 288. 33 Vt. 612.

### 3. Rights and remedies between themselves.

9. **Conveyance.** One tenant in common cannot convey by metes and bounds a part of the estate held in common, where this operates to the injury of his co-tenants. Such conveyance does not prevent a subsequent partition, irrespective of it, by order of court upon the application of the other co-tenants. *Held*, that such deed was so far void and inoperative, that the grantee was not entitled to notice of proceedings for partition taken in the probate court. *Broughton v. Howe*, 6 Vt. 266.

10. **Trespass.** There was an irregular levy of execution upon an undivided interest in a farm, and a conveyance of the interest so levied upon, and the grantee took possession. *Held*, that, *prima facie*, his possession was according to his deed, and that he could not maintain trespass against the owner of the remaining interest, his co-tenant, for a subsequent entry which did not exclude him. *Wilkins v. Burton*, 5 Vt. 76.

11. One heir to an estate cannot sustain

trespass against a co-heir for an injury to their undivided lands. *Owen v. Foster*, 18 Vt. 268.

12. Trespass *qua. clau.* cannot be maintained by a tenant in common of land against his co-tenant for entering upon the common land, although under a claim of exclusive ownership, and cutting and carrying away all the timber. *Wait v. Richardson*, 33 Vt. 190; and see *Booth v. Adams*, 11 Vt. 156.

13. Where one tenant in common occupies a particular part of the common property by agreement of the other tenants, this is so far a severance in fact as to permit him to maintain trespass against them for the same acts which would constitute trespass in a stranger, although the length of such occupation would be insufficient to mature an absolute legal title in severalty. *O'Hear v. De Goesbriand*, 33 Vt. 593.

14. **Adverse title.** The tenant of a tenant in common is not precluded from taking a conveyance from the other tenants in common of their shares. *Catlin v. Kidder*, 7 Vt. 12.

15. One who takes possession under a deed which makes him a tenant in common with another, cannot set up against the other an adverse title in a stranger. *Braintree v. Battles*, 6 Vt. 395.

16. Where one tenant in common of lands purchased the premises at a tax sale and took a deed of the whole from the collector;—*Held*, that this was but a discharge of a common incumbrance and of his own legal liability for the benefit of himself and his co-tenant, and that he acquired no title by the deed to the share of his co-tenant. *Downer v. Smith*, 38 Vt. 464.

17. **Ejectment—Ouster.** A tenant in common of the use and occupation of land whereof his co-tenant has the fee, does not, by a perversion of his right and an actual ouster of his co-tenant, forfeit his interest, but his co-tenant may sue him in ejectment, and recover according to his own interest. *Warren v. Henshaw*, 2 Aik. 141.

18. One tenant in common may acquire title against his co-tenant by fifteen years' adverse possession; but this presupposes an ouster; otherwise, the possession of one is, in judgment of law, the possession of both. *Owen v. Foster*, 18 Vt. 268.

19. In case of an actual ouster of a tenant in common by his co-tenant, no demand to be let into possession is necessary in order to sustain ejectment; and the same proof that puts the statute of limitations in operation, creates an ouster. *McFarland v. Stone*, 17 Vt. 165.

20. Where one tenant in common took from a stranger a deed to himself of his co-tenant's share, and set it up;—*Held*, that this was such an ouster of the co-tenant as entitled him to maintain ejectment for his share. *Catlin v. Kidder*, 7 Vt. 12.

21. A disseisor of lands held in common afterwards took a deed from one of the tenants in common of his interest, and continued in possession. *Held*, that the other tenant in common could not thereafter maintain ejectment against him, without a fresh ouster, or disseisin. *House v. Fuller*, 13 Vt. 165.

22. The plaintiff and defendant being joint tenants under a lease reserving to the lessor the right of re-entry for non-payment of the rent reserved, the lessor conveyed to the plaintiff all his interest in the premises, certain rent being then in arrear. *Held*, that the plaintiff could not maintain ejectment because of the rent in arrear. *Birney v. Birney*, 15 Vt. 186.

23. The sole possession of one tenant in common is not presumed to be adverse to his co-tenant, but to be held in the right of both. To render void a deed to a third person from a tenant out of possession, such tenant, or his grantee, must have notice, at the time of the conveyance, that such holding is adverse. It is not enough that it was intended to be adverse. *Buckmaster v. Needham*, 22 Vt. 617. 10 Vt. 593.

24. Where land is owned in joint tenancy, or tenancy in common, and one tenant takes a deed of the whole, and takes and maintains exclusive possession and makes exclusive claim to the whole under his deed, this is a sufficient ouster of his co-tenant to entitle the latter to maintain ejectment to recover his share, without a demand to be let into possession. *Johnson v. Tilden*, 5 Vt. 426. *Pomeroy v. Mills*, 3 Vt. 410. *Carpenter v. Thayer*, 15 Vt. 552. *Roberts v. Morgan*, 30 Vt. 319.

25. Where one joint owner of lands took and maintained exclusive possession of the lands, and asserted an exclusive claim and title to the whole adversely, and where [as in this case] he contracted to sell and convey the whole;—*Held*, that this was such evidence of an actual ouster of his co-tenant, as that he might elect to treat it as an ouster, and could maintain ejectment, without a demand to be let into possession. *Carpenter v. Thayer*, 15 Vt. 552. 30 Vt. 324.

26. The entry upon and taking possession of lands by one joint owner and his exclusive occupation of them for fifteen years, claiming title to the whole, was *held* not to be such an ouster of his co-tenant as to give title by adverse possession, where it did not appear that such co-tenant had notice of such exclusive and hostile claim. *Roberts v. Morgan*, 30 Vt. 319; and see *Leach v. Beattie*, 33 Vt. 195. *Holley v. Hawley*, 39 Vt. 525. *Catlin v. Kidder*, 7 Vt. 12.

27. Where there is no adverse holding, the possession of real estate is deemed to be in him who has the title; and when one joint owner is in possession of the whole, the pre-

sumption is that he is keeping possession not only for himself but for his co-tenant, according to their several rights; and the other joint owner has a right so to understand, until he has notice to the contrary. *Ib.*

28. A conveyance by one joint tenant, or tenant in common, of all his interest in real estate, though the land is described in such a manner as to pass the whole under the deed if the grantor had owned the whole, is not notice of itself to the other joint owner of any such exclusive claim to the land as to oust him of his legal seisin in the land. He has a right to suppose that by such a deed, both the grantor and grantee understand it to convey the real interest the grantor owns in the land. He may treat the possession of the grantee under such a deed, until notice to the contrary, as a holding by the grantee in his character and right as joint tenant, or tenant in common with the other joint owners of the premises, and for their mutual benefit. *Holley v. Hawley*, 39 Vt. 525. *Roberts v. Morgan*, 30 Vt. 319. *Leach v. Beattie*, 33 Vt. 195.

29. The taking of a deed of land by one tenant in common from a third person, and spreading the same upon the record, has no effect towards constituting such an ouster of his co-tenant as will lay the foundation for the commencement of an adverse possession against him, unless accompanied and followed by a hostile claim of which such co-tenant has knowledge, and by acts of possession not only inconsistent with, but in exclusion of, the continuing right of such co-tenant in the premises. *Holley v. Hawley*. *Leach v. Beattie*.

30. *Devisees*. An entry or acts of possession of one of several devisees of the same estate are those of a tenant in common, until distribution made; and his right is subject to the results of administration according to the will,—as, the payment of debts; and until then, such acts are not operative towards gaining a title by adverse possession. *Ames v. Beckley*, 48 Vt. 395.

31. *Misuse*. If one tenant in common misuses that which is in common with another, he is answerable to that other. For an injury less than a destruction of the subject-matter of the tenancy in common, an action on the case, *ex delicto*, is the appropriate remedy. *McLellan v. Jenness*, 43 Vt. 188.

32. The plaintiff, the defendant and three others owned a main aqueduct, each owning the right to one-fifth of the water passing therein, which they took to their respective premises by branch aqueducts, which each owned separately. In an action on the case alleging that the defendant so maliciously and wantonly made use of his own branch aqueduct as to prevent the plaintiff from enjoying the benefit of the water, the court charged (among other things)



that if the defendant knowingly *suffered* his family to use or waste more than one-fifth of the water, for the purpose of annoying or injuring the plaintiff, or with a wanton disregard or indifference to the inconvenience it might occasion the plaintiff, and the plaintiff had thereby suffered damage, the defendant was liable. *Held* correct—understanding the word *suffer*, as used in the charge, to mean *allow* or *permit*; and whether a voluntary or a negligent permission, is not material. *Id.*

**32. Remedies in chancery.** The character and extent of the respective rights of tenants in common and the proper mode of exercising them, are familiar and proper subjects of chancery jurisdiction. *Lyon v. McLaughlin*, 32 Vt. 423.

**33. Repairs and improvements.** One tenant in common has no implied lien for repairs, as against a levy upon the interest of his co-tenant. *Galusha v. Sinclear*, 3 Vt. 394.

**34.** Where one tenant in common cleared a portion of the common land, and it did not appear that this was done with the assent or knowledge of the other, nor that the premises were improved in value thereby;—*Held*, in an action of account, that the expense of the clearing was not chargeable against the other tenant. *Kidder v. Rixford*, 16 Vt. 169.

**35.** On partition by arbitration and subsequent conveyances between A and B, tenants in common, there was set to A a parcel upon which B had before sowed grain, and the crop was then growing, and A afterwards harvested it. *Held*, that, in adjusting their accounts in the action of account, there should be allowed to B the expense of sowing the grain. *Id.*

**36.** Where two had an interest in a spring of water and an aqueduct, *held* that one could not cut off the supply of water to the other for refusal to contribute towards the necessary expense of repairs. *Coolidge v. Hager*, 43 Vt. 9.

**37. Partition—Remainder man.** Tenants for life, holding in common, cannot make a partition which shall bind those entitled in remainder. *Austin v. Rutland R. Co.*, 45 Vt. 215.

**38. Accounting.** Where the occupancy of one tenant in common is beneficial and at a profit to him, and is entire and exclusive, he is bound, under G. S. c. 41, s. 1, to account to his co-tenant for what he has received by such occupancy more than his just proportion; and this, without an agreement to that effect. *Hayden v. Merrill*, 44 Vt. 336. *Winsall v. Wilkins*, 5 Vt. 87.

**39.** The plaintiff and defendant were tenants in common of a tract of land covered with young and growing timber. The defendant cut off the timber from a parcel of the land, established a race-course thereon, and continued in exclusive occupation thereof at a profit, until

the termination of the tenancy. *Held*, that under G. S. c. 41, s. 1, the defendant was liable in an action of account for what he had received above his just proportion of the estate. *Hayden v. Merrill*.

**40.** A and B who had owned and occupied, as tenants in common, land subject to an annual rent, and had divided the profits from year to year between them, sold the land and divided the avails between them, and promised the purchaser to pay all rent then in arrear. A, being afterwards called upon, paid all the arrears of rent. *Held*, that B was liable to pay him the one-half, in an action of *indebitatus assumpsit*. *Fisher v. Kinaston*, 18 Vt. 489.

See ACTION OF ACCOUNT.

As to *levy of execution* upon estate of tenant in common, see EXECUTION, V., 3.

As to *partition*, see PARTITION.

## II. IN CHATTELS.

**41. Conversion—Action.** A destruction of a personal chattel by one tenant in common is a conversion for which his co-tenant may maintain trover. *Tubbs v. Richardson*, 6 Vt. 442.

**42.** The sale by one tenant in common of the whole property to a stranger, is not such a destruction of the property as amounts to a conversion. *Id.* 12 Vt. 685. 14 Vt. 221. 15 Vt. 707. 16 Vt. 381. 33 Vt. 123. *Sanborn v. Morrill*, 15 Vt. 700. 26 Vt. 427. See *Lyman v. Dow*, 25 Vt. 405. 45 Vt. 853.

**43.** A and B owned a piano, as tenants in common. The defendant, having no possession or title, sold an undivided half to B, and B removed the piano from the State. In an action of trover by A,—*Held*, that as this was no conversion by B, no action lay against the defendant. *Bates v. Marsh*, 33 Vt. 122.

**44.** The sale of an entire chattel owned in common, upon an attachment or execution against one of the owners, is a conversion of the interest of the co-tenant, for which he may maintain trover. *Ladd v. Hill*, 4 Vt. 164. 15 Vt. 509. *Bradley v. Arnold*, 16 Vt. 382. *White v. Morton*, 22 Vt. 15. 26 Vt. 427.

**45. Non-joinder.** In actions *ex delicto*, the non-joinder of a joint owner as plaintiff must be pleaded in abatement, in order to defeat the action. *Briggs v. Taylor*, 35 Vt. 57. *Hall v. Adams*, 1 Aik. 166. S. C. 2 Aik. 180.

**46. Damages.** In actions merely personal, as, trespass *de bonis*, one tenant in common can recover damages only to the extent of his interest in the whole damages. *Chandler v. Spear*, 22 Vt. 388. 24 Vt. 546. 35 Vt. 66.

**47. Attachment.** The attachment of a chattel held in common, on a process against one of the tenants in common, as his sole property, and the taking of the entire and exclusive possession to the dispossession of the other

tenant, do not give the other tenant the right to an action of trespass or trover against the attaching creditor, or officer. *Welch v. Clark*, 12 Vt. 681.

48. Where the interest of one tenant in common of personal property is attached, and the attachment is dissolved, a return of the property to either one of the joint owners is a return to both, and relieves the officer from liability to either, and both. *Frost v. Kellogg*, 28 Vt. 308. *Gassett v. Sargeant*, 26 Vt. 424.

49. **Liabilities of joint owner.** A and B were owners of a saw mill of which A had the entire management and control, when A agreed, for the period of two years, to saw lumber for the defendant at certain prices stipulated. Within the two years A died, and his interest in the mill passed to his widow, who, with B, ran the mill and sawed lumber for the defendant. In an action by B and the widow to recover for the sawing done after the death of A;—*Held*, that, simply as joint owner or tenant in common of the mill with B, A had no authority to bind B by such contract as to the price of sawing; that such contract did not bind the widow, who simply succeeded to A's title in the mill; and that the plaintiffs were entitled to recover what the sawing was reasonably worth, irrespective of the contract with A of which they had no knowledge. *Winslow v. Fraser*, 30 Vt. 522.

50. A owned a stable, and B a livery stock of horses and carriages. A purchased of B an undivided half of the stock, and B sent D with the whole stock to A's stable, recommending D as a suitable person to have the charge of such business. D took the charge, and procured of the plaintiffs feed for the horses, on the credit of A and B. *Held*, that they were jointly liable therefor, irrespective of the question whether they were partners as between themselves, or as to the public, inasmuch as there was nothing in the case to show that either was absolved from the obligation to maintain and care for this joint property. *Wilson v. Henry*, 44 Vt. 470.

### TENDER.

1. **Requisites.** In the absence of the party to whom, by the terms of the contract, a tender is required to be made, the tender, to be good, must be made before dark ("the evening") of the day on which the contract falls due; otherwise, if the party is present. *Sweet v. Harding*, 19 Vt. 587.

2. A tender of a gross sum upon several demands, without designating the amount tendered upon each, is sufficient. So, a defendant may plead generally a tender to

several counts for different demands. *Thetford v. Hubbard*, 22 Vt. 440.

3. In an action of book account a tender was held good, where, before suit, the true sum due was, in bank bills, placed on a table in the room where the plaintiff was, and he was told the amount and that it was ready for him, and he might have taken it if he would, though it was not formally presented, or handed out to him, where he made no objection to the kind of money offered, and the amount due was, after suit, placed in the hands of the auditor and was brought into court. *Curtiss v. Greenbanks*, 24 536.

4. The defendant desiring to make a tender, said to the plaintiff as he was passing, "I want to tender you this money before Mr. Dodge, for labor you have done for me,"—at the same time holding in his hands money enough to pay the plaintiff's claim, but naming no sum. The plaintiff kept along with his team, making no reply. *Held*, that this was not a valid tender. *Knight v. Abbott*, 80 Vt. 577.

5. **Condition.** A tender with a condition annexed to its acceptance, is invalid; as, that the creditor shall give a receipt, or surrender a security or obligation upon which the money is tendered. *Holton v. Brown*, 18 Vt. 224; or, that if received, it shall be in full payment of the claim. *Draper v. Hitt*, 43 Vt. 439. *Preston v. Grant*, 34 Vt. 201. *Foster v. Drew*, 39 Vt. 51. *ACCORD*, 17, *et seq.*

6. A tender was made in this form: "I tender this sum [named] as the balance due on the note." *Held*, that this was a good tender, and not an offer upon condition, and that the receipt of the money did not constitute, in law, an accord and satisfaction. *Preston v. Grant*, 34 Vt. 201. By *Pierpoint, J.*: This was merely an assertion of what the party offering the money claimed, and an identification of the demand upon which he made the tender. It is simply saying, "I tender this sum, it being all that is due upon the note." *Id.* 204.

7. The plaintiff had a claim against the defendant growing out of a transaction about some oats, on which there was really due not exceeding \$170, though the plaintiff claimed more. The defendant had a book account against the plaintiff on which was due \$41.78. The defendant had offered the plaintiff \$170, saying he tendered that upon the oat contract, and the book account might stand, or, the plaintiff might take \$180 of the money, and the defendant would discharge the account. The plaintiff declined to take the money, saying there was not enough. Afterwards the defendant tendered the plaintiff \$180, "supposing and telling the plaintiff that if he took the \$180, it closed the whole business; and if he took the \$170 it settled the oat business and left the account standing." In an action on book,—

*Held*, that this last was not a conditional offer, but a good tender of the balance due; that what was said was but an explanation of the defendant's claim and the purpose of the tender, and what each tender was intended to cover; and was not equivalent to saying, that if the plaintiff received the money, he must receive it as closing matters between them. *Foster v. Drew*, 39 Vt. 51.

8. **Effect.** A tender in settlement of a balance due on a particular claim, is, in law, an admission of the legality of the claim, denying only the amount due. *Woodward v. Cutter*, 33 Vt. 49.

9. Money tendered and paid into court, not sufficient in amount, belongs to the defendant, and should not be deducted in making up the judgment. *Meeker v. Hurd*, 81 Vt. 639.

10. **Keeping tender good.** A tender of the sum due on execution entitles the debtor to relief by *audita querela*. But such tender must be kept good and the money be brought into court; and unless this be averred in the complaint, it is ill on demurrer. *Perry v. Wurd*, 20 Vt. 92.

11. If a suit be brought before a justice court, money tendered must be produced in that court; and if the action is there defended exclusively on other grounds, or a judgment submitted to and an appeal taken by the defendant without insisting on the tender, it will be too late afterwards to set up that defense. *Chipman v. Bates*, 5 Vt. 143. 18 Vt. 336.

12. The tender, in such case, must be pleaded in the justice court and the money be there produced. A mere offer to produce it, though the plaintiff refused to receive it, was held not to be sufficient. *Griffin v. Tyson*, 17 Vt. 35.

13. It is not necessary, in order to keep good a tender of money, that the party should keep the identical money offered, ready to be paid over on demand, or into court; but he may use it as his own, being ready to pay the debt in current money when requested, or into court—herein differing from a tender of specific articles. *Curtiss v. Greenbanks*, 24 Vt. 536.

14. **Demand of tender.** A demand of money tendered, in order to avoid the tender, must be of the precise sum tendered. If of a different sum, as, "of the amount due and owing," the debtor is not bound to regard it. *Thetford v. Hubbard*, 23 Vt. 440.

15. **Tender superseded.** Where one has wholly incapacitated himself from performing a contract on his part, he shall take no advantage of the informality of a tender by the other party. *Morton v. Wells*, 1 Tyl. 381.

16. The necessity of a legal tender may be superseded when, upon an offer to pay, the other party refuses to receive. *Dickinson v. Dutcher*, Brayt. 104.

17. Where a demand is necessary to give a right of action, such demand, accompanied with a claim for more than is demandable and a refusal to receive less, is nugatory, and renders a tender unnecessary. *Russell v. Ormsbee*, 10 Vt. 374. *Gragg v. Hull*, 41 Vt. 217.

18. Where an award was that the defendant should make out and deliver to the plaintiff a deed of certain land and give possession of the same by a certain day named;—*Held*, that the plaintiff's refusal to accept the deed, when duly tendered, was a renunciation of all rights incident to and growing out of the deed, and that the defendant was not bound to go further and tender possession. *Preston v. Whitcomb*, 11 Vt. 47.

19. **Concurrent acts.** Where parties are required to do concurrent acts, those upon one side being the consideration for those on the other, it is not required that the one party, in order to secure a right of action against the other, should make a formal and express tender. All that is required, either in pleading or proof, is, that the party claiming a breach upon the other part should show that he made no default himself; that he was ready and willing to perform his part of the undertaking; that this was well understood by the other party, but that he, notwithstanding, refused to perform his part of the contract. *Redfield, C. J.*, in *Cobb v. Hall*, 33 Vt. 238.

20. Thus, under a contract to convey lands for a certain price to be paid, it is not necessary, in order to an action, that the price should be tendered upon the one side, or the deed upon the other, if the other party refuses to perform. The law never requires a useless ceremony. *Id.* 233. *Hard v. Brown*, 18 Vt. 87.

21. **Rescission.** Where the purchaser of goods has a right to rescind on the ground that they are different in kind or class from those contracted for, and he has used a part of them before discovering the difference, he must, in order to a rescission, not only return the goods unsold, but actually tender the value of the part used. *Hoadley v. House*, 32 Vt. 179.

22. **Specific articles.** A contract absolute for the payment or delivery of specific articles, at a time and place named in the contract, requires for its performance an actual tender at the time and place named. Such tender may be made, though the payee neglect to attend; and the effect of it is to discharge the contract and to vest the property tendered in the payee. Hence, a plea of readiness, or offer to perform, but that the payee was not present to take delivery, is ill. *Barney v. Bliss*, 1 D. Chip. 399. 12 Vt. 581. *McConnel v. Hall*, Brayt. 223. 14 Vt. 461.

23. Where the defendant in the absence of the plaintiff, but at the proper day and place, set apart property in fulfillment of a contract

of which the plaintiff was the legal assignee, and known to be so by the defendant;—*Held*, that the plaintiff thereby became the owner of the property with right of possession, and could maintain trover for a subsequent conversion on the same day by the defendant. *Seward v. Hefin*, 20 Vt. 144.

24. The defendant gave his note to the plaintiff payable in good, well-finished plows, at his shop, in the month of February. On the last day of the preceding January he set aside such plows, at the place named, to the amount of the note, and for the purpose of paying it, marking each plow with the name of the plaintiff; and the plows were kept there in that condition and for that purpose throughout the whole month of February. *Held*, that a second turning out of the property, in direct terms, during the month of February, would have been a useless act; and that this was a tender of the plows and a payment of the note, in the month of February. *Gilman v. Moore*, 14 Vt. 457. 16 Vt. 30.

25. To a note payable "in leather," the tender of leather unsealed, which by law is required to be sealed before being offered for sale, or the tender of leather which is sealed as "bad," is not sufficient. *Elkins v. Parkhurst*, 17 Vt. 105.

26. **Tender after suit.** The statute allowing a tender of the demand sued for and costs, after the commencement of the action to three days before the sitting of the court, &c. (G. S. c. 125, s. 7), was not intended to extend the right to other actions than those in which a tender might be made at common law; but the object was to allow a tender after action brought. *Green v. Shurtliff*, 19 Vt. 592. It does not apply to an action of trover. *Hart v. Skinner*, 16 Vt. 188.

27. In an action on a bond conditioned to convey,—*Held*, that after breach and suit brought, the tender of a deed, with the costs of suit, was not admissible in defense, or in mitigation of damages. *Boardman v. Keeler*, 21 Vt. 77.

28. Where a tender of amends and accrued costs was made after suit brought and after the service of a subpoena, and too late reasonably to countermand the attendance of the subpoenaed witnesses;—*Held*, that a tender was insufficient which did not include the costs of such witnesses as attended the court under the subpoena, although their fees had not been paid nor tendered them. *Smith v. Wilbur*, 35 Vt. 188.

29. A party to whom a tender is made, in such case, is not bound to inform the other what costs he claims, if not inquired of. *Id.*

30. The statute does not allow a tender after judgment by a justice and an appeal taken, and before entry of the appeal in the

county court. A tender, so made and accepted, only operates as a payment of so much towards the debt and accrued costs. *Babcock v. Oulser*, 46 Vt. 715.

31. **Pleading tender.** A tender need not be pleaded, but may be given in evidence under the general issue, where a tender is collateral to the action, operating to extinguish or suspend the plaintiff's title to the specific property sued for; as, in ejectment upon a mortgage (*Powers v. Powers*, 11 Vt. 262; *McDaniels v. Reed*, 17 Vt. 674); nor, where the tender, as authorized by statute, was after suit commenced and before entry in court; nor, in the action of book account, need a tender be pleaded. *Woodcock v. Clark*, 18 Vt. 338.

32. In *scire facias* upon a recognizance for the payment of intervening damages and costs occasioned by an appeal, a tender cannot be pleaded as to the intervening damages, they being unliquidated; but a tender of the costs may be pleaded, and the assignment of intervening damages traversed. A plea of tender to the whole declaration, in such case, is ill. *Green v. Shurtliff*, 19 Vt. 592. *Holmes v. Woodruff*, 20 Vt. 97. 27 Vt. 577.

33. A tender in an action for damages (as in case, or trespass) under G. S. c. 25, s. 44, cannot be pleaded in bar to the jury, but is to be considered by the court only in the matter of the taxation of costs. *Adams v. Morgan*, 39 Vt. 302. *Smith v. Wilbur*, 35 Vt. 188.

34. **Delivery of specific things under special rule of court.** A court of common law jurisdiction has authority (as, in an action of trover or trespass *de bonis asportatis*) to permit, by order, a return of the property sued for in mitigation of damages, and, on payment of costs, to order that the plaintiff shall thereafter proceed at his peril as to subsequent costs. *Rut. & Wash. R. Co. v. Bank of Middlebury*, 32 Vt. 639. *Hart v. Skinner*, 16 Vt. 188. *Yale v. Saunders*, 16 Vt. 248 and note. *Bucklin v. Beals*, 38 Vt. 653.

35. Such power, though discretionary, should not be exercised where it would deprive the plaintiff of full reimbursement, or where the conduct of the defendant has been willful. *Id.* But the fact that the plaintiff claims damages beyond the value of the property, is not a sufficient objection to the granting of the order. 32 Vt. 639.

36. In trover, a tender of the property sued for was disallowed as a defense, where the conversion was willful and the property was essentially injured, and no rule was seasonably moved for. *Hart v. Skinner*, 16 Vt. 188.

37. In trover for certain railroad bonds and after one trial and a review, the defendant was permitted, under a special rule, to deliver the

bonds into court for the plaintiff in mitigation of damages. *Rut. & Wash. R. Co. v. Bank of Middlebury*, 32 Vt. 689.

See BOOK ACCOUNT, VIII.

### TERMS OF COURT.

1. **Adjourned term.** An adjourned term of court must be considered as a separate and distinct term for the purpose of entry of causes, in all cases where entries are proper at such term. *Peari v. Allen*, 2 Tyl. 311.

2. A term of court holden by adjournment, under the statutes of this State, must be considered a new and distinct term, and not a continuation of the former stated term. *Hoar v. Jail Commissioners*, 2 Vt. 402.

3. **Next term.** In reference to appeals, the expression "next term" has been uniformly held to exclude a present or existing session of the court appealed to, and to carry the appeal to the next succeeding term. *Shelburn v. Eldridge*, 10 Vt. 123; and see *Woodward v. Spear*, 10 Vt. 420.

4. A county court writ was made returnable at a term "next to be holden on the second Tuesday," &c. The term appointed by law was the first Tuesday, &c. Held, that the time was sufficiently definite without stating the day, and that a statement of the wrong day might be rejected as surplusage; and the writ was allowed to be amended in this particular, after a plea in abatement filed. *Dean v. Swift*, 11 Vt. 331.

5. By the act of 1806, the county court was required to appoint turnpike inspectors "at their session next following the first day of December, annually." Held, that it was not improper or illegal to appoint them at a term commencing on the last Tuesday of November, where the session continued after the first day of December. *State v. Bosworth*, 13 Vt. 402.

6. **General term.** A cause is not in the supreme court until it has been entered at a fixed county term. It cannot be entered at the general term, unless ordered there by the supreme court sitting in and for a county. *State ex rel. Page v. Smith*, 48 Vt. 14.

7. A petition for a new trial cannot be made returnable to the general term of the supreme court, though the cause be there pending on exceptions. *S. Royallton Bank v. Colt*, 31 Vt. 415.

8. **Particular term named.** An averment in an indictment that, among the pleas of a certain term named, "a certain issue was duly joined," was held as applying to the state in which the pleadings were at that term found, and not to the act of joining the issue; and that

the averment was sustained by the record showing the issue actually joined at a previous term, but standing joined at the term named, and then tried. *State v. Davidson*, 12 Vt. 800.

### THREATS.

1. **Criminal.** Any threats which disturb the public peace are made an offence by the statute against breaches of the peace. A threat, in order to violate that sense of security which constitutes the public peace, must be of some grievous bodily harm, put forth in a desperate and reckless manner, accompanied by acts showing a formed intent to execute them; must be intended to put the person threatened in fear of bodily harm, and must produce that effect, and must be of a character calculated to produce that effect upon a person of ordinary firmness. *State v. Benedict*, 11 Vt. 236. (*Bennett, J.*, dissenting.) 23 Vt. 323.

2. **Actionable.** To warrant an action for writing a letter to the plaintiff giving information willfully false, and with a malicious design to annoy the plaintiff and drive him out of town, the loss or inconvenience sustained must be the direct and reasonable result of the letter and of a reliance upon it; and must consist of something more than mental suffering and annoyance, and the trouble and expense of discovering the authorship of the letter. *Taft v. Taft*, 40 Vt. 229.

3. Threats of bodily hurt which occasion such interruption or inconvenience as is a pecuniary damage, are actionable—as, a threat of imprisonment producing fear, whereby a party is rendered unable to attend to his usual business, and suffers expense and loss. A mere vain fear is not sufficient; and the declaration must show some just cause of fear producing pecuniary damage. (Sufficiency of declaration considered on demurrer.) *Grimes v. Gates*, 47 Vt. 594.

4. In case for threats made in letters, the words need not be set out in the declaration, but only the substance of the threat. *Id.*

### TIME.

1. **Month.** The word *month*, as used in the statutes of this State, means a calendar month, unless otherwise expressed. *Kimball v. Lamson*, 2 Vt. 188.

2. **Computation of time.** In the service of writs and executions, advertising property, warnings of town meetings, &c., it has always been practiced, in reckoning a given number of days, to exclude the day of the act. *Redfield*,

J., in *Pratt v. Swanton*, 15 Vt. 147; and see *Allen v. Carty*, 19 Vt. 65. *Alger v. Curry*, 40 Vt. 449.

3. The rule for computing time for the calling of a school meeting is like that which prevails in case of the service of process; either the day of posting the notice, or the day set for the meeting, will be counted. *Mason v. School Dist. Brookfield*, 20 Vt. 487.

4. Seven days' notice of school district meetings being required by statute;—*Held*, that a notice dated the *first* for a meeting to be held the *seventh* day of the same month was not sufficient. *Hunt v. School Dist. Norwich*, 14 Vt. 800.

5. A town meeting warned on the *first* to be held on the *twelfth* day of the same month, was *held* to be on but eleven days' notice, and irregular. *Pratt v. Swanton*, 15 Vt. 147.

6. In computing the thirty days from the day when the plaintiff is first entitled to an execution (with reference to charging property attached), the first day is excluded. So, in computing the sixty days of the life of an execution, the day of the date is excluded. *Allen v. Carty*, 19 Vt. 65. 20 Vt. 661. 40 Vt. 437.

7. In computing the "sixty days from the time of rendering final judgment," within which, by G. S. c. 83, s. 62, the execution must be returned *non est* in order to charge the bail, the day on which the judgment was rendered is excluded. *Mussy v. Howard*, 42 Vt. 23.

8. G. S. c. 53, s. 19, requires the taking of an appeal from commissioners to be at the time of returning their report, "or within twenty days after such return." *Held*, that in computing the twenty days, the day of the return should be excluded. *Robinson v. Robinson*, 32 Vt. 788.

9. By statute, a writ of review must be brought "within three years next after the rendition of the judgment." The judgment was rendered May 9, 1840, and the writ of review was brought May 9, 1843. *Held*, that the writ was seasonably brought—the day of the judgment being excluded in the computation; and *quære*, as to the distinctions taken between computing from the thing done, and from and after the day of the fact. *French v. Wilkins*, 17 Vt. 341.

10. Where a party is to give notice to another in a distant town within three days, the deposit in the postoffice of a letter containing such notice on the third day and after the departure of the mail of that day, so that the letter does not reach its address until the next day, is not a notice in due time. *Field, Admr., v. Mann*, 42 Vt. 61.

11. **Fractions of a day.** The rule that in law there are no fractions of a day, is applicable to transactions of a public character—such as

legislative acts, or public laws, or such judicial proceedings as are matters of record; but is never applied in mere private transactions involving rights between individuals; there, the true time when an act was done, or a right or authority was acquired, may always be shown. *Courser v. Powers*, 34 Vt. 517. *In re Welman*, 20 Vt. 653.

12. In an action against a justice of the peace for an arrest under a warrant claimed to have been issued before he had taken his official oath, where it appeared that such oath was taken on the day of issuing the warrant;—*Held*, that the true time of the day could be shown—as, that it was after the issuing of the warrant. *Courser v. Powers*.

## TOWNS.

- I. ORGANIZATION.
- II. POWERS AND LIMITATIONS; LIABILITIES.
- III. TOWN MEETINGS.
- IV. TOWN OFFICERS.
- V. DIVIDING AND ANNEXING TOWNS.

### I. ORGANIZATION.

1. The legal organization of a town, at and after a particular time, may be presumed from the fact that at that time it had appointed town officers, and was conducting its affairs as an organized town. This is sufficient *prima facie* proof of due organization. *Londonderry v. Andover*, 28 Vt. 416.

### II. POWERS AND LIMITATIONS; LIABILITIES.

2. **Power to acquire title.** A town, like an individual, can acquire title to land by adverse possession. *Boothe v. Coventry*, 4 Vt. 295.

3. —**to defend suit.** A town may vote a tax to prosecute or defend a suit in which it is interested, although the suit is between third persons. *Briggs v. Whipple*, 6 Vt. 95.

4. —**to inoculate.** A town may lay a tax to defray expenses incurred by the selectmen in inoculating with kine-pox, to prevent the spread of small-pox, under the statute of 1797. (Slade's Stat. 493.) *Hazen v. Strong*, 2 Vt. 427. 11 Vt. 422.

5. —**to take bond.** A town may take a bond, voluntarily given, conditioned to save the town harmless from the support of certain persons therein named, though not at the time chargeable as paupers. *Pawlet v. Strong*, 2 Vt. 442. *Williston v. White*, 11 Vt. 40.

6. —**to contract with turnpike company.** A town and a turnpike company may contract with each other that the company

shall support, for a term of years, a highway bridge to be used by the company, and that the town shall, in consideration thereof, pay the company an annual sum. *Royalton v. R. & W. Turnpike Co.*, 14 Vt. 811.

7. —to sell office of constable. A town, in open town meeting, put up for sale at auction the office of first constable, which was bid in by the defendant. He was then elected to the office, and gave his note to the town for the purchase price. *Held*, that this was authorized by G. S. c. 15, s. 82, and the note was upon valid consideration. *Thetford v. Hubbard*, 22 Vt. 440. 32 Vt. 728. See 32 Vt. 327.

8. —to bring suit. Sundry persons associated for the purpose of killing wolves deposited their State bounty money with the defendant, who afterwards gave his note therefor running to the selectmen of sundry towns. *Held*, that an action lay thereon (by Stat. of 1817), in the names of such towns. *Middlebury v. Case*, 6 Vt. 165.

9. On a bond given to the selectmen of a town, for the benefit of the town, an action lies in the name of the town. *Fairfax v. Soule*, 10 Vt. 154.

10. —to protect their property from fire. Where a town, in its corporate capacity, is the owner of property exposed to loss by fire, it may make appropriations from corporate funds for the preservation and protection of such property from fire; as, by the purchase of fire apparatus, and procuring the assistance of men to use it; or by the aiding of fire companies already organized, or incorporated. *VanStiklen v. Burlington*, 27 Vt. 70. (This, under the power given to towns by G. S. c. 15, s. 95, to grant money, &c., "for the prosecution and defense of their common rights and interests, and for all other necessary and incidental charges within said town.")

11. The town of Burlington, in its corporate capacity, owned valuable property which was exposed to injury by fire, and in town meeting the inhabitants passed the following vote: "Resolved, that the town appropriate a sum not exceeding \$600 \* \* for the fire department, to be disbursed to the engine and hook-and-ladder companies, as the selectmen in their discretion may deem necessary." Said fire companies were incorporated, and not under the authority of the town. *Held*, that said vote was valid, and such appropriation could not be enjoined by a tax payer. *Id.*

12. —to build a jail. The inhabitants of a town cannot by vote impose a tax, or appropriate the corporate funds, for objects entirely foreign to their political or municipal duties; as, to build a county jail; and such tax is illegal and void. *Drew v. Davis*, 10 Vt. 506. 27 Vt. 76.

13. —to rescind vote. A vote in town

meeting to raise money for town purposes by a tax, is merely a resolution to provide themselves with money. So long as this rests in mere resolution and has not been acted upon, the town has power to rescind or reconsider it at a lawful meeting; and having done so, the tax first voted cannot be afterwards assessed or collected. *Stoddard v. Gilman*, 22 Vt. 568.

14. A town cannot by rescinding a vote which has already operated as a contract, defeat the effect of the first vote. *Seymour v. Marlboro*, 40 Vt. 171. *Cox v. Mt. Tabor*, 41 Vt. 28. *Haven v. Ludlow*, *Id.* 418. *Laughton v. Putney*, 43 Vt. 485. *Swift v. Elmöre*, 44 Vt. 87. *Josselyn v. Ludlow*, 44 Vt. 584.

15. —to change their boundaries. Political boundaries, as well as those of private property, may be established or changed by acquiescence of proper parties; but State boundaries cannot be changed by the acquiescence of the local authorities, as towns, but only by the States themselves; and probably not by them, even, without the sanction of Congress. *State v. Young*, 46 Vt. 565.

16. The recognition by adjoining land-owners of a certain line as the line between adjoining towns, though for 20 years or more, does not in law bind the towns. *Smith v. Rockingham*, 25 Vt. 645.

17. **Liabilities—Statute obligation.** No private action lies against a town or other municipal corporation, at common law, for a neglect of duty, though an individual suffer damage thereby;—as, for neglect to keep a highway in repair. It is only by force of the statute that such action lies. *Baxter v. Winooski T. Co.*, 22 Vt. 114. 27 Vt. 457.

18. Municipal corporations, as towns, are not liable to a private action, nor to an indictment, for failure to perform a duty imposed upon them, not by their charter, but by a general law of the State, unless expressly made subject to such remedies by the statute itself. *State v. Burlington*, 36 Vt. 521. *Baxter v. Winooski Turnpike Co.*

19. **Officers as agents.** Where the legislature by general laws has devolved certain duties relative to the general police upon selectmen—as the prevention and removal of nuisances—these do not become corporate duties and obligations of the town, for a neglect of which the town can be held liable by action, or indictment. *State v. Burlington*; and see *White v. Marshfield*, 48 Vt. 20.

20. That highway surveyors and street commissioners sustain to the town the ordinary relation of private agents to a principal, so that the town would be liable to a person injured by their acts of negligence in the performance of their duty—doubted. *Haynes v. Burlington*, 38 Vt. 361.

21. **Interest on accounts.** The rule as to

the computation of interest upon an account against a town, which is known to the officers of the town, stands upon no different ground from accounts between individuals; and does not require a presentation of the account and demand of payment, in order to claim interest. *Langdon v. Castleton*, 80 Vt. 285.

**22. Use and occupation.** Where a town had for years used the plaintiff's house, by his consent, for the purpose of holding town meetings, under the understanding that he should claim nothing therefor, except that the selectmen should grant him a license to sell liquor there on town-meeting days and this had been done when he requested it;—*Held*, that a mere notice given by him in town meeting, that he could not any longer have the meetings held in his house, did not entitle him to recover of the town for such use thereafter, there being no notice that he should claim pay, and no promise to pay. *Orcutt v. Roxbury*, 17 Vt. 524.

**23. Ratification.** An unauthorized, but not void act—as, a condition attached to a contract by a committee acting in behalf of a town—may be adopted and ratified by the town; and such adoption may be legally presumed from a failure to repudiate it. *Danville v. Montpelier, &c., R. Co.*, 43 Vt. 144.

**24.** The selectmen of the plaintiff town laid out a highway, mostly upon the defendant's land and principally for his benefit, and agreed with him that he should charge no land damages, should build the road, and keep it in repair so long as he lived where he then did, and that the town should remit all taxes assessed against him for the purpose of repairing highways in the town, so long as he should continue to keep said road in repair. Each party acted under this agreement for twelve years, and it was fully performed by the defendant. *Held*, that after such recognition by the town it was bound by the agreement, whether or not the selectmen had authority, in the first instance, to make it; and that the defendant having repaired the road for the year in question, was entitled to have such highway taxes remitted. *Mount Holly v. Burwell*, 45 Vt. 354.

**25. Town order.** A town order drawn by the selectmen upon the treasurer and made payable to A B or *bearer* (or *order*), is negotiable, and after presentment for payment and payment refused, can be prosecuted in the name of the assignee and a recovery had thereon, declaring upon the order as such, or under the common money counts. *Dalrymple v. Whittingham*, 26 Vt. 845. *Cook v. Winhall*, 43 Vt. 434. 42 Vt. 552. *Contra*, *Taft v. Pittsford*, 28 Vt. 288; and see *Hyde v. Franklin Co.*, 27 Vt. 185.

**26.** An action does not lie upon a town order until after presentment and demand of the town treasurer (G. S. c. 15, s. 71); and

where the order is received in satisfaction of a claim against the town, a recovery cannot be had for the original consideration without having presented the order. *Dalrymple v. Whittingham*.

**27.** The plaintiff claimed of the defendant town \$600 and took a town order for \$300, but without prejudice to his claim. The town treasurer refused to pay the order. In an action upon the original consideration to recover the \$600, the order was not produced on trial nor accounted for, nor was it shown to have been returned. It not appearing that the order was negotiable,—*Held*, that the plaintiff might recover the \$600. *Rogers v. Shelburn*, 42 Vt. 550.

**28. Collateral impeachment.** Where towns and school districts keep within the limits of their corporate powers, their proceedings, being within their discretion, cannot be collaterally impeached. *Eddy v. Wilson*, 48 Vt. 862.

### III. TOWN MEETINGS.

**29. Warning—time.** Where a town meeting was warned on the 1st day of a month to be held, and was held, on the 12th day of the same month;—*Held*, that this was but eleven days' notice, and that the meeting was irregular and its proceedings invalid. *Pratt v. Swanton*, 15 Vt. 147.

**30.** *Held*, that such proceedings could not be ratified, so as to bind the town, by any subsequent action of the town authorities or the inhabitants not acting in town meeting. *Ib.*

**31. Posting.** It is no objection to the legality of a town meeting that the notices therefor were not posted in the places in the town where such notices had usually been posted, it not appearing but that they were posted in "public places," as required by the statute. *Stoddard v. Gilman*, 22 Vt. 568.

**32.** The record of the warning of a town meeting and of the proceedings of the meeting held under it is sufficient, *prima facie*, to show that the warning was, in fact, posted up as required by law. *Lemington v. Blodgett*, 87 Vt. 210.

**33. Substance of warning.** The warning should indicate the subject for consideration with reasonable certainty, and in such a manner that no person interested could be misled in respect to the proposition to be submitted for the consideration and action of the town. Nothing more is required. *Moore v. Beattie*, 33 Vt. 219. *Ovitt v. Chase*, 37 Vt. 196. *Weeks v. Batchelder*, 41 Vt. 317.

**34. Vote under warning.** It is not necessary to the validity of a vote in town meeting to raise money, that the vote should state the particular facts which show the present neces-



sity of the town for the use of the money. All that is necessary in this respect is, that the vote should indicate, in general terms, the purpose or object for which the money is raised, and if that purpose or object is such as comes within the scope of the powers of the town, it is sufficient. *Blodgett v. Holbrook*, 39 Vt. 386. *Alger v. Curry*, 40 Vt. 444.

35. A warning for a town meeting "to ascertain whether the town would vote to pay bounties to soldiers, and whether it would vote a tax on its grand list for that purpose," is sufficient to sustain a vote to pay such bounties and to raise a tax therefor. And an averment of the warning in that form, and the vote under it, in a plea of justification by a collector, was held sufficient on demurrer, without averring that there was a rebellion, that the town had a quota to fill, &c. *Alger v. Curry*.

36. Held, also, that the "soldiers" referred to should be presumed to be of the regiments and companies of this State. *Id. Clemons v. Lewis*, 36 Vt. 678.

37. Under the warning of a town meeting "to see if the town will vote to raise a tax upon the grand list to pay recruits or volunteers for said town who may hereafter enlist;"—Held, that a vote was invalid which instructed the selectmen to procure volunteers and use their discretion in the payment of bounties, and empowered them "to borrow at the credit of the town, for five years' time, not to exceed 200 cents on the grand list for said purpose"; and that the vote gave no authority to the selectmen to bind the town by a promise to pay a bounty to a volunteer. *Blush v. Colchester*, 39 Vt. 193. *Atwood v. Lincoln*, 44 Vt. 332.

38. Under a warning to vote upon the question of raising money for school purposes;—Held, that the meeting could not vote a tax, or authorize the borrowing of money, for erecting a high-school building. *Allen v. Burlington*, 45 Vt. 202.

39. **Annual meeting.** Towns at the annual March meeting, or at a meeting adjourned from that, which is but a continuation of the same meeting, may transact all matters necessary to their corporate interests, without naming such business in the warning. *Schoff v. Bloomfield*, 8 Vt. 472. 11 Vt. 391.

40. **Special.** A special town meeting may be adjourned to a future day, and then act under the original warning. *Hickok v. Shelburn*, 41 Vt. 409. *Rogers v. Shelburn*, 42 Vt. 550.

#### IV. TOWN OFFICERS.

41. **Election.** Sec. 31 of the constitution of 1786 (Vt. State papers, 527), requiring that "all elections, whether by the people or in general assembly, shall be by ballot," does not

extend to the election of town officers; but they may be chosen by *viva voce* vote. *State v. Marsh*, N. Chip. 29.

42. **Claim for services.** Town officers, as such, have no legal claim against the town to recover for services rendered, unless by an express vote of the town, &c. *Boyden v. Brookline*, 8 Vt. 284.

43. But this does not extend beyond strictly official services. Thus, a town agent, authorized as such to employ an attorney to prosecute and defend suits in behalf of the town, who is himself an attorney and performs professional services for the town, may recover therefor. *Langdon v. Castleton*, 30 Vt. 285.

44. In order that a constable may recover against a town, under G. S. c. 15, s. 82, for neglect to give him the collection of certain taxes, he must set forth a contract to that effect. *Cameron v. Walden*, 32 Vt. 323.

45. **Oath of office.** The oath of office may be taken by a town officer elsewhere than in town meeting. *Andrews v. Chase*, 5 Vt. 409.

46. **Selectmen.** The law does not require selectmen to be sworn. *Lemington v. Blodgett*, 37 Vt. 210.

47. Selectmen cannot, in their official capacity, maintain an action against a highway surveyor for his default, as such, but the action must be in the name of the town; nor will assumpsit lie in such case. *Selectmen of Newbury v. Johnson*, Brayt. 24.

48. In a suit against a town for the default of its constable, the selectmen cannot discharge the constable, so as to make him a witness for the town. *Angel v. Pownall*, 3 Vt. 461. 36 Vt. 358; nor can they discharge a highway surveyor, so as to make him a witness for the town in an action for an injury upon a highway. *Yuran v. Randolph*, 6 Vt. 369.

49. Selectmen have no right to receive money collected by a sheriff on an execution in favor of the town, and discharge him. It was the duty of the sheriff to pay it to the town treasurer. *Middlebury v. Rood*, 7 Vt. 125. 36 Vt. 358.

50. Under the powers given to selectmen "to audit, and in their discretion to allow, the claim of any person against the town for money paid or services performed for the town" (G. S. c. 15, s. 52), they may submit to arbitration a claim against the town for building a bridge. *Dix v. Dummerston*, 19 Vt. 262.

51. Selectmen have power to submit to arbitration claims against their towns for damages sustained upon their highways. *Hollister v. Pavolet*, 43 Vt. 425.

52. Also, to settle and stop a suit brought by the town to recover a penalty for not removing an obstruction out of the highway; although such settlement was opposed by the town agent, appointed under the statute "to prosecute and

defend suits in which the town is interested." *Cabot v. Britt*, 86 Vt. 349.

53. The selectmen have no authority to make a new appointment to a town office—as, a highway surveyor—unless a vacancy occurs in one of the modes specified in the statute. *Cummings v. Clark*, 15 Vt. 653. 27 Vt. 547.

54. It is within the scope of the implied powers of selectmen, to protect the interests of their town by the employment of counsel, at the charge of the town, in road cases where the town agent provides no counsel, and makes no objection to the employment of counsel by the selectmen; and his assent may be presumed where he neglects to employ counsel and no dissent is shown. *Burton v. Norwich*, 84 Vt. 345.

55. The declarations of a selectman made while repairing a bridge upon which an injury had occurred to a traveler, admitting in substance that the town was liable for the injury, were held inadmissible. They did not tend to qualify or explain any act of his; and the liability of the town rests upon acts and not upon admissions of its selectmen or other officers. *Folsom v. Underhill*, 86 Vt. 580; and see *Underhill v. Washington*, 46 Vt. 767.

56. One selectman, without the knowledge or consent of the others, cannot bind the town by contract, nor estop the town by his subsequent assent. *Hunkins v. Johnson*, 45 Vt. 181.

57. Where the three selectmen of a town agreed together as to the mode in which a town business should be transacted, and two of them entrusted the business to the third one, and he made the contracts in relation thereto;—*Held*, that the jury would be justified in finding such assent on the part of the others, or one of them, as to make the act of the one thus contracting the act of the majority, and binding on the town. *Guyette v. Bolton*, 46 Vt. 228.

58. The voluntary acknowledgment by selectmen, after the expiration of their term of office, of a lease by them before executed of public lands, is valid, since, by statute, an acknowledgment could have been enforced. *Lemington v. Stevens*, 48 Vt. 38.

59. **Liability.** Selectmen in determining who were members and the respective numbers of the several organized religious societies of the town to whom certain rents were to be appropriated under G. S. c. 97, s. 5, were held to act in a judicial capacity, and not to be responsible for any error of judgment in ascertaining the facts, while acting in good faith, and with reasonable diligence. *Universalist Socy. v. Leach*, 85 Vt. 108; and see *Fuller v. Gould*, 20 Vt. 643. *Stearns v. Miller*, 25 Vt. 20. *Davis v. Strong*, 81 Vt. 332.

60. **Town agent.** The town agent is designated in the statute as "an agent to prose-

cute and defend suits in which the town is interested"; and his duties obviously pertain to pending litigation—perhaps to the commencement of suits resolved upon, rather than to preliminary advice, the object and effect of which often is to prevent litigation. His duties must have reference to civil suits, and it is quite clear that it was never intended that he should take charge of criminal prosecutions, though the town be interested in the fine and costs. This duty is imposed upon the town grand-juror. *Peck, J., in Burton v. Norwich*, 84 Vt. 345.

61. A town agent to defend and prosecute suits has no authority, as such, to bind the town by a promise to pay a certain sum in settlement of a suit against the town to recover for an injury occasioned by the insufficiency of a highway. *Clay v. Wright*, 44 Vt. 588.

62. **Special agent.** An agent appointed by a town for the purpose of "compromising" a claim for damages in the laying of a highway, may refer such claim to arbitration. *Schoff v. Bloomfield*, 8 Vt. 472.

63. **Town clerk.** A joint action on the case lies against a town and the town clerk for the default of the town clerk in his office—the statute providing that the town "shall be liable to make good all damages," &c. *Lyman v. Windsor*, 24 Vt. 575.

64. It is the duty of a town clerk, under the statute, to provide an alphabet or index to his land records, and to keep and preserve the same for inspection and use, with the same truthfulness and care that he is required to exercise in keeping the books of record. For a neglect in this respect occasioning a special damage, the town, as well as himself, is directly liable in an action. *Hunter v. Windsor*, 24 Vt. 327. 29 Vt. 324.

65. It is not essential to the statement or proof of damage sustained by the neglect of a town clerk to index a recorded mortgage, that any specific request should appear to have been made of the clerk to produce the index, or to show a particular record. A general request to the clerk to produce the books of record is sufficient; for every person has the right to examine the records for himself, and is under no necessity to make known the object of such examination. *Id.*

66. In order to sustain an action against a town clerk for his neglect to keep an index of the records, or properly to index a particular record, it must appear that the plaintiff was injured thereby; as, that such neglect was the reason why actual knowledge of the record sought was not obtained. *Id.* *Lyman v. Edgerton*, 29 Vt. 305.

67. G. S. c. 15, s. 38, subjects to liability a town clerk who shall, "on proper request,

refuse to show any record or any files in his office." The plaintiff's agent had, in the town clerk's presence, examined the town records to ascertain the title to certain lands, and, finding no incumbrance, asked the town clerk "whether he knew of any, or there were any incumbrances on any of the lands; that if he did, he wanted him to show them." The town clerk knew, at the time, that certain mortgages did appear on the records; he had them in mind, and knew that the agent's request referred to them, but he answered that there were none, and he showed none, though he did produce for inspection all the books of record, and the files. *Held*, that this was a *proper request* on the part of the plaintiff and such a *refusal* on the part of the town clerk to show the record as to constitute an official default, and made him and the town liable to the plaintiff for all damages sustained thereby—as, in making a loan and taking a mortgage therefor upon the lands, which were in fact subject to certain undiscovered incumbrances upon the record. *Jarvis v. Barnard*, 30 Vt. 492; and see *Lyman v. Windsor*, 24 Vt. 575.

68. But where the party did not go to the town clerk's office, nor examine the records, nor request to examine them, but only, while examining certain land of the town clerk during a negotiation for the purchase of it, said to him: "you are town clerk and can tell me, is there any claim upon this property?" and the town clerk said there was not;—*Held*, that this was not such an *official neglect or default*, under the statute, as to make the town liable. *Lyman v. Edgerton*, 29 Vt. 305.

69. Where a town clerk is called upon to show the record of a particular deed by name, it could scarcely be doubted that it would be his duty to produce and show to the party the identical record itself, and that, on such request, it would be no sufficient compliance for the town clerk to produce all the records of the town and tell the party he might see it, provided he could find it. *Poland, J., in Jarvis v. Barnard*, 30 Vt. 500; criticising expressions in the opinion in *Lyman v. Edgerton*.

70. Clerk *pro tem*. A clerk *pro tem* may be appointed at an adjourned special town meeting, and his record of the proceedings recorded by the town clerk is valid, though it does not appear that the clerk *pro tem* was sworn. *Hickok v. Shelburn*, 41 Vt. 409. *Rogers v. Shelburn*, 42 Vt. 550. (*Hutchinson v. Pratt*, 11 Vt. 402.)

71. Assistant. An assistant town clerk is not an officer of the town, nor responsible to it; he is appointed by the town clerk under the statute, and is but a clerk or servant of the town clerk, for whose acts the town clerk is responsible. *Charleston v. Lunenburg*, 21 Vt. 488. *Fairfield v. King*, 41 Vt. 611.

72. Hence, under a statute requiring service of process upon a corporation to be made by leaving a copy with the clerk (G. S. c. 88, s. 24), service by copy left with the assistant town clerk is ill (*Fairfield v. King*); and, under the statute providing that in the absence of the clerk from the State such copy shall be left with one of the principal officers of the corporation, such copy left, in such absence of the town clerk, with one of the selectmen is good service, though the assistant town clerk be present. *Charleston v. Lunenburg*.

73. Constable. In order to lay the foundation for an action against a town for the default of its constable, it is not necessary first to get judgment against the constable. The remedies are independent. Hence, a judgment against the constable is not evidence of the liability of the town. *Bramble v. Poultney*, 11 Vt. 208. 12 Vt. 405. 23 Vt. 592. *McGregor v. Walden*, 14 Vt. 450.

74. An action lies against a town, though after the death of its constable, for his default committed in his lifetime. *Martin v. Wells*, 48 Vt. 428.

75. By the act of 1881 the first constable of a town could not be authorized to serve writs out of his own town by vote of the town at any other than the annual March meeting, nor until after a record of such vote in the town clerk's office. *Emerson v. Bailey*, 11 Vt. 656.

76. In order to the disqualification of a constable to act as such, under his election, for neglect to give bonds (G. S. c. 15, ss. 26, 27), the selectmen must first have required him to give the bonds, specifying the amount and the securities required, and have peremptorily refused to allow him to proceed, either in the present tense, or after a certain limited period of indulgence. He can perform all the duties of constable by virtue of his election, until his office is thus vacated by the selectmen. *Bowman v. Barnard*, 24 Vt. 355. *Langdon v. Rutland & Washington R. Co.*, 29 Vt. 212. *Bank of Middlebury v. Rut. & Wash. R. Co.*, 30 Vt. 159. 34 Vt. 377.

77. Testimony that the constable of the defendant town, who was employed to summon some of the defendant's witnesses and to assist in the defense, offered inducements to one of the plaintiff's witnesses to keep away from the trial, was held not admissible, without proof that such act was authorized or approved by the town agent. *Green v. Woodbury*, 48 Vt. 5.

#### V. DIVIDING AND ANNEXING TOWNS.

78. The act of 1848, No. 7, dividing the town of Windsor into Windsor and West Windsor, provided that "the debts now due" from the town of Windsor should be paid by the two

towns newly incorporated. *Held*, that the words quoted embraced all liabilities, whether arising *ex contractu*, or *ex delicto*. *Hunter v. Windsor and West Windsor*, 24 Vt. 337.

79. In the act of 1848, No. 11, "to annex Mansfield to Stowe," it was enacted that "the United States surplus money belonging to the town of Mansfield should become the funds of the town of Stowe; and that the trustees of the town of Stowe might maintain an action on any notes executed to the trustees of Mansfield, or, if payable to the town of Mansfield, in the name of Stowe." *Held*, that this did not enable the town of Stowe to maintain an action upon the official bond executed to the town of Mansfield by the former trustees of that town. *Stowe v. Luce*, 27 Vt. 605.

80. The act of 1848, No. 6, dividing the town of Montpelier, was *held* constitutional, and to create two new municipal corporations, abolishing the old one. *Montpelier v. East Montpelier*, 27 Vt. 704. *S. C.* 29 Vt. 12.

81. The old town of Montpelier having been abolished in the formation of two new towns (Montpelier and East Montpelier), by act of the legislature;—*Held*, that the effect of the act was to abolish the trustee of those rights of land which were reserved in the charter of the original town for public uses, and placed under the charge of its inhabitants, and that it created no division of such rights between the two new towns; that the new town of Montpelier did not succeed to such trusteeship, and could not recover at law the rents of such lands received by East Montpelier. *Ib.* 27 Vt. 704.

82. But upon bill in equity, the court ordered the appointment of a new trustee to administer the trust according to the charter. *Ib.* 29 Vt. 12.

83. "The last dwelling place or home" of a pauper, having a settlement in the town of S, was in that part of S which was annexed to the town of W, the pauper then being supported by the town of S in another town. *Held*, that the pauper upon such annexation became chargeable to W under G. S. c. 19, s. 1, clause 9. *Wilmington v. Somerset*, 35 Vt. 232.

84. The setting off, by act of the legislature, of one portion of a town to another, transfers nothing but the municipal jurisdiction over the territory so set off and annexed to the other town. It does not affect any vested right of proprietorship in the part so set off and annexed. *White v. Fuller*, 38 Vt. 193.

85. Where lands reserved in the charter of one town for the use of schools were, by act of the legislature, annexed to another town;—*Held*, that the proprietorship in the lands was not thereby changed, and that the power of leasing remained in the selectmen of the former town, and was not in the selectmen of the town to which the lands were annexed. *Ib.*

86. The town of Burlington, having voted money for bounties, was subsequently divided into the city of Burlington and the town of South Burlington. The selectmen of the original town placed the money in the hands of a trustee to hold for persons who should be entitled to it. The trustee, after paying bounty to certain soldiers, paid the residue of the money, part to the town of South Burlington and part to the city of Burlington, in proportion to their assets in the original town. *Held*, that a joint action for bounty could not be maintained against said city and town. *Collins v. Burlington*, 44 Vt. 16.

## TREES.

A tree, with its product, is the sole property of him on whose land it is situated: and its location and property should be determined by the position of the trunk or body of the tree above the soil, rather than by the roots within or the branches above it. *Skinner v. Wilder*, 38 Vt. 115. TRESPASS, 92.

As to sale of standing trees, being of an interest in lands, see FRAUDS, STATUTE of, III; TRESPASS, 48, 85, 97.

## TRESPASS.

### I. IN GENERAL.

1. *Trespass ab initio.*
2. *Pleadings and evidence.*

### II. TO THE PERSON.

1. *Action and defense.*
2. *Pleadings and evidence.*

### III. TO PERSONAL PROPERTY.

1. *Action and defense.*
2. *Pleadings and evidence.*

### IV. TO REAL PROPERTY.

1. *For what acts.*
2. *Plaintiff's title and possession.*
3. *Pleadings and evidence.*

For distinction between *trespass* and *case*, see ACTION ON THE CASE.

### I. IN GENERAL.

1. **Tortfeasor.** In trespass, even a *tortfeasor* may, by force of his possession, recover against another *tortfeasor* who shows no right whatever. *Fletcher v. Cole*, 26 Vt. 170.

2. **Corporation.** Corporations are liable in this action for trespasses authorized or commanded by them. *Lyman v. White River Bridge Co.*, 2 Aik. 255. 27 Vt. 107.

3. **Joint trespassers.** The principle applicable to co-trespassers does not affect cases of indemnity, where one employs another to do an act, not unlawful in itself and not known to be illegal; as, for the purpose of asserting a right. *Id.* See *Spalding v. Oakes*, 42 Vt. 343.

4. Where a privity is shown between several defendants in trespass, the acts of any one of them are admissible as evidence of the trespass. *Broughton v. Ward*, 1 Tyl. 187.

5. Two several creditors sued out separate writs of attachment against the same debtor, bearing the same date, which were delivered to the same officer for service, and were served by him at the same time by attaching the same property. In an action of trespass against both creditors and the officer;—*Held*, that this was, *prima facie*, a joint taking by the three. *Ellis v. Howard*, 17 Vt. 380.

6. The plaintiff having a right of action against several persons for a joint assault, made W his agent with full power to settle the claim and to have all he could make out of it. W settled the damages with two of the trespassers, and gave each a writing agreeing to indemnify them against all liability to the plaintiff. *Held*, that this was a full discharge of the two, and also of the other trespassers, it being a payment of the full damages. *Eastman v. Grant*, 34 Vt. 887. See *Spencer v. Williams*, 2 Vt. 209. *Chamberlin v. Murphy*, 41 Vt. 110.

#### 1. *Trespass ab initio.*

7. An abuse of a license given by law makes the wrong-doer a trespasser *ab initio*; but otherwise of a license given by the party. *Hubbell v. Wheeler*, 2 Aik. 359.

8. An abuse of a license in fact will not render the party a trespasser *ab initio*. Where one having license to pass and repass through another's field left the bars down, whereby cattle got in the field and did damage;—*Held*, that an action of trespass did not lie therefor: (1), because the license was a license *in fact*; (2), because the abuse complained of was a mere *non feissance*. *Stone v. Knapp*, 29 Vt. 501.

9. A public officer in the exercise of an authority conferred upon him by law does not become a trespasser *ab initio* by a mere *non feissance*; nor does he become such, except by doing some positive wrongful act giving character to the original act and incompatible with the exercise of the legal right to do the first act, and showing that it was entered upon for an unlawful purpose. *Stoughton v. Mott*, 25 Vt. 668. 26 Vt. 557. 29 Vt. 346, 454. 36 Vt. 681.

10. The abuse of an authority in law will render the party a trespasser *ab initio*; but this abuse must be something beyond a mere *non-feissance*. It must be a positive and active

wrong, and of such a character as to fairly justify the implication that the original entry was for the purpose of committing the wrong, and not *bona fide* under the authority which the law gave and for the purpose for which the law gave it. *Redfield, C. J.*, in *Stone v. Knapp*, 29 Vt. 508.

11. Whenever a process is regular and issues from a court of competent jurisdiction, neither the officer, nor the party, is liable in trespass for any mere abuse of the process, however groundless or malicious their proceedings may be; but the appropriate remedy is case. *Pierson v. Gale*, 8 Vt. 509. 28 Vt. 17.

12. No mere omission, or want of care or skill in doing a lawful act, will render such act a trespass by relation. *Sabin v. Vt. Central R. Co.* 25 Vt. 363, 371; and see *Spear v. Tilson*, 24 Vt. 420. *Wheelock v. Archer*, 26 Vt. 380.

13. The refusal of an officer to take bail on *mesne* process is but a *non-feissance*, for which case is the only remedy; it is not a *malfeissance* which makes him a trespasser for the arrest, or commitment. *Churchill v. Churchill*, 12 Vt. 661.

14. Trespass or trover does not lie against an attaching officer, in behalf of the debtor, for a neglect to take proper care of the property attached, or for other *non-feissance*. *Hale v. Huntley*, 21 Vt. 147.

15. Where property is sold upon an attachment under the statute, and the officer, after judgment for the defendant, refuses on demand to pay over the money, or claims to retain part of it on grounds not well founded in law, he does not thereby become a trespasser *ab initio*. This is but a *non feissance*, and the action of trover for the property attached does not lie against him. *Abbott v. Kimball*, 19 Vt. 551.

16. To make an officer serving process a trespasser *ab initio*, the wrongful act must be done to the property itself—not to the fund realized from a legal sale; as, by a misapplication of it. *Wilson v. Seavey*, 38 Vt. 231.

17. An officer can not be made a trespasser *ab initio* where the original taking upon the attachment was lawful, and the illegality lay only in the sale upon the execution. It must be an abuse of the *same* authority upon which was the original taking, to make him a trespasser *ab initio*. *Heald v. Sargeant*, 15 Vt. 506.

18. In trespass against an officer, complaining only of an illegal taking of goods, it is sufficient to set forth in the plea a sufficient authority for the taking, without stating the ulterior proceedings; and if by any subsequent abuse the defendant became a trespasser *ab initio*, this is matter for replication. *Andrews v. Chase*, 5 Vt. 409. 31 Vt. 441.

19. If, in such case, the plea sets forth such

facts as show the defendant a trespasser *ab initio*, the plaintiff may demur; but he is not to be so treated because he neglects to state his after proceedings, for this is a mere omission. *Id.*

20. An officer attaching property is not made a trespasser *ab initio*, by subsequently using a part of the property attached in removing other parts of it attached at the same time, the property used not being injured or lessened in value thereby. *Paul v. Slason*, 22 Vt. 231.

21. Machinery subject to attachment may be removed by the attaching officer from the building in which it is set up. If in so doing, and in the exercise of all reasonable care, he unintentionally or necessarily does some small injury to the machinery or building, he does not thereby become a trespasser *ab initio*. *Fullam v. Stearns*, 30 Vt. 443.

22. The defendant being impeded by the plaintiff in a lawful attempt to impound the plaintiff's cattle, assaulted the plaintiff in self-defense and in defense of his possession of the cattle. The defendant, maintaining his control of the cattle, instead of proceeding to impound them, turned them into the plaintiff's inclosure. In an action for the assault,—*Held*, that the defendant by such disposition of the cattle did not in this action become a trespasser *ab initio*. *Barrows v. Fassett*, 36 Vt. 625.

23. A person assisting an officer in serving a legal process will not become a trespasser by a subsequent abuse by the officer of his authority, as he would have been if the original taking had been illegal. *Wheelock v. Archer*, 26 Vt. 390.

24. If property attached be used by the officer, he thereby becomes a trespasser *ab initio*, and is liable, *prima facie* for its full value. *Collins v. Perkins*, 81 Vt. 624.

25. If an officer by direction of a creditor attaches a chattel, and the creditor puts it to use with the assent of the officer, both are trespassers *ab initio*. *Lamb v. Day*, 8 Vt. 407.

26. The like use of the chattel attached, by the bailee of the officer, is the act of the officer and makes him a trespasser *ab initio*. *Briggs v. Gleason*, 29 Vt. 78.

27. The doctrine of making an officer a trespasser *ab initio* for using property attached by him has, to our knowledge, never been extended to any case except where there has been a clear, substantial violation of the owner's rights, and of such a character as to show a wanton disregard of duty. *Poland, J.*, in *Paul v. Slason*, 22 Vt. 236. Not every use for the shortest time, or through inadvertence, or for the health of the animal attached, will make the officer a trespasser; but such use as is calculated to lessen the value and expose the life and health of the animal, and which is made of it understandingly and perseveringly

(as in this case), must be regarded as an intentional misuse and perversion of the process, so as to make the officer a trespasser *ab initio*. *Redfield, C. J.*, in *Briggs v. Gleason*, 29 Vt. 80.

28. An irregular sale of a beast impounded makes the impounder a trespasser *ab initio*. *Sutton v. Beach*, 2 Vt. 42.

29. Where an officer levies upon property by virtue of a regular execution and advertises the same for sale, but neglects to sell upon that execution and sells on the day advertised upon a void *alias* execution;—*Held*, that he is liable in trespass; and, by *Williams, C. J.*, he was a trespasser *ab initio*. *Bond v. Wilder*, 16 Vt. 393.

30. The officer making an attachment, and the creditor's attorney directing it, become trespassers *ab initio* by such a subsequent unauthorized disposition of the property attached, as the creditor himself was not authorized to make. *Eaton v. Cooper*, 29 Vt. 444.

31. **Damages—Mitigation.** Where an officer becomes, by an abuse of his authority under process, in respect to property, a trespasser *ab initio*, he is liable *prima facie* for its full value; but he may show in mitigation of damages that the plaintiff subsequently received back the property (*Yale v. Saunders*, 16 Vt. 243); or that the same was legally disposed of for his benefit (*Collins v. Perkins*, 81 Vt. 624); and as was done in *Irish v. Cloyes*, 8 Vt. 30. *Lamb v. Day*, *Id.* 407. *Clark v. Washburn*, 9 Vt. 309. *Stewart v. Martin*, 16 Vt. 397. See *Briggs v. Gleason*, 29 Vt. 78.

32. But to this end, such disposition of the property must be a legal disposition of it; and where the sale upon the execution was illegal;—*Held*, that the payment of the proceeds over to the execution creditor did not go in mitigation. *Hall v. Ray*, 40 Vt. 576.

33. Where an officer sells property upon an execution at a different place from that named in the posted notice, without adjournment to such other place or consent of the execution debtor, he becomes a trespasser *ab initio*, and is liable to the debtor in an action of trespass for the full value of the property, although the officer has paid over to the execution creditor the proceeds of the sale. *Id.* By *Barrett, J.*: Such act is not a mere negligence in the discharge of incidental or implied duties growing out of his lawful custody of the property, nor a violation merely of such duties, nor a mere *non-fensance* of express duties resting upon him, but a departure from the requirement of the statute and in direct violation of it. *Id.* 578-9.

## 2. Pleadings and evidence.

34. **Declaration.** The omission of the words *with force and arms*, in a declaration in

trespass, is only matter for special demurrer. *Higgins v. Hayward*, 5 Vt. 73.

35. Where the plaintiff in trespass alleged the injuries to have been committed between a day named and the date of the writ;—*Held*, that he could not in that suit recover for injuries done between the date and the service of the writ. *Prouty v. Bell*, 44 Vt. 72.

36. Where distinct acts of trespass are laid in one count as committed on divers days and times, &c., the plaintiff may prove as many such distinct acts as were committed within the dates specified; but where there are several defendants, he cannot recover against any one for an act in which he did not participate; and the extent of a joint recovery is measured by the extent of a joint participation in the several acts of trespass. *Myrick v. Downer*, 18 Vt. 360.

37. Where (under the statute) counts in trespass and in trover are joined, the declaration need not contain a special allegation that they are for the same cause of action. *Alger v. Curry*, 38 Vt. 382.

38. Plea, &c. Under the general issue in trespass, the defendant cannot set up matter in discharge. *Austin v. Norris*, 11 Vt. 88.

39. In trespass, matters in justification or discharge must be specially pleaded. If not, and the trial be upon the general issue only, the defendant cannot avail himself of such matters in defense, though they may appear in the plaintiff's proof. *Allen v. Parkhurst*, 10 Vt. 557. *Walker v. Hitehook*, 19 Vt. 634. *Briggs v. Mason*, 31 Vt. 433. *Richardson v. Stockwell*, *Id.* 439.

40. In trespass, a license requires to be specially pleaded only where the license was given by the plaintiff himself; and not where the defendant stands in the shoes of one claiming title against the plaintiff. *Child v. Allen*, 33 Vt. 476.

41. Where a license in trespass is relied upon under the general issue with notice, the plaintiff may recover for what is not covered by the license. *Sawyer v. Newland*, 9 Vt. 383. *Hubbell v. Wheeler*, 2 Aik. 359.

42. In trespass, where the defendant pleads the general issue with notice of special matter in justification, the whole merits of the question are thereby opened on both sides; and no new assignment is necessary to recover, as for a distinct substantive trespass, on what was alleged in the declaration by way of aggravation. *Hubbell v. Wheeler*. *Fullam v. Stearns*, 30 Vt. 443.

43. In an action of trespass, where the defendant gives notice, according to the statute, of special matter of defense under the general issue pleaded, no replication is required; and the plaintiff may avail himself on trial of every matter which he might properly have new

assigned, or replied, if the defendant had pleaded his defense specially. *Keyes v. Howe*, 18 Vt. 411. *Lawton v. Cardell*, 22 Vt. 524.

44. In trespass, the plaintiff is put to proof of his title under the general issue however many special defenses may be pleaded; and the special pleas have no effect by way of an estoppel, or as admissions, as to any facts averred or admitted in them outside the issues upon such particular pleas. *Child v. Allen*, 33 Vt. 476.

45. Replication *de injuria* to a plea of justification in trespass: The defendant put in evidence outside the issue, without objection, and the court ruled that the plaintiff could not avail himself of it, because it was impertinent. *Held* correct. *Braley v. Burnham*, 47 Vt. 717.

## II. TO THE PERSON.

### 1. Action and defense.

46. An assault, what. There may be an assault by a man upon a woman without an actual touching of her person;—as, by an exposure of his person and such movements as show an intention to have intercourse with her, and make her fear that he would. The imposition of the fear and the influence it would have upon her movements and feelings would constitute an actionable injury to her. *Alexander v. Blodgett*, 44 Vt. 476.

47. Matter of defense. In an action for assault and battery by thrusting the plaintiff out of the defendant's store where the plaintiff had lawfully gone, the defendant justified the assault as in defense of his possession, after having first requested the plaintiff to leave and he had refused. *Held*, that if the defendant, in his language, irritated and abused the plaintiff for the sake of having an affray with him, and the occasion was sought by the defendant to lay hands upon the plaintiff for the purpose of injuring and abusing him, and not for the sake of defending the possession, then the justification failed, although the defendant refused to leave on request. *Watrous v. Steel*, 4 Vt. 629.

48. Where standing trees were sold, by parol, with the privilege of cutting and getting them off the land within three years, and the purchaser had cut and piled them upon the land;—*Held*, that the timber cut did not pass with a conveyance of the land but remained the personal property of the purchaser; and that he or his assignee had the legal right to enter upon the land, within the time agreed, to take it away; and *held*, that if, in entering upon the premises to draw off the timber, he was forcibly resisted by the owner of the land, he would be justified in using so much force as would be necessary to remove the obstruction. *Yale v.*

*Seely*, 15 Vt. 221. But on this last point, see *Dustin v. Cowdry*, 23 Vt. 646.

49. If one, on credit, purchases property not carried about the person [such as a stove], by means of false and fraudulent representations as to his ability to pay and as to the amount of his property, he acquires no right of property in the article, or of possession; and the vendor may pursue him and retake the property, using no unnecessary force. If he resists the taking, such resistance is unlawful, and the vendor is not liable for using only that amount of force which is necessary to accomplish the object of retaking the property under the resistance offered. *Hodgeson v. Hubbard*, 18 Vt. 504. See 23 Vt. 646.

50. The defendant, a minor in his father's service, was directed by the father to watch an aqueduct upon the father's premises, and see that no one interfered with it. He went to the boundary of the land where the aqueduct was, and found the plaintiff about to enter, on his way to disturb the aqueduct, which was 22½ feet distant. The defendant forbade the plaintiff going upon the land; but the plaintiff sprang over the fence and approached the defendant in a threatening manner, when the defendant assaulted the plaintiff. In an action for the assault, under a plea of defense of the aqueduct;—*Held*, that the defendant had the right to prevent the plaintiff's further approach towards the aqueduct, and was not bound to wait until the injury or destruction of the aqueduct became more imminent; that he could rightfully defend "the approaches and outposts." *Harrison v. Harrison*, 48 Vt. 417.

51. Character of party. Where one is assaulted, the kind and degree of resistance which may be lawfully employed must be measured, or at least modified, by the apparent danger with which he is threatened; and this would depend, measurably, upon the known character of the assailant—whether "a man of war, or of peace." *Redfield, J. Ib.* 48 Vt. 424. 47 Vt. 81.

52. In an action for an assault, under a plea justifying the assault;—*Held*, that the defendant was entitled to prove that the plaintiff was reputed to be, and was in fact, a quarrelsome man, with a violent and uncontrollable temper, and that this was known to the defendant at the time. *Ib.* 417. *State v. Lull*, 48 Vt. 581. But in order to the admission of such evidence, such knowledge must be shown. *State v. Meader*, 47 Vt. 78.

53. In an action for an assault and battery where the justification was self-defense, the court say:—The amount and extent of force, which the defendant would have a right to use, would depend in some measure on the perilous condition he had reason to suppose he was in from apprehended violence from the plaintiff,

and what force he had reason to suppose necessary to protect himself. Hence, the fact of the presence or proximity of the defendant's two hired men, *known to both parties*, was proper for the jury to consider as bearing on the question. *Edwards v. Leavitt*, 46 Vt. 126.

54. In an action for an assault and battery growing out of a dispute about the occupation of certain lands, it was *held* not error to admit evidence for the plaintiff that the defendant had before the affray brought sundry suits against him for and about the same land and its occupation, which suits were then pending, as tending to show unfriendly feelings towards the plaintiff. *Ib.*

55. Upon the trial of an action for an assault and battery, the defendant justified on the ground of the plaintiff's prior assault, &c., and offered in evidence, to sustain his defense, the record of a conviction of the plaintiff in a criminal prosecution for such prior assault. The county court excluded the evidence. *Held* correct. *Robinson v. Wilson*, 22 Vt. 85.

### 2. Pleadings and evidence.

56. Declaration. In an action for an assault and battery, all the details of the principal transaction declared upon, and which are a part of it, may be proved though not alleged in the declaration. *Devine v. Rand*, 38 Vt. 621. 45 Vt. 288.

57. Where several acts of violence to a person were committed within a short space of time and at places but little distant from each other, and they were so connected together that each of them to some extent characterized the others, and all together made a continuous series of assaults and batteries;—*Held*, that they might all be included in one count of a declaration, with proper allegations. *Earl v. Tupper*, 45 Vt. 275.

58. Where a count in trespass averred that the defendant laid hold of the plaintiff with great force and violence, and with a raw-hide, and with clubs, sticks, fists and feet, gave to the plaintiff a great many violent blows, and with great violence shook and pulled him about, and threw him down, and harshly and brutally kicked him, and wounded him and tore his clothes;—*Held*, that the count stated a succession of trespasses, each requiring some competent justification or excuse, and not a mere aggravation of the first assault. *Hathaway v. Rice*, 19 Vt. 102.

59. But where, in such case, the plea professed to answer "the assaulting, beating and ill-treating," "as in the declaration mentioned";—*Held*, that it should be understood as assuming to justify the assault, &c., precisely as described, and therefore to be co-extensive with the alleged cause of action. *Ib.*



60. **Plea and replication.** In answer to a plea of *son assault*, if the plaintiff would justify his own assault he must reply the matter of justification. A replication *de injuria* would not be sufficient. *Elliot v. Kilburn*, 2 Vt. 470.

61. In an action for an assault and battery and justification pleaded, as *son assault demesne*, moderate correction of a servant, or pupil, &c., with a replication *de injuria*, such replication puts in issue all the substantial averments of the plea, and the plaintiff may, without a new assignment, recover for any excess of force used; but is limited to that, if he in fact made the first assault, or if the moderate correction was justifiable. *Ib.* *Bartlett v. Churchill*, 24 Vt. 218. *Lander v. Seaver*, 32 Vt. 114. *Devine v. Rand*, 38 Vt. 621. *Harrison v. Harrison*, 43 Vt. 417.

62. In such action, a plea of *son assault demesne* is good, although the declaration charges an aggravated battery and wounding. If excess of force was used, that would appear in the evidence, and could be recovered for under the replication *de injuria*. *Mellen v. Thompson*, 32 Vt. 407.

63. In such case, where the declaration charges an aggravated battery and wounding, a plea of *moliter manus*, &c., in defense of a brother, and for preventing a breach of the peace, is not sufficient. *Ib.*

64. In trespass for an assault and battery, the defendant pleaded in justification moderate correction of the plaintiff for misbehavior as his minor servant, and the plaintiff replied *de injuria*. *Held*, that this put in issue the defendant's intent, and made evidence of accompanying acts and words, showing malice, admissible. *Devine v. Rand*, 38 Vt. 621.

### III. TO PERSONAL PROPERTY.

#### 1. Action and defense.

65. **What is a trespass.** Assuming the custody and control of property, as by an attachment and sale on execution, though it be not removed nor any actual force exerted upon it, is a trespass, for which the action of trespass lies. *Hart v. Hyde*, 5 Vt. 328. *Brown v. Scott*, 7 Vt. 57.

66. Where the defendant, an officer, levied an execution upon the plaintiff's only cow and advertised her for sale while she was in the possession of the plaintiff's lessee for a specified term, but did not remove the cow until after the expiration of the lease, and he then drove her away and sold her on the execution;—*Held*, that such subsequent asportation was a fresh trespass for which the plaintiff could maintain the action of trespass. *Keyes v. Howe*, 18 Vt. 411.

67. **Plaintiff's title and possession—Special property.** One who has a special property in goods [as a tanner who has taken skins to tan for a price agreed], may maintain trespass against the general owner and recover damages according to the value of his interest. *Burdiet v. Murray*, 8 Vt. 302.

68. **Actual possession.** Actual possession of personal property is a sufficient title to maintain trespass, except as against the legal owner. *Fisher v. Cobb*, 6 Vt. 622. *Potter v. Washburn*, 13 Vt. 558.

69. One engaged in cutting down a bee tree, found upon the land of another, has such possession as that he can maintain trespass against one who, having no better right, drives him off, finishes the cutting of the tree and appropriates the honey; and can in such action recover the value of the honey. *Adams v. Burton*, 43 Vt. 86.

70. **General property—Right of possession.** The owner of personal property is considered in law as in possession, and, not having parted with the right of possession, he may sustain trespass for the conversion of it though never in his actual possession. *Edwards v. Edwards*, 11 Vt. 587.

71. In order to maintain trespass or trover for chattels, the plaintiff at the time of the injury must have had either the actual possession, or a property in them, either general or special, with the right to immediate possession. *Swift v. Moseley*, 10 Vt. 208. *Hurd v. Fleming*, 34 Vt. 169.

72. Where a sheriff had wrongfully attached property, and while it was so in his possession, he again wrongfully attached it, in behalf of another party;—*Held*, that the owner had sufficient possession in law to enable him to sustain trespass against the sheriff for the second attachment, and against the creditor by whose direction it was made. *Cow v. Hall*, 18 Vt. 191.

73. Where a mortgagee of chattels reserved the right to take possession, if he should at any time deem himself in danger of losing his debt by delay until the debt should fall due;—*Held*, that this did not give such constructive possession as to enable him to maintain trespass for a taking of the chattel from the mortgagor; that the right to possession depended upon a contingency, until the happening of which, followed by some act of the mortgagee asserting the right, the right to possession did not attach. *Skiff v. Solace*, 23 Vt. 279. See *Soper v. Sumner*, 5 Vt. 274.

74. The purchaser at sheriff's sale of property in the possession of a third person, and of which he does not take possession, cannot maintain trespass therefor against the right owner. *Culley v. Cushman*, 12 Vt. 494. *Austin v. Tilden*, 14 Vt. 325.

**75. Outstanding right of possession.**

The general owner of chattels cannot maintain trespass or trover for them, where there is an outstanding possession in another, accompanied with a special property. *Bourne v. Merritt*, 22 Vt. 439.

**76.** The owner of personal property who has by contract parted with the possession and right of possession for a given time, as, by lease, cannot maintain trespass for an injury to it while in possession of the bailee, or for taking it from his possession. *Soper v. Sumner*, 5 Vt. 274. 28 Vt. 283. 19 Vt. 378. *Hart v. Hyde*, 5 Vt. 328. *Hurd v. Fleming*, 84 Vt. 169;—nor trover. *Swift v. Moseley*, 10 Vt. 208.

**77.** The plaintiff sold A certain sheep on condition of payment by a day named, and gave possession with right of possession until default of payment. Before the day of payment arrived, the defendant attached the sheep as the property of A and took them away. *Held*, that the plaintiff, although general owner, could not maintain trespass therefor, not having the right of immediate possession at the time of the attachment. *Hurd v. Fleming*.

**78.** Where the consignee of goods for sale upon commission has failed and become insolvent and there are no commissions unpaid, the consignor has the right of immediate possession and such a constructive possession as that he may maintain trespass against an attaching officer. *Hayward Rubber Co. v. Dunclee*, 30 Vt. 29; and see *Chaffee v. Sherman*, 26 Vt. 287.

**79. General issue.** Under the general issue in trespass *de bonis*, the defendant may give in evidence whatever is in denial of what it is incumbent on the plaintiff to prove; as, property and possession in another, and so not in the plaintiff. *Brainard v. Burton*, 5 Vt. 97.

**80.** In trespass for personal property, the general issue is a denial of the plaintiff's property, as well as of the taking by the defendant. Property in the defendant cannot be pleaded in bar, for this would amount to the general issue. *Merritt v. Miller*, 18 Vt. 416.

**81.** Under the general issue in trespass *de bonis*, if the plaintiff proves property in himself and that the defendant took the property, he is entitled to a verdict. Any matter of justification must be pleaded, or notice be given under the statute. *Strong v. Hobbs*, 20 Vt. 185.

**82. Negative pregnant.** Trespass *de bonis*; *Plea*, that the defendant attached the goods as an officer by virtue of a certain writ, &c.: *Replication*, that the defendant "did not attach said goods by virtue of said writ." On special demurrer, the replication was *held* ill as being a negative pregnant, and uncertain as to the point to be contested. *Briggs v. Mason*, 81 Vt. 483.

## IV. TO REAL PROPERTY.

1. *For what acts.*

**83.** The act of entering, severing and carrying away a part of the realty, as one act, can be recovered for only in the action of trespass *quare clausum*. *Sturgis v. Warren*, 11 Vt. 433.

**84.** The plaintiff was the owner of land under the eddy of a stream in which, in high water, flood-wood, timber, &c., was accustomed to gather and float about. The defendant seized and appropriated some of the wood, &c., while so floating in the eddy. In trespass *qua. clau.* therefor,—*Held*, that although the plaintiff did not own the wood, &c., while so floating, yet he had the exclusive right to seize it while so on his own land and appropriate it to his own use, subject to be reclaimed by the owner; and that he was entitled to recover of the defendant, not the value of the wood, &c., taken, but the value of his *chance* of seizing and enjoying it. *Rogers v. Judd*, 5 Vt. 223.

**85.** The plaintiff owned all the cedar and pine timber standing upon a lot belonging to another, with a right of possession for the purpose of cutting and removing it. He sold to the defendant all the pine timber with the right of going on to cut and remove that. Both parties went on at the same time, the plaintiff cutting the cedar and the defendant the pine, but the defendant removed part of the cedar cut by the plaintiff. *Held*, that the plaintiff could maintain trespass *qua. clau.* therefor. *Haakin v. Record*, 32 Vt. 575.

**86. Disseisin.** In all cases of disseisin, the owner may maintain trespass if the entry was made while he was in possession; but the damages will be restricted to the first entry, unless he has made re-entry before action brought. If he has made such re-entry, he will recover all his intervening damages. *Cutting v. Cox*, 19 Vt. 517. *Stevens v. Hollister*, 18 Vt. 294. *Williams, C. J.*, dissenting.

**87. Entry.** The entry upon land by the owner disseized, measuring the lines, asserting on the land his claim of title and directing his agent to cut the grass thereon, and this with notice to the disseisor, constitute a sufficient re-entry to enable him to maintain trespass for a subsequent entry by the disseisor. *Cutting v. Cox*.

**88.** The plaintiff having title and right of possession of a house, entered and turned out the defendant, but not by force and strong hand so as to make such entry unlawful. The defendant afterwards re-entered. *Held*, that he was liable in trespass therefor. *Mussey v. Scott*, 32 Vt. 82.

**89.** Whether the plaintiff could have returned and expelled the defendant forcibly—

*quare*. See *Whittaker v. Perry*, 38 Vt. 107, 113.

90. A mere intruder upon lands may be forcibly expelled therefrom by the owner, and lawfully, so far as the land is concerned. If guilty of a breach of the peace and trespass upon the person of the intruder in so doing, he is liable for that, but his possession of the land is lawful. *Becher v. Parmele*, 9 Vt. 352. See *Mussey v. Scott*, 32 Vt. 82. *Dustin v. Cowdry*, 23 Vt. 681.

91. The defendant, the owner of cattle, found them upon the plaintiff's land. How they came to escape, or how they came to be in the plaintiff's possession, did not appear. The defendant, against the plaintiff's prohibition, entered and took away the cattle. In an action of trespass *qua. clau.*,—*Held*, that these facts justified the entry. *Richardson v. Anthony*, 13 Vt. 278. (*Bennett, J.*, dissenting.) 15 Vt. 234.

92. *Tree*. It seems, that a tree and its products are the sole property of him on whose land the tree is situated; and that, considering the necessary uncertainty of evidence as to the location and extent of the roots of a tree, its location and property should be determined by the position of the trunk or body of the tree above the soil, rather than by the roots within or the branches above it; and *held*, that where an apple tree was set and grew on the plaintiff's land *six feet* from the division line between his and the defendant's land, but the roots extended into, and the branches overhung the defendant's land, the defendant was liable for picking and converting to his own use the apples growing on the branches overhanging his own land. *Skinner v. Wilder*, 38 Vt. 115. *Note*.—Whether trespass *qua. clau.*, or trover, was the proper action was not decided, since counts in each form were joined under G. S. c. 38. s. 14.

93. *Search-warrant*. Where an officer had completed the service of a search-warrant by entering the plaintiff's house and taking the stolen goods and the plaintiff before the magistrate, and he afterwards made a second entry for another *professed* purpose, which was lawful, the court charged, in an action of trespass *qua. clau.*, that if, after the defendant had fully completed his search for the stolen goods, he made such second entry for the real purpose of finding more evidence against the plaintiff, and that his profession of such other purpose was a mere pretext, the plaintiff was entitled to recover. *Held* correct. *Lawton v. Cardell*, 22 Vt. 524.

## 2. Plaintiff's title and possession.

94. *Actual possession*. A tenant at will may maintain trespass for breaking down the fence of his inclosure. *Brown v. Bates*, Brayt. 230.

95. Occasional acts of possession, with continued claim, constitute a sufficient possession of land to sustain trespass. *Hibbard v. Foster*, 24 Vt. 542.

96. A trespasser upon land is not accountable to his co-trespasser. The latter having manifested no claim, nor pretended to have any right, has, in contemplation of law, no possession that can be disturbed. *Doolittle v. Linsley*, 2 Aik. 155.

97. Where A sold B certain timber standing on A's land, and B had entered and cut and removed a part;—*Held*, that B had such possession as entitled him to maintain trespass *qua. clau.* against a stranger for entering and cutting and removing the rest of the timber bought. *Goodrich v. Hathaway*, 1 Vt. 485. 15 Vt. 233.

98. The defendant went into possession of land under a parol contract of purchase from B, paid part of the purchase price and claimed to hold the land under the contract. B conveyed to the plaintiff. *Held*, that the defendant did not thereby become a tenant of the plaintiff, and that the plaintiff had no such possession as enabled him to sustain an action of trespass. *Ripley v. Yale*, 16 Vt. 257. 34 Vt. 552.

99. The plaintiff was in possession of lands, and his possession was prior to any possession by the defendant, or his grantors. The defendant had a faultless chain of title on paper; but a third person had acquired the ownership by fifteen years' possession adverse to the defendant's grantors. In an action of trespass for a disturbance of the plaintiff's possession;—*Held*, that the plaintiff was entitled to recover. *Hughes v. Graves*, 39 Vt. 359.

100. *Legal seisin*. The legal seisin of land carries with it the possession and is sufficient to enable the owner to maintain trespass, unless the injury is done to a tenant in actual possession, or there is an adverse holding and the injury is committed subsequent to the disseisin. *Prentiss, J.*, in *Robinson v. Douglas*, 2 Aik. 368. *Kellogg, J.*, in *Harris v. Haynes*, 34 Vt. 227. *Chesley v. Brockway*, 34 Vt. 550.

101. The plaintiff had taken a deed of lands, but had not entered into actual possession, the grantor remaining on the premises by mere sufferance, claiming no right. *Held*, that the plaintiff had a sufficient possession to maintain trespass *qua. clau.* for an entry by a stranger. *Chesley v. Brockway*.

102. Where a tenant carries on a farm at the halves, the landlord has still such a possession as enables him to maintain trespass for an injury to the inheritance; as, digging stone, or cutting timber. *Cutting v. Coz*, 19 Vt. 517. 34 Vt. 553.

103. A title to lands, without entry, does not warrant an action of trespass *qua. clau.*

against a party in actual adverse possession, for the cutting of trees upon the land; nor (*semble*) trespass *de bonis* for the wood severed from the land. *Pratt v. Battels*, 28 Vt. 685.

104. Trespass *qua. clau.* against A and B: The plaintiff's title was by levy of execution against A, where the time for redemption had expired, and demand had been made of B, that he surrender possession. A had never been in possession after the levy, and B held possession adverse to A before the levy, and adverse to the plaintiff ever since. *Held*, that the action did not lie against either. *Bourne v. Graham*, 8 Tyl. 411.

105. In trespass *qua. clau.* to land not in the actual possession of the plaintiff, the defendant set up a prior constructive possession in a third person. *Held* a sufficient defense, although the defendant did not connect himself with the title of such third person. *Ralph v. Bayley*, 11 Vt. 521.

### 8. Pleadings and evidence.

106. Declaration. Under G. S. c. 38, s. 14, a count in trespass on the freehold can be joined with a count in case, when for the same cause of action. *Hagar v. Brainerd*, 44 Vt. 294.

107. Description. A declaration in trespass for breaking and entering a certain close, not averred to be the close of the plaintiff, and there taking away certain chattels of the plaintiff, was *held* good as for a trespass *de bonis* only. *Hawley v. Clerk*, 2 Tyl. 20.

108. In trespass *qua. clau.*, a description of the premises as "the close of the plaintiff situate, lying and being in St. Albans," was *held* sufficient. *Rice v. Hathaway*, Brayt. 281.

109. In trespass *quare clausum*, where the declaration gives the boundaries of the *locus in quo*, or otherwise describes it with certainty, it must be proved as laid, and the plaintiff can recover only on proof of the trespass where he lays it. *Hooker v. Hickok*, 2 Aik. 172.

110. The declaration described the *locus* as being in the town of F and bounded East by the West line of the town of P. *Held*, that the plaintiff could not recover if the *locus* was in fact in town P, although he had always possessed, improved and claimed it as being in town F. *Ib.*

111. Matter of aggravation. Matter of aggravation, correctly understood, does not consist in acts of the same kind and description as those constituting the gist of the action, but in something done by the defendant on the occasion of committing the trespass, which is, to some extent, of a different legal character from the principal act complained of. *Hathaway v. Rice*, 19 Vt. 102.

112. In trespass *qua. clau.*, for breaking and

entering the plaintiff's house and there assaulting and debauching the plaintiff's daughter;—*Held*, that the breaking and entry were the gist of the action, and the debauching of the daughter matter of aggravation only. *Hubbell v. Wheeler*, 2 Aik. 359.

113. So, where the declaration charges a breaking and entering of the plaintiff's close, and breaking a certain gate and throwing down fences. *Grout v. Knapp*, 40 Vt. 163; or, taking and carrying away stone thereon. *Goodrich v. Judevine*, 40 Vt. 190; or fences. *Howard v. Black*, 42 Vt. 258.

114. In trespass *q. c. f.* with other wrongs alleged,—as debauching the plaintiff's daughter *per quod*, &c. (*Hubbell v. Wheeler*, 2 Aik. 359); breaking the plaintiff's fence, gates, &c. (*Grout v. Knapp*, 40 Vt. 163); or carrying away the plaintiff's corn,—the breaking of the close is the gist of the action, and the other wrongs alleged are but matters in aggravation. In such cases, a plea justifying the entry justifies the entire trespass; and in order to recover for such additional wrongs the plaintiff must new assign, relying upon them as a distinct ground of recovery. *Warner v. Holsington*, 42 Vt. 98.

115. Matter of aggravation need not be pleaded to, and a plea which justifies the breaking and entering is an answer to the whole declaration—as, a license; right of way; a right to enter for a special purpose, &c. In such case, if the plaintiff relies upon the matters stated in aggravation as a distinct injury, he must bring them forward by a new assignment. *Hubbell v. Wheeler*. *Grout v. Knapp*. *Goodrich v. Judevine*, 40 Vt. 190. *Hathaway v. Rice*, 19 Vt. 107.

116. The declaration alleged, that the defendant broke and entered the plaintiff's close "and tore down and carried away the plaintiff's fence then and there standing." The case was referred on the general issue, and the referees reported that the fence was built by the plaintiff, but as a trespasser upon the defendant's land; that the defendant tore it down, and in so doing unnecessarily broke and injured the same. *Held*, that the plaintiff could not recover; that the gist of the action was the unlawful entry, and the destruction of the fence was but matter in aggravation, and the plea need not answer *that*; and *held*, that although in the reference of an action it may be heard and tried by the referee upon any state of pleadings applicable and appropriate to the case, yet as in this case the *locus in quo* was in the defendant, and so his entry was lawful, no defense could be made upon the facts in the nature of a justification of the entry of the plaintiff's close, which would open the case to the plaintiff for any claim he might make under a new assignment. *Howard v. Black*, 42 Vt. 258.

117. In trespass, in common form, for

breaking and entering the plaintiff's house and removing and damaging his goods, where issue was joined on a replication *de injuria* to pleas justifying the trespasses, the court was "inclined to think" that the plaintiff was not entitled to a charge that if the entry was made with strong hand and a multitude of people, and not peaceably, the plaintiff could recover. *Carpenter v. Barber*, 44 Vt. 441.

118. Where the declaration is of doubtful construction, as to whether certain doings following the breaking and entering are laid as matter of aggravation only, or as distinct injuries, the defendant is at liberty in his plea to treat them as of the former character, since the plaintiff may new assign. *Grout v. Knapp*, 40 Vt. 163. But if such additional matter be pleaded to and be attempted to be justified, the defendant will be bound by his own construction of the declaration, and a new assignment is not necessary. *Carpenter v. Barber*, 44 Vt. 441.

119. In trespass for breaking and entering the plaintiff's close and removing and damaging his goods, the defendant's pleas attempted to justify, not only the breaking and entering, but also specifically the trespasses alleged as to the goods. *Held*, that the replication *de injuria* was an entire traverse of the pleas, and put the whole in issue; that the defendant was bound by his own construction of the declaration, and could not, under the issue, treat the trespass to the goods as matter of aggravation; that there was no necessity for a new assignment; and that the plaintiff might recover for damage done to the goods, though the entry might be justified. *Id.*

120. Plea, &c. In trespass *qua. clau.*, if the defendant attempt to justify under a special plea of title and possession, he must aver every material fact necessary to constitute a title. *Gleason v. Howard*, Brayt. 190.

121. In such action a license must be pleaded. It cannot be given in evidence under the general issue. *Hill v. Morey*, 26 Vt. 178. *Sawyer v. Newland*, 9 Vt. 888.

122. A plea justifying an entry by virtue of a search-warrant sworn out by the defendant, need not aver that a complaint was signed by the applicant; nor that any minute was made of the day, &c., when presented; nor that a recognizance for costs was given; nor that the warrant was returned, in case the goods were not found. These requirements do not apply to a search-warrant. *Chipman v. Bates*, 15 Vt. 51.

123. Trespass *qua. clau.*: Plea—title in defendant. *Replication*—that defendant entered with strong hand, &c., and not peaceably; and issue joined. The defendant on trial justified the forcible entry and expulsion of the plaintiff on the ground of a previous peaceable

entry. *Held*, that to sustain this point, it must appear that the defendant had taken an actual peaceable possession which was not abandoned down to the time of the last entry, so that in what was done on this last occasion the defendant stood in the attitude of defending his possession, and not invading the plaintiff's possession by violence and with strong hand. *Whittaker v. Perry*, 38 Vt. 107. See *Mussey v. Scott*, 32 Vt. 83.

124. In trespass for breaking and entering the plaintiff's close and carrying away certain stone, the plea, pleaded as an answer to the whole declaration, was silent as to the breaking and entering, and set up a justification of the removal of the stone. On special demurrer, the plea was *held* ill. 1st, as professing to answer the whole declaration whereas, at most, it was only an answer in part; 2d, as taking issue upon mere matter in aggravation. By *Kellogg, J.*: If the defendant had the right to remove the stone, he should have pleaded that he entered the close for the purpose of exercising that right, doing no unnecessary damage. *Goodrich v. Judevine*, 40 Vt. 190.

125. In trespass declaring for breaking and entering the plaintiff's store, removing his goods and expelling and keeping him out of the store for 20 days, the defendant's plea justified the entire trespass in its particulars, and the replication (under G. S. c. 33, s. 16) traversed the entire plea. On trial the evidence sustained the plea as to the breaking and entering and as to removal of the goods; but did not tend to prove that it was necessary to this end to expel the plaintiff and exclude him from the store for the time that he was so excluded. *Held*, that it was error to charge that a justification of the entry under the pleadings covered the expulsion and exclusion of the plaintiff; and *held*, that a new assignment was not necessary, as the declaration contained a minute and circumstantial statement of the whole cause of action, and the plea professed to answer the whole, and the traverse was to the whole plea. *Perry v. Carr*, 42 Vt. 50.

126. Where the declaration counts upon a single act of trespass which is justified by the plea, the plaintiff cannot in his replication traverse the plea, and also new assign. *Spencer v. Bemis*, 46 Vt. 29.

## TRIAL OF CIVIL ACTIONS.

- I. GENERAL RULES.
- II. THE ISSUE; EVIDENCE AS RELATED THERETO.
- III. RECEPTION OF EVIDENCE.
- IV. WHAT QUESTIONS ARE FOR THE COURT, AND WHAT FOR THE JURY.

- V. REQUESTS AND CHARGE.
- VI. THE VERDICT.
- VII. ASSESSMENT OF DAMAGES.

#### I. GENERAL RULES.

1. **Admissions.** The concession of a party at one trial, when not attached to the record, is considered as a concession for that trial only and does not bind at any future trial. *Read v. Allen*, 1 Tyl. 4. *Phelps v. Hall*, 2 Tyl. 401.

2. An admission upon trial must be taken according to its terms; and no presumption of a fact can be drawn from it, when the existence of the fact is negated by the admission. *Clarendon v. Weston*, 16 Vt. 332.

3. **Issue to court.** The issue upon a plea of *nul tiel record* can only be tried by the court. If there is also an issue to the jury in the case, the issue to the court should be first tried and determined. *Gray v. Pingry*, 17 Vt. 419.

4. **Instances of error.** Where the county court has jurisdiction of the parties and of the matters involved in a suit, it is error to refuse to try and determine the rights of the parties because they may be more conveniently and completely determined in chancery, and so direct a verdict for the defendant. *Kimball v. Neal*, 44 Vt. 567.

5. It is error for the judge to have any communication with the jury about the case after it has been submitted to them, except in open court. *State v. Patterson*, 45 Vt. 308.

6. **Notice to produce.** If the opposite party in whose possession a deed is presumed to be, is without the State, seasonable notice to his attorney within the State to produce the deed is sufficient to warrant secondary proof of contents. *Mattocks v. Stearns*, 9 Vt. 326.

7. Where suit was brought upon a written contract which was in the possession of the defendant, but was fully described in the declaration;—*Held*, that the service of the writ and declaration was sufficient notice to produce to authorize secondary evidence of contents, where the defendant failed to produce the contract on trial. *Dana v. Conant*, 30 Vt. 246.

8. **Examination of witness.** G. S. c. 80, s. 29, authorizing the court to order the examination of witnesses separate and apart from each other, does not include parties to the cause who may be witnesses. *Streeter v. Evans*, 44 Vt. 27.

9. As a general rule, leading questions are not to be put on an examination in chief; but this rests in the discretion of the court, and error cannot be assigned on it. *Hopkinson v. Steel*, 12 Vt. 582. 21 Vt. 439.

10. The practice as to the proper form of examining a witness upon matters of reputation, has not been uniform—whether to have him state first the general fact, and leave for cross-

examination the witness's actual knowledge and means of knowledge, or to proceed in reverse order; and error cannot be predicated of either course. *Wait v. Brewster*, 31 Vt. 516.

11. A witness testified to a certain transaction and the date of it, and that he had written a letter upon the subject to one R. *Held*, that on cross-examination he might be inquired of, and without producing the letter, whether he did not in that letter give a certain other date to that transaction. *Randolph v. Woodstock*, 35 Vt. 291.

12. In the plaintiff's closing evidence, his counsel offered to read his minutes of the defendant's testimony given on a former trial, which he swore were correct, and contained all of the testimony in chief, but did not contain the defendant's cross-examination. This was admitted against objection, the defendant being in court. *Held* correct. *Johnson v. Powers*, 40 Vt. 611.

13. **Plans, maps, &c.** Plans, maps, profiles, drawings and models, verified by the person making them as correctly made, are allowed, in proper cases, to be used in connection with the testimony of the person making them and all the evidence in the case relative to the various objects shown upon them, for the purpose of explaining and illustrating the subject, and may be submitted to the jury for examination during the trial, and in their retirement; and this, although the plan, &c., does not make a full representation upon both sides. A plan, &c., might be so unfair, as that the court might properly refuse to allow it to be kept before the jury. *Wood v. Willard*, 36 Vt. 82. *Hale v. Rich*, 48 Vt. 217.

14. **Memorandum.** Although private memoranda are not admissible as independent evidence in favor of the party making them (*Lapham v. Kelly*, 35 Vt. 195. *Cross v. Bartholomew*, 42 Vt. 206. *Goddard v. Orcutt*, 44 Vt. 54), yet the witness may testify therefrom, where he has only a general recollection of the transaction and states that the memorandum was correctly made by him at the time it was made. *Mattocks v. Lyman*, 16 Vt. 113; and the memorandum goes with his testimony to the jury. *Lapham v. Kelly*. *Cross v. Bartholomew*.

15. Where a witness on his examination in chief refers to a memorandum to refresh his memory, the opposite party is entitled to take and examine the paper for the purposes of cross-examination. Nor can the witness be excused from producing it on his statement that it was a memorandum of his doings as a detective and of a public nature, and that he could not submit it to examination without a breach of confidence, and a personal injury—certainly not, unless it appears to the court that he had a *reasonable* ground of belief that

he would thereby subject himself to personal injury. *State v. Bacon*, 41 Vt. 526.

16. A witness may be allowed, in testifying, to refer to a memorandum recently made by him partly from recollection, and partly from original entries, bills and receipts, containing dates, figures and amounts and concerning matters that transpired long before; but this, not for the purpose of refreshing his recollection as to the correctness of the entries, but to enable him to state with accuracy the details of things of which he had from recollection made the memorandum, but which he could not carry in his mind so as to be able to repeat them without the aid of the paper. *Pinney v. Andrus*, 41 Vt. 681.

17. **Mixed offer of evidence.** It is not the duty or business of the court to dissect and analyze an entire offer of evidence which, as a whole, is illegitimate, and select and allow such elements of it as would be legitimate if standing alone, excluding the rest. *Wright v. Williams*, 47 Vt. 222.

## II. THE ISSUE; EVIDENCE AS RELATED THERETO.

18. **Proof of issue—Effect.** Where a trial was had, under the general issue, upon a declaration which showed upon its face that the plaintiff could not recover, a verdict was directed for the defendant, although the declaration should have been demurred to. *Smith v. Joiner*, 1 D. Chip. 62. 22 Vt. 126.

19. Where a trial is had upon a declaration which sets forth a defective case, although all the facts are proved as stated, it rests in the discretion of the court whether to allow a verdict to be taken, leaving the defendant to his motion in arrest of judgment, or to direct a verdict at once for the defendant. *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114. *Dyer v. Tilton*, 23 Vt. 818, 819. *Amidon v. Aiken*, 28 440. 44 Vt. 157.

20. Upon trial under the general issue, the plaintiff is entitled to a verdict if he proves the facts stated in his declaration, although the declaration might be ill on demurrer, or on motion in arrest; and although the evidence may disclose matter in justification. *Allen v. Parkhurst*, 10 Vt. 557. 19 Vt. 689. 81 Vt. 438.

21. Where the plaintiff proves his declaration, he is entitled to a verdict in the absence of proof of facts on the part of the defendant to obviate it; and the defendant cannot require the court, on the trial before the jury, to entertain and decide a question outside the issue joined. If the declaration be insufficient, the objection should be taken by demurrer, or motion in arrest. *Newman v. Wait*, 46 Vt. 689.

22. It is not error to receive evidence which

sustains the declaration, though the declaration is ill, or shows no cause of action. *Wheelock v. Wheelock*, 5 Vt. 438. *Onion v. Fullerton*, 17 Vt. 359.

23. Whatever evidence is pertinent to prove the facts put in issue cannot be rejected, and the verdict must be according to the issue and evidence, regardless of the sufficiency of the pleadings. *Barney v. Bliss*, 2 Aik. 60. 11 Vt. 349. *French v. Thompson*, 6 Vt. 54. 22 Vt. 126. 23 Vt. 319.

24. Where a plea is traversed and the issue formed is tried by jury, the insufficiency of the plea, as that the defendant had no right to plead such a plea, cannot be raised upon an exception to the charge. The court tries such issues as the parties make by their pleadings. *Carpenter v. Welch*, 40 Vt. 251.

25. Where an insufficient special plea is traversed and issue joined, it seems, that the issue must be tried, and that the court cannot lay it out of the case. *Batchelder v. Kinney*, 44 Vt. 150.

26. If a defendant claims judgment on the ground that he has proved a plea, which is insufficient in law as a defense, he must at least prove, so far as he does allege. *Bryant v. Pember*, 45 Vt. 487.

27. If a defendant succeeds upon an issue of fact joined on one of several pleas going to the whole action, he is entitled to a verdict and judgment, irrespective of the result of any other issue joined on any other line of pleading. *Wilson v. Seavey*, 38 Vt. 221.

28. **Evidence confined to issue.** Where parties go into special pleadings, the rule is universal that they shall be confined strictly to the facts put in issue. *Campbell v. Hyde*, 1 D. Chip. 65.

29. In an action upon notes surrendered to the defendant after part payment accepted as in full upon his representations, claimed to be false and fraudulent, that he had disposed of all his other property in payment of his honest debts;—*Held*, that evidence for the defendant that he owed others besides the plaintiff to an amount as great as all his property, was not admissible, since it did not tend to prove that the statements made were not false, nor that the plaintiff was not thereby deceived. *Reynolds v. French*, 11 Vt. 674.

30. In an action to recover the difference agreed to be paid on an exchange of oxen, the only defense was a warranty of the plaintiff's oxen. *Held*, that it was without the issue and incompetent for the defendant to prove that the oxen he exchanged were worth more than those he received. *Thomas v. Howe*, 38 Vt. 600.

31. Where issue was taken on pleas: (1), that the defendant did prepare a suitable and convenient kiln or dry-house, and that it was prepared and ready for use when required for the

purpose of securing the crop of hops; (2), that he did prepare, &c., according to the true intent and meaning of said contract, and to the full satisfaction of the plaintiff;—*Held*, that evidence that the plaintiff directed the defendant not to build a dry-house, but consented to the use of his own, and it was so used, and he was paid for such use, and all to his satisfaction, sustained the issue on both pleas. *Thompson v. Kilborne*, 28 Vt. 750.

32. Where by the pleadings it is admitted, by not being traversed, that certain persons were committee of a school district, testimony that they were not, is not admissible; *aliter*, if it be a question of identity. *Moss v. Hinds*, 29 Vt. 188.

33. **Impertinent averments.** There is a distinction between an averment merely unnecessary, and an impertinent averment; the first must be proved; the latter need not be. *Fairhaven T. Co. v. French*, 1 D. Chip. 209.

34. In an action on a contract of sale of certain shares of stock in a corporation, where the declaration averred a division of the stock into shares;—*Held*, that such averment must be proved. *Id.*

35. In case for fraudulent representations as to land sold, it was *held* unnecessary for the plaintiff to prove the source of the defendant's title, although stated in the declaration, such averment being superfluous, and surplusage. *Curtis v. Burdick*, 48 Vt. 166.

36. **Waiver by not objecting.** Where the evidence upon trial supplies any defects in the pleadings or formal issues, and no objection is taken to the pleadings or evidence, the case will be determined upon the facts established in the case, as though the pleadings had been accommodated thereto. *Paige v. Smith*, 18 Vt. 251. *Wood v. Springfield*, 43 Vt. 625.

37. The admission of testimony not objected to cannot be alleged as error, although it was not properly admissible under the pleadings; was by parol where it should have been in writing, &c. *Davenport v. Hubbard*, 46 Vt. 200. *Hartland v. Henry*, 44 Vt. 593. *Laurent v. Vaughn*, 30 Vt. 90.

38. Where the plaintiff, without objection, allowed inadmissible testimony to be introduced which tended to establish a material fact in defense;—*Held*, that the defendant had the right to have such testimony considered by the jury; for, had it been objected to and excluded, the defendant might have supplied its place with unobjectionable testimony. *Porter v. Gile*, 44 Vt. 520.

39. Where a deposition was admitted "subject to objection for substance;"—*Held*, that after the testimony was closed the competency of the witness—as that she was the wife of one of the parties—could not be objected to. *Motley v. Head*, 43 Vt. 633.

40. In an action for an assault and battery, where the general issue was pleaded with notice of defense that the assault was committed in defense of the defendant's property, the plaintiff had testified, without objection, that he was constable of the town of H, and having a writ of attachment in his hands for service upon the defendant (which was in evidence), was attempting to attach thereon the defendant's property in the town of W, and was acting as such officer when assaulted. The defendant in his opening argument to the jury raised the objection, for the first time, that the plaintiff had shown no authority to serve the writ in W under G. S. c. 15, s. 81. *Held*, that the objection came too late; and that upon the state of the evidence, as left by the plaintiff, the burden was on the defendant to show a want of authority in the plaintiff to serve process outside the town of H. Distinction taken between this case, and a justification by virtue of process. *Wakefield v. Fairman*, 41 Vt. 339.

### III. RECEPTION OF EVIDENCE.

41. **Order—Discretion.** In all cases, the court has, to a certain extent, a discretionary power and control as to the order in which the evidence shall be introduced, for the purpose of placing the parties upon an equal footing in respect to the trial so that neither shall gain an unjust or undue advantage. Unless this discretion is so exercised as to deprive a party of a reasonable opportunity of availing himself of his evidence, or of his legal right in this respect, no ground of exception exists. *Prout, J.*, in *Pratt v. Rawson*, 40 Vt. 189. *Skinner, C. J.*, in *Pingry v. Washburn*, 1 Aik. 287. *Mattocks v. Stearns*, 9 Vt. 326. *Clayes v. Ferris*, 10 Vt. 112. *Goss v. Turner*, 21 Vt. 437. *Thayer v. Davis*, 38 Vt. 163.

42. The general rule in relation to the order of evidence is well established in this State. The plaintiff is entitled to rest upon making a *prima facie* case. The defendant is then to introduce all his evidence in answer to the plaintiff's claim. The plaintiff is then allowed to introduce testimony to rebut the evidence given by the defendant, and also additional evidence in support of his case as made in the opening; and ordinarily this closes the evidence. *Poland, J.*, in *Kent v. Lincoln*, 33 Vt. 598.

43. But, in practice, these general rules have always been so applied, and in justice should be, as to give each party an opportunity to answer and controvert every fact, and to contradict or impeach any witness introduced by the opposite party. If a witness is called for the first time by the plaintiff in the close, or the plaintiff in the close introduces proof of a new and distinct fact, not fairly notified to the



defendant by the opening evidence so as to enable him to answer it in his general evidence, he must be allowed to impeach such new witness, and to answer or contradict such new fact afterwards; and the refusal of the court to allow this would be error. *Poland J., supra*; and so held in the case. 82 Vt. 589. *Clayes v. Ferris*, 10 Vt. 112.

44. But where the plaintiff's evidence in the close only tended to sustain the evidence introduced in the opening and was not upon any new point, but upon a point in respect to which the defendant had introduced testimony;—Held, that the defendant had no right to introduce any further testimony; and the decision below excluding it was affirmed. *Thayer v. Davis*, 38 Vt. 163.

45. The plaintiff, as a witness, had testified, making out a *prima facie* case, and rested. He was cross-examined in relation to facts which, if established, discredited or impeached him. The defendant then put in his defense, which was a denial of the plaintiff's case and evidence of further facts tending to impeach the plaintiff's testimony, and rested. The plaintiff was then recalled, and contradicted only the new facts introduced by the defendant in the way of impeachment, these facts being of the same character as those inquired about on cross-examination, and which the defendant then had an opportunity to cross-examine the plaintiff upon. The defendant then offered general evidence of impeachment of the plaintiff's character for truth, which the court excluded. Held, that it was within the discretion of the court, at that stage of the trial, so to do. *Pratt v. Rawson*, 40 Vt. 183.

46. The right of opening or closing the evidence in a case does not belong to the plaintiff, or the defendant, as such, but depends entirely upon which party takes the affirmative of the issue; and the right to rest upon a *prima facie* showing is mutual. Thus, if the defendant rely upon an independent fact in discharge of the plaintiff's claim, as payment, he may content himself in the outset by establishing such defense *prima facie*, with the same right to sustain it by rebutting evidence, if attacked, as the plaintiff had as to the issue when the affirmative ground belonged to him. *Goss v. Turner*, 31 Vt. 437.

47. In an action against a town for an injury occasioned by running off a highway by reason of its insufficiency, a witness for the defendant was asked on cross-examination, and without objection, whether, on the day before the accident, he did not go off at the same place with his team; and he answered in the affirmative. The defendant then proposed to go into an inquiry as to the particular circumstances of his running off. The plaintiff objected, disclaiming any use to be made of

this fact except as serving to fix the time and to call the attention of the witness to the road; and thereupon the court ruled that the explanation sought was of no importance and excluded it, as not bearing on the issue. Held, that this was in the discretion of the court, and the decision was not error. *Allen v. Hancock*, 16 Vt. 230.

48. A witness, having testified, returned some days later in the trial and corrected his previous testimony on a single point. The opposing counsel then put the question: "Are you not as likely to be mistaken on other points in which your testimony differs from that which you gave before the probate court, as you are in this?" The court excluded the question and required that the cross-examination, at that stage of the trial, should be confined to the point in respect to which the witness had corrected his testimony. Held correct; and, by a majority, that the matter was entirely in the discretion of the judge; and by other members of the court, that the question was improper because it called the witness's attention to no single point in his testimony in the probate court, but to the whole collectively, and assumed that there was such contradiction. *Thornton v. Thornton*, 89 Vt. 123.

49. **Provisional testimony.** Where testimony, not admissible by itself, is offered and admitted upon the statement of counsel that it will be so connected with other evidence to be put in as will make it admissible, and such other evidence is not given, the court in summing up should exclude the testimony from the consideration of the jury. *State v. McDonnell*, 32 Vt. 491. *Conn. & Pass. R. R. Co. v. Baxter*, *Id.* 814.

50. The professional opinion of a medical expert, based upon hypothetical facts, may, in the discretion of the court, be received in evidence as well before evidence given of the facts, as after; or after evidence of part of the facts only, when the court is satisfied that the party intends in good faith to offer proof of the supposed facts. *Earl v. Tupper*, 45 Vt. 275.

51. An exception taken to evidence introduced out of its proper order, or which standing alone would not be admissible, is cured, provided such evidence, in its relation to other evidence afterwards introduced, becomes, in the end, pertinent to the issue. *Jenne v. Joslyn*, 41 Vt. 478.

52. **Irrelevant.** Where the defendant had put in certain irrelevant testimony, the plaintiff was allowed, against the defendant's objection, to contradict it. Held not to be error. *Gottlieb v. Leach*, 40 Vt. 278.

53. The introduction of evidence by one party, that might have been excluded if objected to, does not necessarily open the door to the other party to introduce incompetent

evidence. But where the evidence introduced is a circumstance morally tending to render the disputed fact more probable, even if so remote as not to be admissible as legal evidence, the other party has a right to do away with the impression it may create in the minds of the jury, by evidence of the same character and force, tending directly to meet and explain it. *Peck, J., in Lytle v. Bond*, 40 Vt. 624; and, for the refusal to admit such evidence in reply, the judgment was reversed. *Ib.* 618.

**54. Improper. Dictum.** In the trial of cases where the issue is not defined and where, at the time, it is often impossible to anticipate what questions may arise in the course of the trial, testimony offered should be received if competent evidence in any view of the case which may be thereafter taken. And a new trial is not to be granted on account of the admission of evidence which might become important in any supposable state of the other evidence, or upon any question which might probably thereafter arise, unless it appears that it was improperly applied in the decision of the case; so that, as a general rule, it is not safe to raise questions upon the admissibility of evidence, but to reserve the questions upon the application of the evidence to the determination of the case. *Redfield, C. J., in Harris v. Holmes*, 80 Vt. 352. But see *infra*.

**55.** The error of admitting improper testimony, which is objected to, is not cured by a charge to the jury not to consider it. *Conn. & Pass R. R. Co. v. Baxter*, 82 Vt. 805. *Sterling v. Sterling*, 41 Vt. 80. *Williams, C. J., in Allen v. Hancock*, 16 Vt. 283. *Redfield, J., in Hodge v. Bennington*, 48 Vt. 458. *Poland, C. J., in Wood v. Willard*, 86 Vt. 88.

**56.** Where a deposition containing some irrelevant and perhaps improper matter was allowed to be read in full to the jury against a general objection thereto, but the court charged the jury to disregard the objectionable parts;—*Held*, that this was not error; that it was a question of practice, and that the judge must be allowed some reasonable discretion. *Northfield v. Plymouth*, 20 Vt. 582. (The authority of this case is considerably limited. *Poland, C. J., in Wood v. Willard*.)

**57. Harmless.** A judgment will not be reversed for the reason that an improper question was allowed to be put to a witness, if no improper evidence was obtained by his answer. *Randolph v. Woodstock*, 85 Vt. 291.

**58.** Where a witness to a proper question gave an inadmissible answer before there was time to check him or interpose an objection, and the court said that was not evidence for any purpose;—*Held*, that here was no error which could be revised. *Ib.*

**59.** A witness for the plaintiff made a statement while testifying, which was instantly

objected to by the defendant and excluded by the court as inadmissible. The defendant requested the court to charge upon this as testimony. The court declined and treated the statement as not in the case. *Held* correct. *Morse v. Richmond*, 42 Vt. 539.

**60.** The declaration in an action for slander was in two counts—one for words charging perjury, the other for words charging theft. Evidence was introduced in support of both counts. The testimony being closed, the plaintiff proposed to abandon the first count. This the county court, against the defendant's objection, allowed, and instructed the jury to lay that count and all the testimony in relation to it out of the case. *Held*, that this was not error, and that the action of the county court was proper in the case. *Kirkaldie v. Paige*, 17 Vt. 256.

**61. Party not objecting.** A party cannot allow testimony to be introduced without objection, thereby waiving his right to object, and then, after the testimony is closed and the case is being argued, insist upon its exclusion. *Laurent v. Vaughn*, 80 Vt. 90.

**62.** The question being as to the validity of the levy of an execution;—*Held*, there being no objection to the authentication of the record but only to its want of intrinsic validity, that this objection was not waived by not objecting to the reading of the record and by letting it pass to the jury, and that the same question could be raised on argument to the court. *Stanton v. Bannister*, 2 Vt. 464.

**63.** Where a paper presented by the defendant, was read to the jury without objection, but the court charged the jury that it was of no avail in the case, and the court afterwards permitted the paper to go to the jury with the other papers in the case, though against the objection of the plaintiff against whom the verdict was;—*Held*, that this was not error. *Warden v. Warden*, 22 Vt. 563.

**64.** Where the only objection made to testimony offered was that it was immaterial;—*Held*, that all other objections to it were waived; as to proof of the contents of a letter without proof of loss. *Weeks v. Barron*, 88 Vt. 420.

**65.** I think that where evidence has a moral tendency to induce belief of the truth of a disputed fact, although the inference from it is too remote to constitute legal evidence, the right to object to it is waived by suffering it to come in without objection, since the party offering it may have relied on it, and thereby been induced to omit supplying it by other proof. *Peck, J., in Cavendish v. Troy*, 41 Vt. 107.

**66. Limitation of issue.** Where an injury is improperly laid with a *continuando* and so the declaration may be subject to a special demurrer, the plaintiff on trial, without any waiver on his part, may, upon the objection of

the defendant, be confined by the court to proof of a single injury. *Baxter v. Winooski T. Co.*, 22 Vt. 114.

67. **Election.** In an action against a town to recover for injuries received upon a highway, the declaration, in a single count, averred the insufficiency of a certain section of the highway, and that the plaintiff's wagon was thereby broken and his horse killed. On the trial it appeared that the axle was broken at one point in the highway and the plaintiff was there thrown out, when the horse taking fright ran 21 rods along the road and was then thrown into a ditch and killed—both points being in that section of the highway which was averred to be insufficient. The plaintiff claimed to recover by reason of the insufficiency of the road as well at the point where the horse was killed, as at the point where the axle was broken—at both points, or either. The defendant asked that the plaintiff should be put to his election. The court refused. *Held*, not erroneous;—for it was the continuous insufficiency of this line, or section of road, not a point in the road, that caused the injury. *Hodge v. Bennington*, 48 Vt. 450.

68. Where the subject matter and causes of action are separate and divisible and the declaration is single and in one count, the plaintiff cannot duplicate the causes of action, and it would be error, after he had given evidence of one, to allow him to attempt to prove another; and if two causes of action should become disclosed by the evidence, he should be required to elect for which he would go. But it is otherwise, as here, where the cause of action is single and essentially one occurrence and one transaction, yet made up of parts and embracing many incidents. *Redfield, J., Id.* 457; and see *Earl v. Tupper*, 45 Vt. 275.

#### IV. WHAT QUESTIONS ARE FOR THE COURT, AND WHAT FOR THE JURY.

69. **For the court.** In an action upon contract where the testimony is all in paper, it is the duty of the court to instruct the jury, as a question of law, whether the testimony, all being true, proves the contract alleged; and, if not proved as alleged, to direct a verdict for the defendant. *Mixer v. Williams*, 17 Vt. 457.

70. Judgment reversed, because the judge did not, upon request, instruct the jury what constituted fraud in fact in a sale of chattels; nor, whether the facts proved amounted to a delivery and change of possession. *Mott v. McNiel*, 1 Aik. 162.

71. In every case where there is no conflict in the evidence, the question of change of possession—as, in case of sales and attachments—is purely one of law, and as such to be decided by the court. But where the testimony is con-

flicting and the facts uncertain, it must be submitted to the jury to find the facts; and the court is to say what facts, if found by the jury, constitute a sufficient change of possession. *Burrows v. Stebbins*, 26 Vt. 659, explaining *Stephenson v. Clark*, 20 Vt. 624. *Hall v. Parsons*, 17 Vt. 271. *Wilson v. Hooper*, 12 Vt. 658. *Rothchild v. Rowe*, 44 Vt. 889.

72. It is error to submit a question to the jury, where the evidence presents only a question of law. *Collamer v. Langdon*, 29 Vt. 32. *Driggs v. Burton*, 44 Vt. 124.

73. The plaintiff, son of the defendant, testified that while a minor he went out to work, the defendant saying he might have all he earned, if he would; that he afterwards, while still a minor, enlisted in the army with his father's consent, and upon the defendant's assurance that the plaintiff should have all the money, bounty, &c., and that whatever the plaintiff should send him he would pay back; and testified in detail the amounts sent, and when, &c. The defendant claimed that, admitting the truth of the testimony, the jury were at liberty to infer, or not to infer, such a relation as would entitle the plaintiff to recover; but the court instructed the jury that if the testimony was true, the plaintiff was entitled to recover. *Held* correct. *Ayer v. Ayer*, 41 Vt. 302.

74. A request to charge was, that the plaintiff could not recover for any trespass committed on "the Slocum piece," because that was not covered by the description given in the declaration. Whether so or not, was not a simple question of construction, but depended upon the findings of the jury. The court charged that the plaintiff could not recover for any trespass not committed upon the premises described in the declaration. *Held*, that the request was substantially complied with. *Clark v. Boardman*, 42 Vt. 667.

75. **For the jury.** Where testimony tending to sustain an issue is submitted to the jury, it cannot be assigned for error that "the court permitted a verdict" against the weight of the testimony, or without sufficient testimony. The whole question is with the jury, and it is no judicial act of the court that they permit a verdict to be rendered. *Stearns v. Howe*, 12 Vt. 577.

76. In all questions depending upon a general inference from a multiplicity of particular facts, the inference is always one of fact unless the law has established some fixed rule—as, six months' notice to quit, &c.; or where the inference is one which admits of no doubt, so that it will strike all minds alike. But in all questions of doubt of this character, and where the law has fixed no rule, the inference is one to be made by a jury. Such are questions of due diligence, skill, reasonable time, probable

cause, intention, &c. *Seadons v. Newport*, 28 Vt. 9.

77. The question of reasonable diligence, or how much would have been made from a particular security if reasonable diligence had been used, is for the jury, and not for the court. *Brainard v. Reynolds*, 36 Vt. 614.

78. Certain depositions to the unsoundness of a horse were excluded by the court, as not sufficiently identifying the horse. *Held* erroneous—there being other testimony in the case to establish the identity, which was a question for the jury. *Wason v. Rowe*, 16 Vt. 525.

79. The defendant's counsel insisted to the jury that certain depositions of the plaintiff were guarded in expression, avoided details, &c., indicating a purpose to get up a false case. The court instructed the jury, that if they found the depositions subject to this objection they might consider it in weighing the testimony of such witnesses, and that the whole question as to the truth of the depositions was with the jury. *Held*, it appearing that the depositions were fairly subject to such criticism, that the charge of the judge was proper. *Clough v. Patrick*, 37 Vt. 421.

80. The bill of exceptions stated that the plaintiff gave evidence tending to prove certain facts; that the defendant introduced no testimony, and that the court charged that if the jury believed the testimony in the case, the plaintiff was entitled to recover. General verdict for plaintiff. *Held*, that the charge was erroneous; that it should have been put to the jury to find how the fact was—which is quite another thing from finding that the evidence given tended to prove the fact. *Bourne v. Merritt*, 22 Vt. 429.

81. A ruling "that in the absence of any evidence discrediting or contradicting the deposition offered, it was sufficient evidence" of a fact in question, was *held*, under the circumstances, as taking from the jury the question of the truth of the evidence, and was erroneous. *Webb v. Richardson*, 42 Vt. 471.

82. Where upon the testimony of one of the plaintiff's witnesses a case was made against the plaintiff, but there was other testimony tending to sustain his case;—*Held*, that it was error to direct a verdict for the defendant. *Barnum v. Hackett*, 35 Vt. 77.

83. In trespass for driving the defendant's wagon against the plaintiff's carriage, but not purposely, the evidence was conflicting as to whether the collision was by the plaintiff's or defendant's negligence. The jury disagreed; whereupon the court directed a verdict for the plaintiff and an assessment of the damages, so that the cause might pass to the supreme court to have the question of law determined whether trespass would lie in such case. *Held* error, because if the jury had found the facts as the

defendant's evidence tended to show, the plaintiff could not have recovered in any form of action. *Howard v. Tyler*, 46 Vt. 683.

84. To what particular demands or accounts a party's acknowledgment or promise applies, where it is not specific, is a question of fact to be determined by the triers of fact. *Kimball v. Baxter*, 27 Vt. 628. *Brewin v. Farrell*, 39 Vt. 206. *Hunter v. Kittredge*, 41 Vt. 369.

85. The testimony not being unequivocal as to the extent of the authority of an agent, or the length of time it was to continue, *held* erroneous to decide this as a question of law. *Riley v. Wheeler*, 42 Vt. 528.

86. Although there may be no conflict in the evidence, and no dispute as to the language made use of by the parties in the making or discharging of a contract, the conferring of an authority, &c., the question may yet be one of fact for the jury, and not of law for the court—a question of intention, as to how the language and the transaction were really understood by the parties; and this to be determined from all the circumstances attending the transaction. *Williams v. Heywood*, 41 Vt. 279. *Adams v. Flanagan*, 36 Vt. 400.

87. If there is any evidence tending to show that the parties to an unwritten contract might have understood it in the way claimed by one of them, it is the duty of the court to submit to the jury to find whether the parties did so understand it. *Andrews v. Moretown*, 45 Vt. 1.

88. The cases are rare where it is necessary to have a jury inquire into facts affecting the construction of a written contract; yet such cases may occur, where the question of intention, with proper instructions, must go to the jury. *Redfield, J.*, in *Roberts v. Button*, 14 Vt. 195.

89. A verdict cannot be directed for the defendant, if there is any evidence tending to prove the contract as set up in the declaration. *Lewis v. Pratt*, 48 Vt. 358.

90. Where there is any evidence of a material fact, it must be left to the jury; otherwise, it is error. *Rogers v. Judd*, 6 Vt. 191.

91. Where evidence is given tending to prove a material fact, it is error in the court to adjudge it insufficient, and direct a verdict. That is exclusively for the jury to determine. *Jones v. Booth*, 10 Vt. 268. *Wemel v. Missisquoi Lime Co.*, 46 Vt. 458.

92. The testimony of a competent witness, however much discredited, must be submitted to the jury to be weighed by them. *State v. Roe*, 12 Vt. 93.

93. It may be proper for a court to instruct a jury to find for a plaintiff if the evidence is believed, where there is no conflict of evidence and it directly proves the fact in issue, or where the fact is a necessary and invariable

inference of law from what is proved. But if there be any conflict in the evidence, or if it only shows facts from which the main fact is to be presumed or inferred by the jury, the case should be left to the jury, under proper legal instructions. *Lindsay v. Lindsay*, 11 Vt. 621.

94. **Finding without evidence.** It is error to leave to the jury to find a fact, when there is no evidence tending to prove such fact. *Manwell v. Briggs*, 17 Vt. 176. *Birney v. Martin*, 8 Vt. 236. *Bray v. Wheeler*, 29 Vt. 514. *Dean v. Dean*, 43 Vt. 344.

95. **Case of leaving to the jury to find a fact upon conjecture, and without evidence.** Judgment reversed. *Driggs v. Burton*, 44 Vt. 124.

96. It is error to instruct the jury to decide a cause according as they find a particular fact, where there is no testimony tending to prove that fact, or where all the testimony given tends to prove the contrary. *Birney v. Martin*, 8 Vt. 236. *Fullam v. Cummings*, 16 Vt. 697.

97. **Non-suit.** A non-suit imports a voluntary act of the plaintiff. The court cannot enforce a non-suit on trial, while the plaintiff insists on proceeding to verdict. *French v. Smith*, 4 Vt. 363.

98. The court cannot take a case from the jury on trial and order a judgment of *non-suit*, against the plaintiff's will, for the reason that he fails to make out a case. Such judgment is proper only in cases where the plaintiff fails to appear and prosecute, or voluntarily withdraws after appearance, or fails to comply with some rule or order of the court. *Smith v. Crane*, 12 Vt. 487. *Brown v. Munger*, 16 Vt. 12.

#### V. REQUESTS AND CHARGE.

99. **Requests—Time for presenting.** The rule of practice requires, that any special requests to charge should be presented to the court by the opening of the argument for the party making the requests. *Vaughan v. Porter*, 16 Vt. 266. *Cady v. Owen*, 34 Vt. 598. *Wilmot v. Howard*, 39 Vt. 455.

100. After the court has submitted the cause to the jury, a request to charge upon a new point is not in time, and the court is not bound to receive it. *Stanton v. Bannister*, 2 Vt. 464. *Wetherby v. Foster*, 5 Vt. 136.

101. Nor is the court bound to notice a request made after the argument is closed. *Vaughan v. Porter*, 16 Vt. 266; nor after the jury have come in disagreed. *Cady v. Owen*, 34 Vt. 598; nor least of all, to notice a request made after argument and charge, where the charge adopted the position taken by counsel on both sides—as, that certain testimony was to be treated as impeaching evidence only; and the new request was to charge that it was evi-

dence in chief—thus giving to it a new character and application. *Wilmot v. Howard*, 39 Vt. 447.

102. **Character of request.** The character and value of special requests to charge, commented upon by *Williams, C. J.*, in *Waller v. Keyes*, 6 Vt. 257; by *Redfield, J.*, in *Vaughan v. Porter*, 16 Vt. 266.

103. A court is never bound to regard written requests to charge, unless they are couched in such terms as to be *sound to the full extent*. The fact that *some sound law* might be extracted from the requests, or that in general terms they may be sound law, with certain qualifications, is not enough. They must be wholly sound law, and without any necessary qualification, or it is not error to refuse them. But the court is bound to charge upon every point material to the decision of the case upon which there is evidence, and to charge correctly and fully, whether requested or not. *Redfield, J.*, in *Vaughan v. Porter*.

104. Where a party is not entitled to a charge to the full extent of his request, the mere refusal so to charge is not error. *Underwood v. Hart*, 23 Vt. 120.

105. A request which collates certain conceded and certain disputed facts and isolates them from others which affect their force, thus making an unreal case, is not required to be made a separate branch of the charge, and may be refused. *Thornton v. Thornton*, 39 Vt. 122.

106. Where a request to charge was an entire proposition, made in reference to the plaintiff's right to recover and not in reference to damages, and was properly denied;—*Held*, that it was not error for the court to omit to single out a particular part of the request and apply it upon the question of damages, if there was no affirmative error upon the question of damages. *Whittaker v. Perry*, 38 Vt. 107.

107. To entitle a party to a reversal of judgment upon the ground that the court refused to charge as requested, it should appear that the party was entitled, as a matter of legal right, to the charge requested. *Bates v. Cilley*, 47 Vt. 1.

108. **Duty to charge properly.** Though a party is not entitled to the particular charge requested, he is entitled to such a charge as the facts in the case require. *Hazard v. Smith*, 21 Vt. 123.

109. The county court is always bound to charge the jury according to the rules of law applicable to the case, whether specifically requested so to do, or not. *Redfield, J.*, in *Buck v. Squiers*, 23 Vt. 498.

110. There may be cases where a verdict would not be set aside, or judgment be reversed, for neglect of the court to charge upon a material point, *not having been requested so to do*; yet it is error, in such case, to refuse on

proper request. *Skinner, J., in Washburn v. Tracy*, 2 D. Chip. 128.

111. Each party is entitled to a correct charge as to the legal result of such a state of facts as he claims to exist, and as his testimony tends to prove. *Clark v. Tabor*, 28 Vt. 222. *Dodge v. Stacy*, 39 Vt. 565. *Morse v. Huntington*, 40 Vt. 495. *Whitney v. Lynde*, 16 Vt. 579.

112. A party has a right, on trial, to require the opinion of the court upon any point of law pertinent to the issue, and the refusal to give such opinion is cause for exception, and a ground of error. *Fletcher v. Howard*, 2 Aik. 115.

113. A judgment of the county court was reversed, where they avoided the expression of an opinion to the jury of the law applicable to the issue, as embraced in the request to charge. *Brainard v. Burton*, 5 Vt. 97.

114. The law, and all the law upon the subject, which is required to enable the jury to come to a correct determination, must be decided by the court, or it will be error; but the judge is not obliged to answer requests made upon a hypothetical case. *Brooks v. Claves*, 10 Vt. 37.

115. Though the judges of the county court may disagree upon a material question of law, it is their duty nevertheless to charge one way or the other upon the point, or else suspend the trial to another term. For refusal to charge in such case, judgment was reversed. *Boardman v. Keeler*, 1 Aik. 158. So, also, where, by reason of such disagreement, the question of law was submitted to the jury. *Hall v. Adams*, 1 Aik. 166.

116. **Charge to be warranted by, and applied to, the evidence.** The court is not bound, and ought not, to charge what the law is as to a point upon which there is no evidence. *Mack v. Snider*, 1 Aik. 104. *Barron v. Fay*, 38 Vt. 705.

117. A request to charge must be warranted by the evidence, and should not be answered unless so warranted, though the request may be a correct statement of a legal proposition. *Clark v. Boardman*, 42 Vt. 667.

118. It is not the duty of the court to give instructions to the jury upon any abstract point, not raised by the evidence; and it is error to instruct them to return a verdict as they may find some particular fact, when there is no evidence tending to prove that fact. *Wetherby v. Foster*, 5 Vt. 136.

119. It is error for the court to instruct the jury to decide the cause upon the consideration of certain specified facts or circumstances, when there are others which ought also to be taken into account. *Gordon v. Tabor*, 5 Vt. 108.

120. Unless the testimony is all one way, it

is error for the court to charge that if they find the facts as testified to by the witnesses, they should find for the plaintiff. Where the testimony is not concurrent, the attention of the jury should be called to the different aspects of the case as presented by the testimony; and they should be directed to the particular facts they must find in order to entitle the party to a verdict. For a too general direction in this respect, the judgment will be reversed and a new trial granted. *Hazard v. Smith*, 21 Vt. 138.

121. **Abstraction.** Judgment *reversed*, because the charge laid down the law only in the abstract, without specific application to the facts in evidence. *Mason v. Silver*, 1 Aik. 367.

122. It is the duty of courts, in their instructions to juries, to make the law applicable to the particular case, and not to deal in mere abstractions—as, by reading to them legal principles from text-books and reports. Such practice criticised. *State v. McDonnell*, 32 Vt. 491.

123. It is not the duty of the court, in a charge, to illustrate a general proposition of law, correctly stated, in every conceivable way, or in any particular manner unless specially requested so to do. It is enough, if the illustrations given do not inculcate any false principle. It is its duty to state correctly the general principles governing the case, and to illustrate them sufficiently to enable the jury to understand their proper application to the case. *Ross, J., in Whitcomb v. Fairlee*, 43 Vt. 675.

124. **Discretion.** As to circumstantial evidence, it rests in the discretion of the judge to what extent he will go in laying down to the jury the approved rules for weighing such evidence. It is not error unless he gives wrong instructions—though the want of full instructions may, in some courts, have been considered ground for *new trial*. *State v. Roe*, 12 Vt. 93.

125. How far the court will go in its charge, having laid down the ultimate doctrine of the law of the subject and case, in developing and amplifying it and indicating pertinent considerations bearing upon the application and results of it, in view of the evidence, is generally matter of discretion not revisable by the supreme court. *Durgin v. Danville*, 47 Vt. 95.

126. **Contradictory instructions.** Where contradictory instructions in a charge are given, one wrong and the other right, the judgment will be reversed; for, in such case, the jury would be left to take which statement they might choose, and might take the wrong one and so be led into error. *Alexander v. Blodgett*, 44 Vt. 476.

127. **Several counts.** If testimony be admitted generally in support of several counts

in a declaration, which is legally admissible in support of part only, it is error, unless the jury are properly instructed to which count the testimony is applicable, and to which not. *Vail v. Strong*, 10 Vt. 457.

128. Where a declaration contains several counts, setting out the cause of action in different ways to meet any differences that might arise on the proof, or different views of the language of a contract, and no objection is made to the admissibility of the evidence upon particular counts, and no question is made to the court as to the applicability of the evidence to each, no exception lies because the court does not voluntarily assume the duty of directing the attention of the jury, and confining the recovery, to such counts as the proof sustains. *Brintnall v. Sar. & W. R. Co.*, 32 Vt. 665.

129. **Error induced by concession of party.** In an action of assumpsit, the defense was put upon the ground of fraudulent representations and concealment, and the charge of the court was correct upon that point. The defense might, upon the evidence, have been put upon the ground of a breach of an express warranty, but was not; and the charge would have been erroneous as applied to such defense. *Held*, that no exception lay. *Richardson v. Concord*, 40 Vt. 207.

130. By *Barrett, J.*: It has been often held, that the court ought to give correct instructions to the jury as to matters of law involved in the case, as tried, without special request; and if, without specific requests for a charge, the court gives incorrect instructions, it may be made the subject of exception. But, in the present case, we think the judge fully performed his duty when he correctly charged the jury as to the law in reference to the right and claim asserted by the plaintiff, and the defense asserted by the defendant, on the trial; and we do not regard it error for him to omit to charge as to a defense which was not made, even if it be thought that such defense might have been legitimately made; nor for him to give instructions that were correct as to the defense that was, in fact, made, but would not be correct as to a defense that might have been made on some other ground, but was not made. *Id.* 210.

131. *Held*, that where the plaintiff gives evidence tending to prove all the facts necessary to a recovery, it is not error for the court to direct a verdict for the plaintiff, although there was evidence for the defense tending to disprove some of such necessary facts, where the defendant declines to go to the jury upon such facts—this being virtually a concession of such facts, material to the right of action, as the evidence tends to establish. *Mudgett v. Johnson*, 42 Vt. 423.

132. After the close of the evidence, the plaintiff's counsel said they did not claim there

was anything for the jury to try, and the county court thereupon decided that the plaintiff was not entitled to recover. The evidence tended to prove the fact upon which the court's decision rested. *Held*, that the finding of the court was conclusive. *Davis v. St. Albans*, 42 Vt. 585.

133. **Comment on evidence.** It is not usual in this State for the court to express an opinion to the jury upon the weight of evidence. *Gordon v. Tabor*, 5 Vt. 103; and the court is not obliged to express such opinion. *Brainard v. Burton*, 5 Vt. 97. *Vincent v. Stinehour*, 7 Vt. 62; but it is not error for the court so to do. *Stevens v. Talcott*, 11 Vt. 25. *Gale v. Lincoln*, 11 Vt. 152. *Yale v. Seely*, 15 Vt. 221. *Sawyer v. Phaley*, 33 Vt. 69; and see *Missisquoi Bank v. Everts*, 45 Vt. 293.

134. Where the court below expressed to the jury their opinion that there was no sufficient evidence to charge two of the defendants, but that the jury would weigh the evidence and determine for themselves, and the jury rendered a verdict in favor of said two defendants;—*Held*, that this was not cause for reversal of the judgment. *Yale v. Seely*.

135. It is not error in law for a judge in his charge to express his opinion as to the weight and tendency of the evidence, although this may have great influence upon the verdict, if he still distinctly leaves the evidence to the jury to weigh and to draw a different conclusion, and the language used is not likely to mislead the jury in this respect. *Sawyer v. Phaley*, 33 Vt. 69.

136. Where a question arises on that subject, the court may lawfully state to the jury his impressions and understanding as to how a witness meant to be understood in the testimony he had given, and may indicate how such impression and understanding were derived, especially when the court distinctly leaves to the jury to find the fact from the testimony. The idea that it is the duty of the court to leave the jury to such light as may be shed upon them by counsel in the argument of cases, without intimations as to the true light in which, under the law, the materials of evidence are to be considered and used, not only is not proper to be countenanced, but is counter to the practice of the best class of judges. *Missisquoi Bank v. Everts*, 45 Vt. 293.

137. The judge in charging the jury remarked that he recollected no evidence upon a certain point, unless it was certain evidence which he referred to. *Held*, that if this was a mistake of the judge, it was not a subject of error, where he left all the evidence to the jury, as they heard it. *Dow v. School Dist. Walden*, 46 Vt. 108.

138. So long as the county court does not withdraw evidence from the consideration of the jury, and states no erroneous principle of

law to govern their consideration of it, the supreme court will not revise the charge, nor reverse the judgment. *Sampson v. Warner*, 48 Vt. 247.

139. In an action against a town for an injury received upon a highway, the defendant requested a charge that the jury should not allow any feeling of sympathy for the plaintiff to influence them in deciding the case. The court charged the jury that they would remember to lay aside their feelings in the case, but said to them: "Of course none of us can do away entirely with our sympathies; we all have more or less feeling of sympathy for a party who has been injured, and it is right we should have; but in making up your verdict in the case, you will lay aside your feelings of sympathy, as far as may be, and determine the issues upon the evidence given in court, forgetting, as far as may be, the parties and the consequences of your determination." *Held*, no substantial error; but that it would have been more satisfactory if the judge had been more decided and explicit in instructing the jury, that their feeling of sympathy for the plaintiff should have nothing to do with their verdict. *Fulsome v. Concord*, 46 Vt. 135.

140. **Measure of proof.** The defendant in a civil action requested the court to charge the jury, that if they doubted about the fact of his liability they must find for him. *Held*, that such charge would be error; that this rule prevails only in criminal cases. *Spencer v. Daggett*, 2 Vt. 92.

141. In a statute action, the first count of the declaration was for a penalty, the second for damages, and the third for both. *Held*, that a general charge that in order to a recovery the jury must be satisfied beyond a reasonable doubt, was, as to the second count, erroneous. *Barnet v. Ray*, 33 Vt. 205.

142. **Exceptions—Waiver.** When the plaintiff rests, the defendant may have judgment upon the case as it then stands, and that judgment is subject to exception. But if, by leave of court, further evidence is put in by the excepting party and the case varied, the original exception is waived. *Driggs v. Burton*, 44 Vt. 124. *Carr v. Manahan*, 44 Vt. 246.

#### VI. THE VERDICT.

143. **Correcting verdict.** Where a jury by mistake return an erroneous verdict, it may be corrected by the court on inquiry of the jury in open court; or it may be committed to the jury again to correct the error, although (as in this case) there had been a brief and partial separation. *Montgomery v. Maynard*, 38 Vt. 450.

144. **Harmless error.** A verdict will not be set aside for a mistake which cannot pre-

judice the moving party; as where, in ejectment, the verdict was for nominal damages and, by mistake, included more land than the defendant (the moving party) claimed or was in possession of. *Burnell v. Maloney*, 39 Vt. 579.

145. **Special verdict.** It is always competent for a court to require the jury to find separately on each issue of fact presented by the evidence. When the verdict is thus rendered, the case will not be remanded for a new trial, unless there is error in some branch of the case with respect to which a different verdict would alter the general result. *Spaulding v. Robbins*, 42 Vt. 90.

146. A special verdict is authorized by G. S. c. 80, s. 85, and it is not matter of exception for the court to order it. *Hogle v. Clark*, 46 Vt. 418. *Babcock v. Culver*, 46 Vt. 715, 721.

147. Where a special verdict is taken, it is the duty of the court to render the proper judgment upon the facts found by it; and by such verdict an error in directing a general verdict, upon other grounds, was *held* cured. *Ib.*

148. The error in a charge upon one point may be cured, or become immaterial, by a special finding of the jury upon some other point. *Davis v. Judge*, 46 Vt. 655. *Hodge v. Bennington*, 43 Vt. 450.

149. When the issues in a case are divisible and distinct, and a special finding of the jury on one issue renders the other immaterial, then the error of the court in admitting improper evidence upon such other issue, and applicable only to that, becomes immaterial, and the judgment will not be reversed therefor. *Hodge v. Bennington*.

150. **Immaterial issue—Repleader.** A verdict set aside and a repleader awarded, because of the immateriality of the issue. *Eddy v. Cochran*, 1 Aik. 359.

151. **Verdicto non obstante.** The defendant pleaded in justification, as an officer, an execution returnable in 120 days. The plaintiff replied that the execution, as issued, was returnable in 60 days and was altered to 120 days after its return; and issue was joined. The court rejected evidence of the alteration, and rendered judgment for the defendant. Judgment affirmed;—for that the issue was immaterial, since the defendant was justified in either case, the process being regular on its face; and if the evidence had been admitted and the issue found for the plaintiff, it would have been the duty of the court, not to award a repleader, but at once to give judgment, *non obstante verdicto*, for the defendant. *Gage v. Barnes*, 11 Vt. 195.

152. In order to sustain a motion for judgment for the plaintiff, notwithstanding a verdict for the defendant upon his plea, the plea must not only be defective, but must have



presented an immaterial issue. Where the plea presents an equitable defense, it will always be sustained after verdict. *Chase v. Holton*, 11 Vt. 347. *Barney v. Bliss*, 2 Aik. 60.

153. To a plea of payment after a debt fell due, and on a day named, there was a traverse of payment *on that day*, in the words of the plea. *Held*, after verdict, that the traverse did not form an immaterial issue, and was sufficient. *Stearns v. Stearns*, 32 Vt. 678.

154. Where a verdict passes for the plaintiff, though upon a defective declaration, the court cannot render a judgment for the defendant, *verdicto non obstante*. *French v. Steele*, 14 Vt. 479. 27 Vt. 31.

155. A judgment *verdicto non obstante* is never rendered for the defendant; and it is only rendered for the plaintiff upon the confession in a plea which is bad in substance. Where the issue joined upon an immaterial replication is found for the defendant, the court does not know for whom to render judgment, and either awards a repleader, or arrests the judgment upon proper motion. *Stoughton v. Mott*, 15 Vt. 162.

156. A motion for a judgment *non obstante verdicto* is necessarily founded on the record alone, and can never depend on any state of evidence not disclosed by the record. *Snow v. Conant*, 8 Vt. 301. *Cobb v. Cowdery*, 40 Vt. 27.

157. **Motion in arrest.** It is doubtful whether any motion in arrest can be sustained where the issue is tried by the court. *Bliss v. Arnold*, 8 Vt. 252.

158. A motion in arrest cannot be sustained for such things as took place on the trial. *Walker v. Sargeant*, 11 Vt. 327.

159. A decision made upon demurrer stands as the law of that case upon a motion in arrest, though the pleadings have been changed. *Ross v. Bank of Burlington*, 1 Aik. 48. 27 Vt. 699.

## VII. ASSESSMENT OF DAMAGES.

160. After judgment by default or *nil dicit*, in an action against a sheriff for an escape on execution, the damages may be assessed by the clerk, on computation, after the term. Matter in mitigation of damages, as the poverty of the prisoner, is a subject for the jury on trial, or motion for a hearing in damages. *Weeks v. Lawrence*, 1 Vt. 433.

161. A and B were sued for a joint trespass. A suffered a default and judgment passed against B on trial, and damages were assessed against A equal to the damages recovered against B. On exceptions taken by B, *held*, that there was no error in the judgment. *May v. Bliss*, 22 Vt. 477.

162. A judgment against a defendant, without trial, stands as if judgment had been rendered upon a demurrer to the declaration, and

every fact alleged in the declaration which it would have been necessary for the plaintiff to establish by proof to entitle him to a judgment, is regarded as established by the judgment. *Bradley v. Chamberlain*, 31 Vt. 468.

163. Where the facts thus alleged furnish of themselves a rule of damages, as in an action upon a note of hand, or any other contract which must be proved precisely as alleged, the plaintiff is *prima facie* entitled, upon a hearing for assessment of damages, to the amount of damages indicated by this rule. *Ib.*

164. A judgment against a defendant, though without trial, determines the plaintiff's right to recover some damages, at least nominal; but whether more or not, is a question fully open for trial and evidence on both sides upon the assessment of damages, as if such preliminary judgment had not been rendered. *Ib.* *Chamberlin v. Murphy*, 41 Vt. 110.

165. On the assessment of damages, after a preliminary judgment, evidence which goes only to the right of recovery is not admissible; but it is no objection, in such case, to evidence which is relevant to the question of damages, that it would also have been legitimate upon the main question if that had been tried, and would even have prevented a judgment. *Chamberlin v. Murphy*.

For trials in criminal cases, see **CRIMES**; in particular actions, see **ACTION**—and special titles, as **ASSUMPSIT**, **TRESPASS**, &c.

See, also, **EVIDENCE**; **WITNESS**; **PRACTICE**; **PLEADING**; **VARIANCE**; and special subjects, as **HIGHWAYS**, **RAILROADS**, **PAUPERS**, &c.

## TROVER.

- I. FOR WHAT THE ACTION LIES.
- II. THE PLAINTIFF'S TITLE.
- III. WHAT IS A CONVERSION.
- IV. DEFENSE.

### I. FOR WHAT THE ACTION LIES.

1. **Generally.** For all personal chattels.
2. **Securities — Papers.** Trover for a promissory note lies in favor of the maker against the payee where it is wrongfully withheld, or transferred after payment. *Buck v. Kent*, 3 Vt. 99. *Pierce v. Gilson*, 9 Vt. 216.
3. So, by two makers of a joint and several note, though one is surety for the other. *Spencer v. Dearth*, 43 Vt. 98.
4. So, also, for the plaintiff's note loaned to the defendant, which the defendant paid, and then claimed of the plaintiff. *Park v. McDaniel*, 37 Vt. 594.

5. The same law as to a mortgage deed; and it is no objection to the action that the fact of payment is disputed. *Gleason v. Owen*, 85 Vt. 590. *Spencer v. Dearth*, 43 Vt. 98—disapproving *dicta* in *Pierce v. Gilson*, 9 Vt. 221.

6. So, as to a bond. *Bullock v. Rogers*, 16 Vt. 294.

7. Trover lies for a check in behalf of him whose property it is, whether payable to him or indorsed to him, or not. *Tilden v. Brown*, 14 Vt. 164.

8. Also by a judgment creditor for a writ of execution which he had sued out, and which the defendant wrongfully detained, although the execution had expired before suit brought. *Keeler v. Fassett*, 21 Vt. 539.

## II. THE PLAINTIFF'S TITLE.

9. In order to maintain trover (or trespass) the plaintiff must have had, at the time of the injury complained of, either the actual custody of the thing injured or taken, or a property in it, either general or special, with the right to immediate possession. *Swift v. Moseley*, 10 Vt. 208. 34 Vt. 169. Instance of trover by bailee against bailor. *Hickok v. Buck*, 22 Vt. 149.

10. Naked possession, whether rightful or obtained by force or fraud, is a sufficient title to sustain trover against a mere stranger. *Knapp v. Winchester*, 11 Vt. 351.

11. The plaintiff in trover cannot stand upon a possession which he has voluntarily surrendered, though under protest, but is remitted to his right of property. *Ib.*

12. The receptor of property attached, who has actual possession of it for safe keeping, may sustain trover for it against a third person who takes it out of his possession. *Thayer v. Hutchinson*, 13 Vt. 504. 17 Vt. 638.

13. Where the plaintiff bailed certain personal property for three years, but with a stipulation that he might take it back at any time "on his request";—*Held*, that he had such right to immediate possession as to sustain trover against the defendant, who, within the three years, attached the property as that of the bailee. *Batchelder v. Warren*, 19 Vt. 371. 23 Vt. 283.

14. The plaintiff owned certain wood which stood under an attachment by copy in the town clerk's office, but was not removed. The defendant without authority drew away and converted the wood. *Held*, that as general owner the plaintiff could maintain trover therefor; but the court ordered a stay of execution until the lien of the attachment should be ended. *Mussey v. Perkins*, 36 Vt. 690. See *Briggs v. Taylor*, 35 Vt. 57.

See TRESPASS, III. POSSESSION.

## III. WHAT IS A CONVERSION.

15. **Definition.** In the sense of the law of trover, a conversion consists either in the appropriation of the property to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the owner's right, or in the withholding the possession from the owner under a claim of title inconsistent with his. *Keillogg, J., in Tinker v. Morrill*, 39 Vt. 480.

16. A conversion, when applied to the action of trover, imports an unlawful act, and not a mere non-feasance. The action will not lie for mere neglect in keeping and taking suitable care of property attached, or bailed, whereby it becomes damaged, lost or destroyed. The remedy, in such case, is an action on the case for negligence, or upon the contract, if any. *Ib.* 477. *Abbott v. Kimball*, 19 Vt. 551. *Nutt v. Wheeler*, 30 Vt. 436.

17. **Instances.** The master employed to run a vessel which became wrecked, afterwards, without license of the owner, loaned to the defendant an anchor of the vessel, and it was used by him to its injury. *Held*, to be a conversion by each. *Rice v. Clark*, 8 Vt. 109.

18. Case of a conversion in trover, where the plaintiff might, at his election, have treated it as a sale and delivery. *Holland v. Osgood*, 8 Vt. 276.

19. The pledging of property in one's possession, which belongs to another, without authority of the owner, is a conversion by both the pledgor and pledgee, whether the pledgee was aware of the real state of the title or not. *Thrall v. Lathrop*, 30 Vt. 307.

20. In such case, or in case of a sale, a joint action of trover lies against both parties to the transaction. *Grant v. King*, 14 Vt. 367. *Buckmaster v. Mower*, 21 Vt. 204.

21. The plaintiff purchased of the defendant his mail contract and stage property, and it was stipulated that the postmaster at M should retain all the government checks or drafts to be sent to the defendant and should deliver them to the plaintiff; and the defendant so directed the postmaster at M. The defendant obtained one of such checks, afterwards issued, and converted it to his own use. *Held* (three judges to two), that the defendant was liable in trover therefor. *Tilden v. Brown*, 14 Vt. 164.

22. In an action of trover for a watch, the court charged that the defendant was liable, if the watch was disposed of by some other person than the defendant upon an understanding with the defendant that he was to share in the avails, and he did so. *Held* correct; and that the charge must be understood as connecting the understanding referred to with the disposition of the watch, as well as with the shar-

ing in the avails. *Johnson v. Powers*, 40 Vt. 611.

23. Where the defendant shut up the plaintiff's turkeys with his own, and refused to let the flock at large so that the plaintiff's could be identified;—*Held*, that this was a conversion, although the defendant offered to deliver a certain number, such as the plaintiff might select, but a less number than the plaintiff claimed and in fact owned. *Leonard v. Belknap*, 47 Vt. 602.

24. **Officer's receipt.** If an officer attaches property, and bails it to a receptor who refuses to deliver it on request, trover lies against the receptor. *Sibley v. Storey*, 8 Vt. 15. *Pettes v. Marsh*, 15 Vt. 454. *Brown v. Glead*, 33 Vt. 147. *Tinker v. Morrill*, 39 Vt. 479.

25. **Necessity of demand.** Where one purchases personal property of a person in possession of it, but who is not the true owner and has no right to sell it, and the purchaser takes possession claiming title to it as owner and puts it to use, this is an actual conversion and makes him liable in trover to the owner, *without any demand or notice*, though he purchased in good faith of one whom he supposed to be the owner and entitled to sell it. *Riford v. Montgomery*, 7 Vt. 411. *Grant v. King*, 14 Vt. 367. *Deering v. Austin*, 34 Vt. 380. *Bucklin v. Beals*, 38 Vt. 653; and see *Swift v. Moseley*, 10 Vt. 208. *Thrall v. Lathrop*, 30 Vt. 307.

26. The purchaser of stolen goods who resells them, is liable in trover to the true owner without any previous demand and refusal, though he acted in good faith. *Courtis v. Cane*, 32 Vt. 232.

27. **Demand and refusal.** A demand and refusal is not a conversion, but only evidence of a conversion, and only evidence thereof when the party might have delivered the property if he would; but, under these circumstances, it is plenary evidence of the fact of a conversion having been committed, and, unexplained, is equivalent to a conversion. The fact that the property afterwards goes to the owner's use only goes in mitigation of damages. *Irish v. Cloyes*, 8 Vt. 80.

28. A demand and refusal is only evidence of a conversion, where the defendant was in such a condition that he might have delivered the property if he would. *Kellogg, J.*, in *Tinker v. Morrill*, 39 Vt. 480.

29. A demand and refusal to deliver is not a conversion, nor evidence of a conversion, when the party upon whom the demand is made had not the article in his possession, or power to deliver. *Buck v. Ashley*, 37 Vt. 475. *Rice v. Clark*, 8 Vt. 109. *Irish v. Cloyes*, 8 Vt. 80. *Knapp v. Winchester*, 11 Vt. 351. *Yale v. Saunders*, 16 Vt. 248. *Tinker v. Morrill*, 39 Vt. 477.

30. In the action of trover, a rightful demand

and a wrongful refusal are in law a conversion. *Peck, J.*, in *Gragg v. Hull*, 41 Vt. 222.

31. **Character of demand.** Where one entitled to demand of the defendant certain articles or a certain amount of property, demands more than he is entitled to, the defendant is not justified in omitting to deliver that part of the property which is rightfully demanded; but where the demandant refuses to receive any part unless he can have the whole, and he is not entitled to the whole, the defendant is excused from tendering any part of it, as he is not bound to do a nugatory act. *Gragg v. Hull*, 41 Vt. 217.

32. A party is entitled to a reasonable time to deliver property after rightful demand, where there is no denial of the demandant's right and no refusal. What is such reasonable time would depend in a measure upon the distance of the property from the place of demand. *Ib.*

33. A charge, in such case, leaving to the jury to say whether "they were satisfied that the defendant had sufficiently accounted for his neglect or refusal to deliver the property, &c.," was *held* too indefinite, and as leaving law and fact combined to the jury. *Ib.*

34. **What is not a conversion.** Merely claiming title to property taken by an officer and advertised to be sold on execution and forbidding him to sell it, where the party had no control or possession, was *held* not to amount to a conversion; and that a previous actual appropriation of a part of it, did not vary the question as to the remainder. *Lowry v. Walker*, 4 Vt. 76.

35. The owner of property attached as the property of another, cannot maintain trover against the officer when he neither took actual custody and possession, nor any receipt, and where the owner was never disturbed in his possession, but used and appropriated the property to his own benefit. *Amadon v. Myers*, 6 Vt. 308. 18 Vt. 194. *Hart v. Hyde*, 5 Vt. 331.

36. A mere assertion of ownership of property, unless made in view of the property and in the presence of the owner and in order to deter him from exercising his just control over it, is not evidence of a conversion in trover, and should not go to the jury. *Irish v. Cloyes*, 8 Vt. 80.

37. Where the lessee of certain sheep sold them to the lessor and received payment therefor, the lessor knowing them to be the same sheep leased by him;—*Held*, that this was not a conversion for which the lessor could maintain trover. *Downer v. Rowell*, 24 Vt. 343.

38. W being the apparent but not the real owner of a cow in his possession, bargained with the defendant that he should keep the cow for W through the winter and should have the right then to purchase the cow by paying W

§20, unless W should at that time pay him \$18 for the keeping. The cow went into the possession of the defendant, but W, who lived in the same house with the defendant, had the sole use and benefit of the cow. In an action of trover by the real owner of the cow,—*Held*, that there was no evidence of a conversion by the defendant. *Deering v. Austin*, 84 Vt. 330.

39. It is merely a breach of contract, and not a conversion of an article of property borrowed, to refuse to return it on demand, as agreed, to the place from which it was taken when borrowed—the borrower making no claim to it and not objecting to the owner's taking it. *Farrar v. Rollins*, 87 Vt. 295.

As to *conversion* by a bailee, see BAILMENT.

#### IV. DEFENSE.

40. The plaintiff had wrongfully got possession of the property of A, and detained it. A brought suit against him and attached the same property, which the attaching officer delivered to A, and A then discontinued his suit. In trover against the officer for a refusal thereafter to re-deliver the property to the plaintiff, on demand;—*Held*, in the absence of evidence that the defendant was privy to the purpose of A in bringing his suit merely to get possession of the property, and upon the assumption that the defendant acted in good faith in making the attachment, that the delivery of the property to A, the right owner, was a defense. *Mullen v. Sherman*, 87 Vt. 498.

41. Trover for a wagon. The defendant, as sheriff, had attached a wagon in the possession of R, as the property of R, but which was in fact the property of the plaintiff, and had removed the wagon, and the plaintiff had demanded it, and the defendant had refused to surrender it. Afterwards, the defendant asked the plaintiff what he claimed about the wagon; and the plaintiff replied that he wanted it returned to R where it was taken from—that was all he claimed about the wagon. The next morning the defendant, by direction of the attaching creditor, returned the wagon to R. *Held*, that it was a question for the jury, upon such evidence, whether it was the understanding between the parties that such return was to be a discharge of all claim for the taking and detention of the wagon, as well as for the wagon itself; and if the jury should so find, then such return was a full answer to the plaintiff's claim; that, upon such facts, the acceptance of the wagon by the plaintiff would be unnecessary, and an immaterial fact; and therefore the court below erred in their charge, that if the wagon was returned, and accepted by the plaintiff, that would diminish the damages to the

extent of the value of the wagon—a double error. *Spalding v. Stewart*, 88 Vt. 78.

42. *Plea*. A special plea in trover which amounts, in legal effect, to a denial of the conversion, amounts to the general issue and is bad on special demurrer. *Turner v. Waldo*, 40 Vt. 51.

See DAMAGES.

### TRUSTEE PROCESS.

I. IN WHAT CASES THE PROCESS LIES, AND WHAT MAY BE REACHED BY IT.

II. PROCEDURE.

I. IN WHAT CASES THE PROCESS LIES, AND WHAT MAY BE REACHED BY IT.

1. *Plaintiff must be a creditor*. A person claiming damages for a conversion of his property is not a creditor, in the meaning of the trustee act. *Hutchinson v. Lamb*, Brayt. 234.

2. *Defendant an inhabitant*. To bring a case within the statutes as to absconding and concealed debtors, as they existed in 1826, the debtor must have been an inhabitant of this State. *Austin v. Palmer*, 2 Vt. 489.

3. Where a single man, having a usual place of resort as a home in New Hampshire, came into this State under a contract to teach a school for three months, leaving his chest of clothes in New Hampshire and going there once or twice during his term to exchange them, and at the expiration of his term returned there;—*Held*, that he had not thereby become "an inhabitant" of this State within the meaning of the statute as to absconding or removing debtors. *Boardman v. Bickford*, 2 Aik. 345. 7 Vt. 410.

4. *Trustee a resident*. A person residing without this State, coming within it for a temporary purpose, is not liable to be summoned as trustee of an absconding or absent debtor. *Baxter v. Vincent*, 6 Vt. 614.

5. It is no objection to a trustee action that the plaintiff and defendant are citizens of another State, the trustee being a resident of this State. *Chase v. Houghton*, 16 Vt. 594. *Ward v. Morrison*, 25 Vt. 593.

6. *Absconding, &c.* The principal debtor may plead in abatement that he was not an absconding or concealed debtor. *Austin v. Palmer*, 2 Vt. 489—overruling *Strong v. Allen*, Brayt. 232; and *Gaffield v. Enos*, Brayt. 234.

7. One sued as trustee of an absconding or concealed debtor may plead in bar that the debtor is not an absconding or concealed debtor. *Emerson v. Paine*, 9 Vt. 271. 16 Vt. 463.

8. The trustee process cannot be sustained

against a partnership as absconding or concealed debtors, unless all of the members have absconded, or kept concealed. *Leach v. Cook*, 10 Vt. 289.

9. **Joinder.** Several persons having distinct interests cannot be joined as trustees in the same trustee process. *Atkinson v. Minor*, 1 Tyl. 122. (Changed by statute.)

10. **Town.** A town cannot be held as trustee of an absconding or concealed debtor. *Bradley v. Richmond*, 6 Vt. 121. (Changed by statute.)

11. **Partnership.** If different trustees are summoned generally, they are liable as trustees for all their debts to the principal debtor, both joint and several; but not for partnership effects held by other partners, not named in the writ, unless such effects specifically described. *Pettes v. Spalding*, 21 Vt. 66. 28 Vt. 741. 42 Vt. 172-4.

12. The debt due from a partnership, a part of whose members reside in this State and part in another, can be attached by trustee process in case the partnership was formed, and the business of the firm was transacted, and the partnership debt was payable, in this State. *Peak v. Barnum*, 24 Vt. 75.

13. Where one is summoned as a trustee individually, and not as a member of a firm, and where the other members of the firm are not named in the writ, nor summoned, he is not bound to disclose or answer as to the indebtedness of the firm of which he may be a member, nor will the process reach such debt of the firm. *Knapp v. Lecanway*, 27 Vt. 298. *Lamson v. Bradley*, 42 Vt. 165, 173.

14. Where persons summoned as trustees are summoned only as partners, the effects or credits in the hands of one of them individually are not attached, and cannot be held. *Coverly v. Bragyard*, 28 Vt. 738. 42 Vt. 174.

15. Co-partnership funds cannot be attached by trustee process for the separate debt of one of the partners, where the other part owner objects. *Towne v. Leach*, 32 Vt. 747.

16. The defendant contracted in his own name with the alleged trustee to build a bridge for him. W was in fact a partner with the defendant in the transaction, but the trustee had no knowledge of this. The defendant and W did the work together as partners. In a suit against the defendant alone for his sole indebtedness;—*Held*, that the trustee was not chargeable, for that his indebtedness was to the defendant and W jointly. *Bartlett v. Woodward*, 46 Vt. 100.

17. Where one partner assigned, in payment of his individual debt, a promissory note belonging to his firm;—*Held*, that the assignee was not liable for the note, or its proceeds, as trustee of the firm in a trustee action by the creditors of the firm. *Huntoon v. Dow*, 29 Vt. 215.

18. **Joint debt.** A joint debt due to two or more persons cannot be attached by trustee process in a suit against only one of them; and the trustee will in such case be discharged when knowledge of the fact is brought to the court, although by a claimant who has no title. *Fairchild v. Lampson*, 37 Vt. 407. *Bartlett v. Woodward*, 46 Vt. 100. *Towne v. Leach*, 32 Vt. 747.

19. **Joint and several interests.** Where two or more are summoned as trustees, following the statute form, with nothing in the writ added to indicate in what capacity they are required to disclose, whether as to their *joint* or their *several* liability, they are before the court in both capacities, and are chargeable for all their indebtedness to the principal debtor, joint as well as several, if all the joint debtors are before the court as trustees. *Lamson v. Bradley*, 42 Vt. 165.

20. On a default in such case, the court may render judgment against the trustees severally, or jointly, for the full amount of the recovery against the principal defendant. *Id.*

21. The defendant and the claimant, being joint equal owners of a quantity of cheese, put it in the hands of the trustee for sale, he to pay to each his share of the avails. *Held*, that the defendant's share of the avails could be held by the trustee process. *Piper v. Hanley*, 48 Vt. 479.

22. **Specific chattels in common.** Where specific chattels, owned in common by two persons, are in the hands of a third person, the interest of one part owner may be attached by trustee process in a suit against him. *Bartlett v. Wood*, 32 Vt. 372.

23. **Officer.** An officer having money in his hands collected on an execution, may be held as trustee of the execution creditor though the money has not been demanded. *Hurlburt v. Hicks*, 17 Vt. 193. *Bullard v. Hicks*. *Id.* 198.

24. So, for coin, bank bills or money attached on *mesne* process and remaining in the attaching officer's hands after settlement of the suit, he may be held as trustee of the defendant. *Lovejoy v. Lee*, 35 Vt. 430.

25. Also, for a surplus in his hands arising from a sale on attachment or execution, where the attachment has been dissolved, or the execution satisfied. *Id.* *Adams v. Lane*, 38 Vt. 640.

26. An officer held bank bills attached by him in a suit which had been settled, the debtor having acquiesced in the attachment. *Held*, that the officer could not shield himself from liability as trustee of the debtor, by claiming that the attachment was effected by a trespass upon the person of the debtor. *Lovejoy v. Lee*, 35 Vt. 430.

27. **A co-plaintiff** may be summoned and

held as trustee (G. S. c. 34, s. 2). *Lyman v. Wood*, 42 Vt. 113.

**28. Ordinary attachment.** Personal property of a debtor in the possession of a third person may be attached by the trustee process, although in all respects open to the ordinary process of attachment, and although the trustee has no claim to or lien upon the property. *Brown v. Davis*, 18 Vt. 211. 30 Vt. 189.

**29. Nature of claim against trustee.** It has been held sufficient under all our trustee statutes, that the claim upon the trustee was a legal debt by contract, that it belonged to the principal defendant, and that he had a right to have it enforced by an action at law, if necessary. The creditor cannot by this process pursue a mere equity claim against the trustee, and such as is enforceable only in a court of chancery; nor can such claim be asserted by the trustee against the defendant. *Weller v. Weller*, 18 Vt. 55 (1844.) *Hoyt v. Swift*, 13 Vt. 129.

**30.** It is sufficient to charge one as trustee, that the principal debtor has deposited property with him, or that he is indebted to the principal debtor, though something further—as, a demand—be requisite to constitute a right of action by the principal debtor. *Corey v. Powers*, 18 Vt. 587.

**31.** One is not necessarily chargeable as trustee because the principal debtor may have a cause of action against him in assumpsit, as, to recover for usury paid; or for money obtained by an oppressive agreement; or for a fraud practiced; or for failure to perform a duty as a professional man, mechanic, or common carrier. These are not “credits intrusted,” &c. *Barker v. Eady*, 19 Vt. 131. *Fish v. Field*, 19 Vt. 141.

**32.** To charge a trustee, the principal debtor must have a cause of action against him. The attaching creditor takes the place of the principal debtor; and if there is no cause of action, there is no right to be attached. *Kettle v. Harvey*, 21 Vt. 801.

**33.** In order to hold one chargeable as trustee, there must be a debt, or fiduciary obligation on his part, and not a mere tort, or breach of duty. *Held*, that the liability of a constable to the execution creditor for breach of official duty in respect to the collection of the execution, he having received no money, cannot be so attached. *Hemmenway v. Pratt*, 23 Vt. 332.

**34. Contingency.** A contingency which affects the debt itself, will prevent its being held on trustee process; and this was so under the statute of 1797. *Burke v. Whitcomb*, 18 Vt. 421. 18 Vt. 44.

**35.** The maker of a note payable upon a contingency being summoned as trustee of the payee, it appeared that after service of the trustee process and while it rested in contingency, it was assigned to a third person and

notice thereof given to the maker, but that it became absolute before disclosure. *Held*, that the maker was not chargeable as trustee. *Ib.*

**36.** This “contingency” must be such as to affect the debt itself, and not simply the liability of the trustee to have the effects or credits called out of his hands in a particular manner; or which affects only the mode and time of accounting. *Downer v. Curtis*, 25 Vt. 650. 40 Vt. 241.

**37.** If the liability is certain, and the debt uncertain only as to the amount, it is not contingent within the meaning of the statute. *Downer v. Topliff*, 19 Vt. 399.

**38.** Money deposited with one as security for becoming bail for the depositor, is not a “credit” or money due depending upon a contingency, under G. S. c. 34, s. 6; but is rather “effects” of the depositor in the hands of the depository, and is subject to trustee process, while so held on deposit, for the debts of the depositor; and the depository is chargeable as trustee when discharged from his liability as bail, deducting his claims for indemnity. *Ellis v. Goodnow*, 40 Vt. 237.

**39.** Where the trustee, as payment of his indebtedness to the principal debtor, had given orders upon his own debtor for payment to the trustee, and to charge the same to the trustee's account;—*Held*, that the liability of the trustee was only contingent upon reasonable demand of payment of the orders, refusal, and notice given back; and that before presentment of the orders he was not chargeable as trustee. *Sibley v. Frost*, 23 Vt. 352.

**40.** A promissory note with this condition: “I am at my option about paying the principal of this note while I pay the interest annually”—was *held* subject to be attached by trustee process. *May v. Smith*, 25 Vt. 610.

**41. Defendant's title and right.** In order to charge one as trustee, the goods, effects and credits of the principal defendant in the hands of the trustee must belong to the principal defendant in his own right. *Boyden v. Ward*, 38 Vt. 628.

**42.** The estate of an intestate was appraised by the committee at less than \$300, and was assigned by the probate court to the defendant, widow of the intestate, and administratrix, under G. S. c. 53, s. 1. A debt due the intestate was not inventoried. No commissioners of claims were appointed. After the assignment and within three months after the granting of administration, a creditor of the estate brought this suit before a justice and summoned said debtor of the estate as trustee, and got judgment by default against the defendant, and a judgment against the trustee from which the trustee appealed. *Held*, that the trustee was not chargeable; 1st, That the proceedings in the probate court barred any proceedings in

a common law court; 2nd, That the administratrix was not liable without an order for the payment of the debts, and that the judgment against her was not a judgment against the estate; 3d, That the debt of the trustee was not due to the defendant in her own right, but in trust, and therefore not attachable. *Id.*

43. The maker of a promissory note payable to a married woman, and given for her separate property, cannot be held as trustee of her husband. *Parks v. Cushman*, 9 Vt. 320.

44. **Exemptions.** Property exempt by law from attachment and execution cannot be attached by trustee process. *Parks v. Cushman*, 9 Vt. 320. 19 Vt. 544; and the trustee may set up this objection in his own name, though not raised by the principal debtor. *Clark v. Acerill*, 31 Vt. 512.

45. The money of a pensioner in the hands of his agent or attorney, received and held as a pension for transmission to the pensioner, is not subject to the trustee process. *Adams v. Newell*, 8 Vt. 190. 19 Vt. 544.

46. **Obligation to support.** The obligation to support another is of a personal character and cannot be attached by trustee process; nor can the conveyed property which furnished the consideration for such obligation, be attached, where such consideration came from another party. *Briggs v. Beach*, 18 Vt. 115. 36 Vt. 432.

47. Where the principal debtor conveyed all his property in consideration of an agreement for future support for life, leaving nothing for payment of debts:—*Held*, that the grantee was chargeable as trustee for the specific articles conveyed. *Crane v. Stickles*, 15 Vt. 252. 18 Vt. 119. 36 Vt. 432.

48. Where a father conveyed all his property to his son as a consideration for future support, and, as part of the contract, the son agreed to pay the father's debt to A:—*Held*, in a suit by A against the father, summoning the son as trustee, that the son was chargeable. *Corey v. Powers*, 18 Vt. 587.

49. **Lessee.** A lessee was held as the trustee of the lessor for rents agreed to be paid by the payment of certain specified debts of the lessor, where the several creditors had not accepted this agreement, and the lessee had not agreed with them to pay them. *Burt v. Hurlburt*, 16 Vt. 292.

50. **Agreement to indemnify.** An engagement to indemnify constitutes an indebtedness which may be attached by trustee process, after a right of action has accrued upon it in consequence of actual damnification; as, where a judgment has been recovered against the party agreed to be indemnified. *Downer v. Topliff*, 19 Vt. 899. 22 Vt. 20.

51. **Other instances.** Where one sold and received payment for an article and failed to

deliver it through defect of title;—*Held*, that he was chargeable for the purchase price as trustee of the vendor. *Edson v. Trask*, 22 Vt. 18.

52. A gave his note to B. B agreed with C to transfer the note to him for shingles which he agreed to make for B. C made part of the shingles only, when A was summoned as trustee of C, and thereupon C quit the job of making the shingles and B paid him for what he had done. The note had not been transferred or delivered to C. *Held*, that A was not indebted to C and was not liable as trustee. *Wakefield v. Crossman*, 25 Vt. 298.

53. Where property was taken from a trustee by an execution in the same suit, issued prematurely;—*Held*, that he was not chargeable as trustee therefor. *Goddard v. Hapgood*, 25 Vt. 351.

54. The assignee of a lease is not chargeable as trustee of the lessee for the rents accrued under the lease during his own occupation, and which he agreed with the lessee to pay to the lessor; for he is liable to the lessor directly as assignee of the term. *Overman v. Sanborn*, 27 Vt. 54.

55. The trustee purchased of the plaintiff a farm worth \$1700, for the defendant to reside upon, and paid \$1200 and took a warranty deed. There was a mortgage of \$500 then existing upon the farm, given by the plaintiff to one S, which the defendant procured one B to agree to pay, and secured him therefor by turning out his, the defendant's, property—the plaintiff being present and knowing of the transaction. At the hearing, the mortgage had not become due and had not been paid. The suit was to recover for a debt which existed at the time of the purchase of the farm. *Held*, that the trustee was not chargeable. *Jenks v. Silloway*, 30 Vt. 687.

56. The plaintiff sued A, summoning B as trustee, and citing C as claimant. A had owed a debt to a third person for which C was surety; and to secure C, he, by arrangement between A, B and himself, had sold and executed a bill of sale of A's property to B, taking B's note therefor to himself to hold for his security. A's debt was afterward paid from C's property, and C thereafter, on settlement with A, retained the note as his own absolutely. B was willing to be adjudged trustee for the specific property. *Held*, nevertheless, that the title to the property vested in B by the sale and that he was not trustee of A therefor; and that C, although claiming only the proceeds, yet was entitled to a judgment discharging B as trustee, and for his own costs. *Boutwell v. McClure*, 33 Vt. 127.

57. **Conveyance fraudulent.** The grantee in a conveyance which is fraudulent and void as to the creditors of the grantor, cannot be

held as his trustee, unless the grantee is indebted for the price stipulated. *Barter v. Currier*, 18 Vt. 615. *Hunter v. Case*, 20 Vt. 195. *Stevens v. Kirk*, 37 Vt. 207.

58. —**in trust**. One holding the title to land in trust for another, and for which he is not indebted to his *cestui que trust*, cannot be made chargeable by reason thereof in trustee process. *Doane v. Doane*, 46 Vt. 485.

59. —**subject to mortgage**. The grantee of land conveyed subject to a mortgage which he is to pay as part of the purchase price, does not thereby become personally liable to the holder of the mortgage note, so as to be chargeable as his trustee. *Smith v. Hyde*, 36 Vt. 308.

60. **Securities**. One is not chargeable as trustee on the ground of his having in his hands mere securities for money belonging to the principal debtor, though held in trust, but not collected. *Sargeant v. Ieland*, 2 Vt. 277. *Hitchcock v. Egerton*, 8 Vt. 202. *Denison v. Petrie*, 18 Vt. 42. *Scofield v. White*, 29 Vt. 330. *Van Amee v. Jackson*, 35 Vt. 173. *Stickney v. Crane*, *Id.* 88. *Edgerton v. Martin*, *Id.* 120. *Stevens v. Kirk*, 37 Vt. 204.

61. This is so, although the trustee, acting as agent of the principal debtor, has taken the securities payable to himself, yet not so as to make himself a debtor. *Fuller v. Jewett*, 37 Vt. 473.

62. A conveyed to B certain lands, under an agreement that B should sell the same and apply the avails in payment of a debt which B had assumed for A, and pay A the balance. B sold the lands for more than the amount of said debt, receiving part cash and the balance in good notes running to himself secured by mortgage. On the report of a commissioner, finding as a fact that B held such notes "as his own property and not as agent of A";—*Held*, that B was chargeable presently as trustee of A for the amount of the sale above the said debt and certain expenditures upon the land, although B had not as yet received in cash as much as he had been obliged to pay out. *Smith v. Wiley*, 41 Vt. 19.

63. Where the trustee's promissory note is held by a third person in pledge or as collateral security for a debt of the payee of less amount, it may be attached by trustee process against the payee, and held for the excess. *Fay v. Smith*, 25 Vt. 610. *Downer v. Tarbell*, 32 Vt. 22.

64. This may be done, although notice of the transfer may have been duly given to the maker, by bringing into court for the assignee (claimant) the amount of his claim—under the equity of G. S. c. 33, s. 31. *Perrin v. Russell*, 33 Vt. 44.

65. **Soldier's bounty**. The statute exempting from trustee process money payable or

received as a soldier's bounty, does not exempt a debt due from the trustee to the soldier on the purchase of his claim to a bounty, where the trustee has received the money and the soldier claims no immunity against the process. *Yates v. Hurst*, 41 Vt. 556.

66. **Payment before due**. The payment of a debt before it falls due, although done in order to avoid being trustee and to aid the other party to place the debt beyond the reach of his creditors, does not fall within the law which prohibits fraudulent and deceitful conveyances &c. (G. S. c. 113, s. 32), and the party so paying is not liable as trustee, where such payment is made before service of the process. *Fletcher v. Pillsbury*, 35 Vt. 16.

67. **Note payable to third person**. Where one to whom a debt is due has the debt made payable to another, or transfers it and makes it nominally payable to another instead of himself—as, by a note—in order to avoid a trustee process, such transfer is void as to the creditor, and the debt is still subject to the trustee process. *Camp v. Scott*, 14 Vt. 387. *Marsh v. Davis*, 24 Vt. 363. *Seymour v. Cooper*, 25 Vt. 141. *Van Amee v. Jackson*, 35 Vt. 173.

68. **Support**. Where the principal debtor had labored for the trustee under an agreement, that while he should be so laboring the trustee should support him and his family, and apply any excess of his earnings to the payment of his debts;—*Held*, that such an agreement was not fraudulent in fact, nor in law; and that the trustee, not being indebted under the agreement, was not chargeable. *Worthington v. Jones*, 23 Vt. 546.

69. Where, under a family arrangement, a father who was poor and destitute of a home went and lived with his son, and was supported by him, and labored for him whenever and as the father chose, neither expecting to charge the other;—*Held*, in the absence of proof of bad faith towards creditors of the father, that the son could not be held as his trustee, although the services were worth more to the son than the support furnished. *Cobb v. Bishop*, 27 Vt. 624.

70. A testator bequeathed a sum of money to his son "for the support of himself and family and for no other purpose;" which sum the executors paid over to the son's attorney. *Held*, that this money constituted a trust fund for the purposes named in the will, and could not be attached by trustee process for the son's debts; and, by *Bennett, J.*, the result would be the same, if the bequest had been to the son for his support, and for no other purpose—not naming the family, or the son not having a family. *White v. White*, 30 Vt. 333.

71. Where a fund in the hands of a trustee was created by the voluntary bounty of a parent for the benefit of a child, to be ex-



pendent according to the judgment and discretion of such trustee;—*Held*, that it was not attachable by trustee process for the debt of such child. *Van Amee v. Jackson*, 35 Vt. 173; and see *Roberts v. Hall*. *Ib.* 28.

72. S conveyed his farm and personal property thereon to his son-in-law, reserving the occupancy and right of control during his life, and took back a mortgage conditioned for his support during life and for the payment on demand, after his decease, of \$1000 to the defendant, his son; but there was no personal engagement to pay the \$1000, and S was still living. *Held*, that the mortgagor was not liable as trustee of the defendant. *Morey v. Sheltus*, 47 Vt. 342.

73. **Void assignment.** Where an assignment was made by a debtor, void in law as to creditors but not fraudulent in fact, and a creditor, instead of directly attaching the property assigned, summoned the assignee as trustee;—*Held*, that the plaintiff had thereby ratified the assignment, as respects the disposition of any property under it down to the commencement of the suit. *Bishop v. Hart*, 28 Vt. 71.

74. In such case, *held*, that the assignee was not liable as trustee for money received on the sale of real estate assigned which had been attached by other creditors, since the title conveyed might be defeated by such attachments, and the assignee be made liable to his grantee. *Ib.*

75. **Other instances.** Where the mortgage of factory machinery, &c., was summoned as trustee of the mortgagor, and after the expiration of a decree of foreclosure of his mortgage he in good faith sold the property for less than the amount of his decree, and its fair market value did not exceed the amount of the decree;—*Held*, that he was not chargeable as trustee, although the property in the hands of a dealer in machinery, or a practical manufacturer (which he was not), would have been worth more than the decree. *Hawks v. Sawyer*, 38 Vt. 99.

76. C, at the request of the defendant, purchased of H his remaining interest in a threshing machine then in his possession, but which he had before sold conditionally to the defendant, and for which the defendant had paid in part, with the understanding that C would let the defendant have and use the machine, with a chance to pay for it. C took the machine into his own possession, refused to let the defendant have it, and denied that he had any interest in it. The defendant neither tendered the residue of the price, nor took any means to perfect his title. *Held*, that C was not chargeable as trustee of the defendant. *Smith v. Sharpe*, 45 Vt. 545.

77. F, the defendant, owed D, the claimant,

and N owed F. F put his demand against N into D's hands to collect and to credit the avails in payment of his debt to D. D employed M, the trustee, to collect and remit to him the claim against N. M collected the money of N, but while it was in his hands he was sued as trustee of F. *Held*, that the money in the hands of M was the money of D, and that M was not liable as trustee of F. *Hale v. Foley*, 47 Vt. 260.

78. The arrangement between the defendant, trustee, claimant, and W, was, that the defendant should perform services in the employment of the trustee for the claimant, in the name of W, who should receive the pay therefor from the trustee, and pay the same to the claimant; in consideration whereof the claimant agreed to and did advance supplies to the defendant and his family to enable him to perform the service. *Held*, an original undertaking, and not an assignment of a present or prospective claim, and that the party sued as trustee was not chargeable as such. *Carr v. Sevens*, 47 Vt. 574.

79. **Interest.** One summoned and chargeable as trustee for money of the principal debtor in his hands, is not chargeable for interest thereon while the demand was locked up by that, or a previous trustee process, where the demand was not on interest when attached, and the trustee has received no interest on the fund. *Lyman v. Orr*, 26 Vt. 119. *Isham, J.*, dissenting.

80. **Effects received between service and disclosure.** The trustee is chargeable for any goods, effects or credits of the principal defendant which have come into his hands before his disclosure, which had not passed out of his hands before service of the trustee process;—whether the same came to him before, or after, service of the process. *Newell v. Ferris*, 16 Vt. 135. *Hurlburt v. Hicks*, 17 Vt. 198. *Spring v. Ayer*, 23 Vt. 516. *Seymour v. Cooper*, 25 Vt. 141.

81. After service of a trustee process, the trustee bought land of the principal defendant, agreeing to pay therefor \$125 in a horse and wagon, and \$200 in money, and paid the horse and wagon at the time of the execution of the deed. *Held*, that, to this extent, it was an exchange of property, and the trustee was not chargeable for the \$125, but was chargeable for the \$200 unpaid. *Seymour v. Cooper*.

82. Before the statute of Nov., 1856, exempting from attachment the personal earnings of a debtor accruing after the service of the trustee writ;—*Held*, that if the trustee was not indebted in the sum of ten dollars when the writ was served, he would not be liable as trustee for future earnings, provided that at no time he became indebted to an amount exceeding ten dollars, although the mutual dealings afterwards would have increased the debt beyond the ten

dollars, if there had been no payments. *Carr v. Fairbanks*, 28 Vt. 806. *McDaniels v. Morton*, 84 Vt. 101.

**83. Other suit pending.** It is no defense to the maintaining of a trustee process, that at the time of service a suit had been brought by the principal debtor against the trustee, and was then pending; but this may be pleaded as a temporary bar, and stay. *Trombly v. Clark*, 18 Vt. 118. 14 Vt. 140. (Now regulated by G. S. c. 34.)

**84. —in chancery.** Where one summoned as trustee disclosed that the principal debtor had brought a suit in chancery against him, calling for an account of all the same matters, which, before service of the trustee process, had been set down for hearing on the bill, answer and testimony, and, before filing the disclosure, had been heard by the chancellor but was not decided, in which suit he had denied his liability;—*Held*, that the proceedings in the court of chancery could not be thus arrested, and that the trustee process did not lie. *Wadsworth v. Clark*, 14 Vt. 189.

**85. Annexation to freehold.** A quarried, dressed, sold and delivered to B a quantity of granite, and laid it down in the earth for a permanent walk on B's premises. A got the stone without right from C's quarry, who, after the walk was laid, claimed the stone as his property. *Held*, in a trustee action, that the property in the stone after being laid into the walk was in B, the trustee, and that he became indebted to A therefor, and was liable as his trustee for at least the increased value thereof above their value in the quarry. *Jackson v. Walton*, 28 Vt. 43. See REAL PROPERTY.

**86. Claimant.** In order for a claimant in a trustee process to hold the funds as against the process, it is not enough that he has a right of action against the principal debtor, but he must show that the money or property in the hands of the trustee is his money or property, and that he has a present legal right to it. *Sibley v. Johnson*, 43 Vt. 67.

**87. Assignment.** The interest of an assignee of a note, not negotiable, will not be protected against an attachment by trustee process. (*Sed quare*.) *Safford Co. v. Hull*, Brayt. 281.

**88.** An oral assignment of a chose in action operates as an equitable transfer and, when followed by notice thereof from the assignee to the debtor, will be protected from subsequent attachment by trustee process against the assignor. *Noyes v. Brown*, 33 Vt. 431. *Hutchins v. Watts*, 35 Vt. 360. *Spafford v. Page*, 15 Vt. 490.

**89.** By the statute of 1832 a note payable to bearer was made subject to trustee process, like a note payable to order; and a judgment against the maker, as trustee, before notice of an assign-

ment, was a defense to an action brought by the assignee. *Evarts v. Gove*, 10 Vt. 161.

**90.** Under the statute of 1836, the maker of a negotiable note while current could not be held therefor as the trustee of the payee, if indorsed to a bona fide holder before due, although no notice of the transfer had been given to the maker before service of the trustee process. *Hinsdill v. Safford*, 11 Vt. 309. *Nor*, if so transferred after service of the trustee process. *Little v. Hale*. *Id.* 482. *Nor*, if still remaining in the hands of the payee, but not yet due and subject to be negotiated. *Hutchins v. Evans*, 13 Vt. 541. (Changed by stat. 1841. G. S. c. 34, s. 47.)

**91.** A deposited with B notes against a third person to collect and pay proceeds to A, or his order. B being summoned as trustee of A, it appeared that after service of the process, but before disclosure, B had received payment of one of the notes. In fact, A had sold the notes to C before the institution of the suit, but B did not receive notice thereof until after the receipt of the money. *Held*, that the money so received was the money of C; that B was never the debtor of A, and was not chargeable as his trustee. *Denison v. Petrie*, 18 Vt. 42. (1843.)

**92.** Where one takes a note by assignment after it has been attached for the debt of the assignor, he takes it subject to the lien created by the attachment. *Downer v. Tarbell*, 32 Vt. 22.

**93.** An assignment of a promissory note for a valuable consideration, though fraudulent, puts it beyond the reach of trustee process. *Hutchins v. Hawley*, 9 Vt. 295. (Changed by subsequent statutes, and not now the law. *Wheeler v. Winn*, 88 Vt. 126.)

**94.** Where a note has been transferred with intent to avoid a debt or defeat an attachment, and the maker has received notice of the assignment before service upon him as trustee of the assignor, the want of consideration for the assignment and the existence of a trust in favor of the assignor will be presumed, in the absence of proof to the contrary, if such facts are necessary to charge the trustee. *Lyman v. Tarbell*, 30 Vt. 463. *Wheeler v. Winn*, 38 Vt. 122.

**95.** S in this State gave his negotiable promissory note to W in this State, payable on demand. W went into Massachusetts and there transferred the note to P, a citizen of Massachusetts, with intent to avoid his debt to this plaintiff, of which intent P was privy. P then applied to S, representing that he had purchased the note, and requested S to take it up and give one running directly to P. This S in good faith did, suspecting nothing wrong. Afterwards, this suit against W was brought and S was summoned therein as trustee, and S was then informed that the plaintiff claimed that the transfer from W to P was fraudulent. While this suit

was pending, S, happening in Massachusetts, was there sued by P upon his note given to P, and before trial he settled that suit and paid P the note. *Held*, that although the payment to P of the original note, at the time the second note was given, would have been a good discharge, yet that the substituted note was but the same debt in a new form; that as the *situs* of the debt was in this State, a judgment in this suit would have been conclusive in Massachusetts in respect to the debt; that the payment of the substituted note, without asking of the Massachusetts court a delay of that suit for a determination of this, and before the Massachusetts court had had an opportunity to act upon the question, must be regarded as voluntary; and that S was chargeable as trustee. *Wheeler v. Winn*.

96. **Conflicting assignments.** The priority of title by assignment, as between different assignees of the principal debtor, claimants, cannot be determined in a trustee suit. Thus, where the plaintiff and another, as claimant, severally, claimed the funds in the hands of the trustee by assignment, the trustee was discharged;—in either case, the debtor had no interest in the matter sought to be attached. *Shattuck v. Smith*, 16 Vt. 132.

97. **Notice—to whom.** Where an indemnifying bond had been assigned,—*Held*, that notice thereof given to the surety on the bond only, he being insolvent, was not sufficient to protect the assignment against attachment by trustee process in a suit against the obligee. *Downer v. Topliff*, 19 Vt. 399.

98. Notice of the assignment of a promissory note, having sureties, given to the principal alone, is sufficient to protect it from trustee process for the debt of the assignor. *Seward v. Garlin*, 33 Vt. 533.

99. A joint and several negotiable promissory note was assigned before due for a valuable consideration, and notice thereof was given by the assignee to one of the two makers before the service of a trustee process against the payee. *Held*, that the note was protected to the assignee against the attachment. (G.S. c. 84, s. 47.) *Ayott v. Smith*, 40 Vt. 532. The same law, in case of notice to an accommodation indorser of a note. *Hunt v. Miles*, 42 Vt. 533.

100. The assignee of a claim against an intestate estate gave a written notice of the assignment to the widow and heirs of the deceased, and to the person who was afterwards appointed administrator. *Held*, that the notice being in the hands of the administrator at the time of his appointment, took effect from that time; and that he was not chargeable as trustee of the assignor upon a suit commenced after such appointment. *Brown v. Millington*, 25 Vt. 242.

101. Notice of the assignment of a town

order, given either to the selectmen or to the town treasurer, is sufficient to prevent the attachment of it by trustee process for the debt of the assignor; and such notice may be given by an agent of the assignee to demand payment of the town treasurer. *Thayer v. Lyman*, 35 Vt. 646.

102. Where an order was drawn on the town treasurer by an overseer of the poor, and assigned, notice by the assignee to the overseer was *held* not sufficient. *Thompson v. Downing*, 48 Vt. 646.

103. —**by whom.** Notice of the transfer of a promissory note or of a chose in action, in order to protect it from attachment by trustee process against the assignor, must be given by the assignee, or by his procurement. Knowledge of the transfer is not sufficient, nor is notice from a stranger, or from the assignor, without the procurement of the assignee. *Peck v. Walton*, 25 Vt. 33. *Webster v. Moranville*, 30 Vt. 701, 745. *Hutchins v. Watts*, 35 Vt. 362. *Farm. & Mech. Bank v. Drury*, 35 Vt. 469. *Barron v. Porter*, 44 Vt. 587.

104. But such notice given by one acting in behalf of the assignee—as, a son for his father—where the assumed agency was afterwards adopted and the act ratified by the assignee before the service of the trustee process, was *held* sufficient. *Brickett v. Nichols*, 30 Vt. 748.

105. Notice of the assignment of a claim given to the debtor by the assignor, but in the presence of the assignee and he assenting, was *held* sufficient to protect the claim from trustee process against the assignor. *Downer v. Marsh*, 28 Vt. 558. *Hutchins v. Watts*, 35 Vt. 360. 35 Vt. 471.

106. Notice of the assignment of a demand, such as to protect it from trustee process, need not be given personally by the assignee, nor personally by his agent. If given by procurement of the assignee, or of his agent, it is sufficient, when the debtor thus becomes informed of the fact of the assignment and of the fact of the notice by the assignee, or his agent. *Barron v. Porter*, 44 Vt. 587.

107. —**given on Sunday.** Such notice is not insufficient because given on Sunday. *Crozier v. Shanta*, 43 Vt. 478.

108. —**actual.** The notice of transfer of a promissory note required by the statute, in order to protect it against trustee process, must be actual personal notice. Notice by mere legal implication is not sufficient;—as, by a record in the town clerk's office of the assignment of a mortgage, and the note secured by it. *Stearns v. Wrisley*, 30 Vt. 661.

109. B bank received from M bank a note for collection. *Held*, that the cashier of B bank had thereby authority to notify the maker that M bank owned the note; but that a mere

notice to the maker by such cashier that M bank had sent the note to B bank for collection, was not sufficient notice of claim by M bank to protect the note from trustee process in suit against the payee. *Worden v. Nourse*, 36 Vt. 756.

110. A gave his note to B in payment of a debt to B, but it was drawn payable to C, or bearer, C being a stranger to the transaction. C afterwards purchased the note of B, but gave no notice to A of the transfer. In suit against B, trusteeing A with C as claimant;—*Held*, that as the note was originally the property of B, A was chargeable as trustee, as against the claim of C, for lack of notice to A of the assignment. *Williams v. Shepherd*, 33 Vt. 164.

111. A promissory note given by a citizen of this State, may be held by trustee process against a foreign assignment for the benefit of creditors, unless notice of the assignment has been given by the assignee. [In this case, all the parties were resident citizens of New York, where the assignment was made, except the trustee.] *Martin v. Potter*, 34 Vt. 87. See *Rice v. Courtis*, 32 Vt. 460.

112 —by second assignee. Although notice of the assignment of a promissory note has been given to the maker by the first assignee, yet if the note is afterwards assigned and the subsequent assignee fails to give such notice, the note is subject to attachment by the trustee process by the creditors of his immediate assignor. *Seward v. Garlin*, 33 Vt. 583.

113. It was otherwise under the act of 1798 (Slades Stat. 144). *Britton v. Preston*, 9 Vt. 257.

114. **Banks.** A negotiable promissory note, made payable at a bank and indorsed to and discounted by such bank before due, was held attachable by trustee process against the payee, under the act of 1841, where the bank had failed to give notice of the transfer before service of the process. *Kimball v. Gay*, 16 Vt. 131. (Changed by G. S. c. 34, s. 47.)

115. *It seems*, that a bank cannot, under G. S. c. 34, s. 47, defeat a trustee process summoning the maker of negotiable paper as the trustee of the payee, by discounting such paper after it has received notice of the service of the trustee process, or knowledge of such facts respecting it as would put a reasonable man upon inquiry. *Root v. Barnes*, 27 Vt. 274.

116. Where the maker of a negotiable promissory note is summoned as trustee of the payee, the discount of such note by a bank will not prevent the trustee from being held chargeable, if the claim of the bank has been satisfied by the person for whom the discount was made. *Id.*

117. Negotiable paper held by a bank as collateral security, but not actually "discounted," or purchased, was held, under act of

1852, No. 4, to be attachable by trustee process, where no notice of the assignment had been given by the bank. *Farm. & Mech. Bank v. Drury*, 35 Vt. 469. (Changed by G. S. c. 34, s. 47.)

118. A negotiable promissory note discounted before due, by a bank in good faith, and in the ordinary course of business, was held exempt from trustee process against the maker, under G. S. c. 34, s. 47, although such process had been served on the maker before the transfer to the bank, but of this the bank had no knowledge. *Hall v. Bowker*, 44 Vt. 77.

119. And so held, although judgment had been obtained against the maker as trustee of the payee, before the negotiation of the note to the bank. *Bank of Newbury v. Webster*, 47 Vt. 43.

120. **Retainer by trustee.** The trustee is allowed under the statute to deduct from the effects in his hands all his demands against the principal defendant founded on contract express or implied, although such demands may accrue during the pendency of the trustee process, unless they arise out of voluntary advances to the defendant after service of the process, or from other transactions intended to render the creditor's attachment less beneficial to him. *Weller v. Weller*, 18 Vt. 55.

121. In a trustee suit the plaintiff, as against the trustee, stands on the rights of the principal debtor, and subject to all legal offsets and counter-equities; but the assignee of a promissory note assigned before due, but subject to trustee process for lack of notice of the assignment, stands on the rights of the payee, not subject to such offsets and equities. *Stearns v. Whiskey*, 30 Vt. 661.

122. Where the trustee had, previous to the service of the process, become liable as a co-surety with the principal debtor, and, after such service but before disclosure, had paid such obligation;—*Held*, that he was entitled to deduct from the funds in his hands the sum for which the principal debtor was liable to him by way of contribution. *Strong v. Mitchell*, 19 Vt. 644. 27 Vt. 38. 28 Vt. 393.

123. Where the trustee has actually paid or assumed liabilities of the principal debtor before service of the process, having in hand, as security therefor, estate both real and personal of the principal debtor, he will not be compelled to look to the real estate for his security, unless he has been guilty of intentional misconduct, but may, where he has acted in good faith, apply the personal property in payment of his own debt and is not chargeable as trustee therefor [except for an excess]. *Soefield v. Sanders*, 25 Vt. 181. *Goddard v. Hapgood*, 25 Vt. 351. 27 Vt. 38. 28 Vt. 75.

124. A factor, agent, attorney, or trustee, may retain compensation for his services, as

such, out of the trust fund in his hands, and the plaintiff can recover only the balance, although there is no plea in set-off; and this, whether the compensation is given by express, or by implied, contract. *Redfield*, C. J., in *Hubbard v. Fisher*, 25 Vt. 539.

125. Where a school district was summoned as a trustee for the wages of a school teacher;—*Held*, that the district could set up and rely upon a payment made to the teacher by the prudential committee out of his own money, during the teacher's term of service, but before the service of the trustee process, although such payment was made without the knowledge or request of the district, but was afterwards adopted by it. *Edson v. Sprout*, 33 Vt. 77.

126. Where an assignee under an assignment void in law as to creditors, but not fraudulent in fact, was summoned as trustee of the assignor;—*Held*, that he should be allowed the amount of the assignor's indebtedness to him, his expenses under the assignment, and a reasonable compensation for his services, and be held as trustee for the balance only. *Bishop v. Hart*, 28 Vt. 71; and see *Merrill v. Englesby*, 28 Vt. 150. *Bradley v. Dow*, *Id.* 158.

127. Where an assignee, under a trust assignment for creditors which was void as to the plaintiff, a creditor, by reason of the fraud of the assignor, but of which the assignee was ignorant, was summoned as trustee of the assignor;—*Held*, that he was chargeable only for such funds as were in his hands at the date of service of the process; and that the plaintiff could not complain of any previous payments under the assignment, as wrongful. *Stickney v. Crane*, 35 Vt. 88.

128. The trustee is not entitled to retain from the funds in his hands anything to satisfy his agreements which are within the statute of frauds, or not legally binding upon him. *Hazeltine v. Page*, 4 Vt. 49. *Strong v. Mitchell*, 19 Vt. 644.

129. Where several trustees are jointly indebted, there cannot be set off, or deducted, an indebtedness of the principal debtor to one of the trustees and a third person, partners. *Wells v. Mace*, 17 Vt. 503.

## II. PROCEDURE.

130. **Jurisdiction.** A suit can be commenced by trustee process only in such cases as are provided for by the statute. If so commenced in a case not authorized, the court lacks jurisdiction, and the suit will be dismissed on plea, or motion, of either the principal defendant (*Ferris v. Ferris*, 25 Vt. 100. *Boardman v. Bickford*, 2 Aik. 845. *Austin v. Grout*, 2 Vt. 489. *Hill v. Whitney*, 16 Vt. 461. *Tarbell v. Bradley*, 27 Vt. 535); or of the trustee (*Bradley v. Cooper*, 6 Vt. 121. *Emerson*

*v. Paine*, 9 Vt. 271. *Leach v. Cook*, 10 Vt. 239); and either at or after the first term. *Tarbell v. Bradley*, 27 Vt. 535.

131. Nor can the suit, if so wrongly brought, proceed against the principal defendant by discharging the trustee, or by striking from the record the trustee part of the writ. *Ferris v. Ferris*. *Hill v. Whitney*, 16 Vt. 461.

132. The form of the action determines whether it may be brought by trustee process. *Ellwell v. Martin*, 32 Vt. 217.

133. In an action *ex delicto* a trustee summons was added to the declaration, but the writ was served on the defendant as an ordinary writ of attachment, and was not served on the trustee named. *Held*, that this was not a suit "commenced by trustee process," since it was not served upon the trustee, and that the trustee summons should be treated as surplusage. Motion to dismiss for this cause overruled. *Graves v. Severens*, 37 Vt. 651.

134. But where, in like case, the writ was served upon the trustee, the suit was dismissed. *Ferris v. Ferris*, 25 Vt. 100.

135. Where the service of a trustee process upon the principal defendant is not such as to require him to appear in court, and he does not appear, so that no judgment can be legally rendered against him, the proceedings will be dismissed on motion of the trustee. *Washburn v. N. Y., &c., Mining Co.*, 41 Vt. 50.

136. **Subsequent attachments.** The statute allowing subsequent attaching creditors to become parties to a suit, and to contest the validity of the debt or claim of a prior attaching creditor, applies to the case of attachments by trustee process. *Harding v. Harding*, 25 Vt. 487.

137. **Venue.** In trustee process the residence of the plaintiff, or of the principal debtor, determines where the suit is to be brought, and not the residence of the trustee. *Trombly v. Clark*, 13 Vt. 118.

138. **Form.** Trustee process issued under the revised statutes in the form required by the former statute, was *held*, as to the trustee, good. *Sawyer v. Howard*, 22 Vt. 538.

139. **Alter**, as to the principal debtor; it being as to him, defective in regard both to process and service. *Park v. Williams*, 14 Vt. 211.

140. **Recognizance.** In a trustee process, whether it be a summons or an attachment, two recognizances for costs must be entered; one to the defendant and one to the trustee. *Grinwold v. Bell*, 2 Aik. 355. (1827.)

141. The minute of the recognizance to the principal debtor, and to the trustee, blended both recognizances together, over one signature, but was distinctly expressed. *Held* well enough. *Corey v. Gale*, 13 Vt. 639.

142. A recognizance taken to each of two

or more persons summoned as trustees, cannot be sued in the names of all jointly, although the clerk (erroneously) has entered a joint judgment of discharge and for their costs, taxed collectively. *Page v. Baldwin*, 29 Vt. 428.

**143. Service.** The mode prescribed by the statute for service upon an absconding or concealed debtor in a trustee process cannot be varied, or omitted, by reason of any circumstances of difficulty or impossibility. *Huntington v. Bishop*, 3 Vt. 515.

**144.** Under the statute of 1807, service of a trustee process upon an absconding debtor by leaving a copy at his last and usual place of abode, was held good, without the return stating that it was left with any person. *Barlow v. Hunt*, 10 Vt. 129.

**145.** Under the trustee act of 1835, the officer who made service on the trustee within his precinct could complete the service upon the principal debtor, although without his precinct. *Corey v. Gale*, 13 Vt. 639.

**146.** Held contra under C. S. c. 32, s. 10. (G. S. c. 34, s. 9.) *Wires v. Griswold*, 26 Vt. 97.

**147.** Service upon the trustee by copy left at his house during his absence from the State, was held sufficient to charge him as trustee of the payee of his negotiable promissory note, which had been before assigned but of which he had not received notice until after such service; and although, having at the time of such notice no knowledge of such service, he had, but upon no new consideration, promised to pay the assignee. *Barney v. Douglass*, 19 Vt. 98. 25 Vt. 599.

**148.** Where a trustee process was served upon the trustee by the officer delivering him a copy of the writ, but without a copy of his return thereon;—Held, nevertheless, that the debtor's property in the hands of the trustee was attached by the writ, and that this was effectual against subsequent purchasers and attaching creditors;—herein differing from attachments made by copy left in the town clerk's office, where the return of the officer is all that constitutes the attachment. *McKenzie v. Ransom*, 22 Vt. 324. 28 Vt. 741.

**149.** The only mode of valid service of a trustee process upon the principal debtor, who is not a resident of the State, is that prescribed in G. S. c. 34, s. 10. *Morse v. Nash*, 30 Vt. 76.

**150. Acceptance of service.** A written acceptance of service of a trustee process by the trustee, is sufficient to protect the fund against a subsequent assignment by the principal debtor. *Cahoon v. Morgan*, 38 Vt. 234.

**151. Trustee not served.** One named as trustee in a writ, but not served with process, is not a party trustee in the suit, and the suit is not affected thereby. *Lyman v. Wood*, 42 Vt. 114.

**152. Amendment of process.** It is not competent for the county court to enlarge an attachment by an amendment of a trustee process while in court, by describing the trustee as member of a firm. *Bennett, J., in Knapp v. Levanway*, 27 Vt. 298.

**153. Successive attachments.** Where goods in the hands of a third person are attached by trustee process, a further lien upon them, subject to all previous liens, may be acquired by like process; and it is questionable whether this is not the only mode of attaching the surplus, and whether the trustee may not, in such case, retain the custody against any attachment of the goods specifically. *Bank of Middlebury v. Edgerton*, 30 Vt. 182.

**154. Rights fixed by service.** After service of successive trustee processes, the voluntary payment by the trustee of an earlier attachment before judgment, unless judgment shall be rendered against him in that suit, will not avail him as against the later attachments. *Wilder v. Weatherhead*, 32 Vt. 765.

**155.** After service of a trustee process, the trustee cannot make any new arrangement with the principal defendant varying their existing obligations, so as to lessen or subvert the legal or equitable rights of the plaintiff acquired by his attachment. *Edgerton v. Martin*, 35 Vt. 116.

**156. Effect on other suit.** The pendency of a trustee suit will not abate or bar a subsequent suit by the principal debtor in the first suit against the trustee, for the same cause of action; but the court will protect the defendant by stay of execution until he is released in the trustee suit. *Morton v. Webb*, 7 Vt. 123. *Jones v. Wood*, 30 Vt. 268.

**157.** It is no good reason for continuing the trial or hearing of a case, that the claim has been attached by trustee process, since the court has power to control the execution, so as to render the trustee process effectual. *Wilson v. Fire Insurance Co.*, 19 Vt. 177.

**158.** The rights of the principal debtor for every purpose of making demand of his debtor, summoned as trustee, or of securing his claim against the trustee by attachment, or otherwise, remain unimpaired by the pendency of the trustee proceedings, but in subordination to the lien created by such proceedings. *Hicks v. Gleason*, 20 Vt. 139. 30 Vt. 270.

**159.** The defendant in a suit pending was summoned as trustee of the plaintiff, and was adjudged trustee for the full amount of the plaintiff's claim against him, but had not paid that judgment. Held, that this was no bar to a recovery by the plaintiff for the full amount of his claim; but the court ordered stay of execution until the plaintiff should cause the defendant to be released from the trustee judgment. *Spicer v. Spicer*, 28 Vt. 678. 30 Vt. 271.

**160. Claimant.** The claimant in a trustee suit cannot maintain a plea in abatement, or other dilatory plea, or any plea which does not go to the merits of the controversy between him and the attaching creditor. *McKensie v. Ransom*, 22 Vt. 324. 28 Vt. 507.

**161.** The assignee of a chose in action is concluded by a judgment against the assignor by which the debtor was adjudged trustee of the assignor, where such assignee was notified of the proceedings. *Spafford v. Page*, 15 Vt. 490.

**162.** The claimant may contest the validity of the plaintiff's demand, and show that it is prosecuted solely for the benefit of the defendant, although the claimant's title is by a conveyance from the defendant which is void as to *bona fide* creditors of the defendant—it being good as against him. *Boutwell v. McClure*, 80 Vt. 674.

**163. —before commissioner.** Under the trustee act of 1853, No. 15 (G. S. c. 34, s. 19 *et seq.*), *semble*, that the commissioner has no jurisdiction to try and determine the rights of a claimant. *Ib.*

**164. Held**, that on the appointment of a commissioner to take the disclosure of a trustee, if a claimant is cited in, or voluntarily appears before the commissioner and makes his claim, the commissioner has jurisdiction to determine whether the funds in the hands of the trustee belong to the claimant—that is, whether the person summoned as trustee, is trustee—although the claimant has filed no allegations; and the claimant cannot, on the coming in of the report, claim a jury trial, nor can the proceedings be objected to for such informality. *Towne v. Leach*, 32 Vt. 747. *Russell v. Thayer*, 30 Vt. 525.

**165.** As to whether the jurisdiction of the court may be affected by its appearing before a commissioner, under the trustee act, that there is or may be a claimant of the funds who has not entered or been cited in as a claimant in the cause—see *Wheeler v. Winn*, 38 Vt. 122.

**166.** Suit before a justice;—judgment against the principal defendant by default, and trustee adjudged chargeable;—claimant appealed. In the county court, the claimant filed no allegations, and a commissioner was appointed without objections. *Held*, so far a waiver by the plaintiff, that he could not object to the claimant's being heard before the commissioner because allegations were not filed; and, *semble*, that it is discretionary with the county court whether it will order allegations to be filed. *Carr v. Severe*, 47 Vt. 574.

**167. Effect of judgment for claimant.** A judgment in favor of the claimant does not determine, as against the trustee, what, if anything, is due the claimant, but only operates to discharge the trustee in that suit; and the claim-

ant is left to pursue his remedy against the trustee the same as if no trustee suit had ever been brought, and the trustee has the same right to defend. *Carpenter v. McClure*, 37 Vt. 127.

**168. Disclosure—Report.** Where a commissioner is appointed under G. S. c. 34, s. 19, the whole case as to the liability of the trustee is referred, and the disclosure previously filed is but evidence before him; and where he professes to report the facts, and makes no reference to the disclosure as containing further facts, the court can take no notice of statements in the disclosure not embraced in the report. *Lovejoy v. Lee*, 35 Vt. 480.

**169. Evidence.** The declarations or acts of the principal debtor are not evidence against the trustee. *Cahoon v. Ellis*, 18 Vt. 500.

**170.** The disclosure of one trustee is not evidence against his co-trustee. *Downer v. Topliff*, 19 Vt. 399.

**171. Death of defendant.** In a trustee suit, the death of the principal defendant and the appointment of commissioners, after final judgment against him, do not discontinue the suit under G. S. c. 53, s. 16, so as to entitle the trustee to be discharged; but the cause may proceed for enforcing the lien created by the attachment, as against the trustee. *Miller v. Williams*, 80 Vt. 386.

**172.** Otherwise, where there was a default entered and the cause was continued without assessment of damages, and the principal defendant died and commissioners were appointed before assessment, where the case was one of open damages. *Sheldon v. Sheldon*, 37 Vt. 152.

**173.** A trustee suit commenced before a justice, wherein judgment passed against the principal defendant and trustee, was appealed by the claimant only, and was continued the first term without an affirmance of the judgment against the principal defendant. Before the next term the defendant died, and administration of his estate was granted and commissioners were appointed. *Held*, that the suit, under the statute, was discontinued. *Dow v. Batchelder*, 45 Vt. 60.

**174. Confession of judgment.** Before Stat. 1855, No. 9 (G. S. c. 125, s. 6), the principal debtor in a trustee suit brought to the county court, confessed judgment before a justice according to C. S. c. 115, s. 4 (G. S. c. 125, s. 4), but with the understanding of both parties, that the cause should be entered and proceeded with in the county court, for the purpose of charging the trustees. *Held*, nevertheless, that the confession of judgment was a merger of the original cause of action, and was a defense to the action in the county court. *Barnes v. Lapham*, 28 Vt. 307. 36 Vt. 664.

**175. Judgment and execution.** The judgments against the principal debtor and

trustee are separate and distinct judgments, and cannot be embraced in the same execution.

*Rider v. Alexander*, 1 D. Chip. 287. (1814.)

176. The case is not ended as to the principal debtor upon the rendition of a judgment against him, so long as it is not ended as to the trustees; but such judgment must lie until the determination of the whole case; and until then, an execution cannot regularly issue on such judgment. *Jones v. Spear*, 21 Vt. 426. 30 Vt. 389. *Hapgood v. Goddard*, 26 Vt. 401.

177. After judgment against the principal defendant and one of the trustees, and a continuance as to the other trustees, execution by leave of court was issued upon the judgment against the first trustee, and put in the hands of the sheriff for service. *Held*, that he was liable for neglecting to levy and return the same. *Passumpsic Bank v. Beattie*, 32 Vt. 315, citing 23 Vt. 516. 26 Vt. 401.

178. If the indebtedness of the trustee is, by his contract with the principal debtor, payable in labor or specific property on demand, and there has been no breach of the contract, the judgment must be that the sum ascertained to be due is so payable. *Bartlett v. Wood*, 32 Vt. 372.

179. **Trustee refusing to answer.** Whether judgment should be rendered against a trustee for his refusal to answer a question propounded, rests in the discretion of the county court and cannot be revised in the supreme court. *Worthington v. Jones*, 23 Vt. 546. 27 Vt. 308. But see *Lamson v. Bradley*, 42 Vt. 173.

180. **Enforcement of judgment.** Where one was adjudged trustee for a certain sum payable in leather, and no steps required by law to charge the trustee personally, or the property in his hands, had been taken, and no proper service had been made on the principal debtor;—*Held*, that a *scire facias* could not be maintained to revive the judgment against either. *Rice v. Talmadge*, 20 Vt. 378. 30 Vt. 512.

181. Under G. S. c. 34, an action of debt can be maintained on a judgment rendered against a trustee for a sum payable presently and in money. *Chandler v. Warren*, 30 Vt. 510. 31 Vt. 700.

182. **Review.** There was no review from a judgment for or against one sued as trustee of an absconding or concealed debtor. *Huntington v. Bishop*, 5 Vt. 186. *Emerson v. Paine*, 9 Vt. 271.

183. **Appeal, &c.** Before the act of 1842, one summoned as trustee before a justice had no right of appeal—he not being regarded as a party to the action. *Earl v. Leland*, 14 Vt. 328.

184. A trustee is party to an execution against him, in such sense that he may sustain

*audita querela* to set it aside when void, or voidable. *Wilson v. Fleming*, 16 Vt. 649.

185. Where a trustee appeals from the adjudication of a justice of the peace, the law does not allow him to stay the progress of the appeal by confessing judgment before the justice twelve days before the next session of the county court; nor does it authorize the justice, thereupon, to affirm the judgment against the principal defendant. *Sanford v. Huxley*, 18 Vt. 170.

186. Under R. S. c. 33, s. 8, authorizing the defendant to bring a petition to vacate a judgment obtained through fraud, accident or mistake;—*Held*, that this did not authorize such petition by one summoned as a trustee. *Denison v. True*, 23 Vt. 42. 24 Vt. 358.

187. Under the statute allowing an appeal by "either party" from the judgment of a justice;—*Held*, that a claimant who was permitted to appear as such in a trustee suit, was, as respects his title to the effects in question, a party, and entitled to appeal. *Hutchinson v. Bigelow*, 23 Vt. 504.

188. The claimant can appeal, if at all, only in such cases as are appealable by the other parties. *Cabot v. Burnham*, 28 Vt. 694.

189. The plaintiff in a trustee suit before a justice may appeal from a judgment discharging the trustee, although the principal debtor suffered judgment by default. *Van Buskirk v. Martin*, 28 Vt. 736.

190. An appeal, whether by one of the principal parties or only by the trustee or claimant, brings the whole case into the county court as to all the parties. *Dow v. Batchelder*, 45 Vt. 60.

191. Where judgment is rendered against the principal defendant and a judgment discharging the trustee, and the plaintiff appeals from the judgment discharging the trustee, the defendant may appear in the county court and make defense, as by filing a motion to dismiss. *Bryant v. Pember*, 43 Vt. 599.

192. **Exceptions.** The principal debtor may take and prosecute exceptions to an adjudication of the county court, that the trustee is chargeable. *Hurlburt v. Hicks*, 17 Vt. 193.

193. **Stat. 1867.** Under the act of 1867, No. 1, s. 1, attaching creditors by trustee process were entitled to share *pro rata* in the proceeds, though the first process was returnable to a justice and the other to the county court. *Bird v. Taylor*, 43 Vt. 584. *Held*, that the first attaching creditor's claim to participate was not defeated by his failing to file a copy of the record of his judgment with the clerk of the county court, under s. 6, in a case where the second attaching creditor had neglected to file his claim to participate, until it was too late for the first creditor to comply with the requirements of s. 6. *Id.*



194. **Chancery.** Settlement and marshaling of the claims of sundry attaching and trusteeing creditors, in aid of a trustee suit pending. *Bank of Middlebury v. Edgerton*, 30 Vt. 182.

195. **Protection of trustee.** A trustee adjudged chargeable will be protected in his payment of the judgment, although no personal notice of the suit was given to the principal debtor, who was absent from the State, and although no recognizance for a writ of review was given by the plaintiff. *Stearns v. Wrisley*, 30 Vt. 661.

196. It is no defense to an action, that the defendant was adjudged trustee in another action and paid that judgment, if such judgment was rendered on his default, or without disclosure, where a true disclosure would have shown him not liable as trustee. *Probate Court v. Niles*, 32 Vt. 775. *Allen v. Spafford*, 42 Vt. 116.

197. If a trustee makes no disclosure, or but a partial disclosure which is not a full statement of all the facts, as well those which go to his discharge as those which charge him, a judgment against him as trustee, and payment thereof, will not protect him against the claim of any other party in interest not made a party to the proceedings. *Seward v. Heftin*, 20 Vt. 144. *Marsh v. Davis*, 24 Vt. 368. *Allen v. Spafford*.

198. It would seem to be otherwise, where he has fully disclosed according to his legal duty. *Ib. Holmes v. Clark*, 46 Vt. 22, 27.

199. **Costs.** Where several trustees personally attend, the travel and attendance of each may be taxed. *Porter v. Russell*, 1 Tyl. 35.

200. **Held**, that costs are taxable in behalf of trustees and claimants, respectively, for actual travel only, and not for travel at such times as they appeared only by attorney. *Hunt v. Miles*, 42 Vt. 538.

201. A trustee before a justice employed a person, not an attorney, to assist him. **Held**, that an allowance therefor as "counsel fees," in the taxation of costs for the trustee, was erroneous. *Miller v. Williams*, 30 Vt. 386.

202. A trustee disclosing funds of the principal debtor in his hands, for which he has already been adjudged chargeable in a former suit against the same debtor, should be adjudged chargeable in the second suit, subject to his liability in the first. In such case, the trustee's costs should not be deducted from the sum in his hands, but he is entitled to judgment therefor. *Bullard v. Hicks*, 17 Vt. 198.

203. Costs incurred in litigating the question of the liability of the trustee after judgment against the principal debtor, where the trustee was adjudged chargeable, were allowed to be taxed as costs of the suit, to be paid from the funds in the hands of the trustee. *Jones v. Spear*, 21 Vt. 426.

204. A trustee who excepted, but wholly failed upon his exceptions in the supreme court, was not allowed to retain out of the funds in his hands his costs in the supreme court; but costs were not taxed against him. *Brown v. Davis*, 19 Vt. 608.

205. Where a trustee removes the case into another court by exceptions, or appeal, he does it at his peril as respects costs. If he fails upon his exceptions, he cannot tax costs, but must pay costs to the plaintiff. But if upon the plaintiff's exceptions the judgment is modified, the trustee is still entitled to tax costs, he being passive and not an actor. *Goddard v. Collins*, 25 Vt. 712.

206. Where a trustee is discharged, for any cause, his claim for costs is a matter of absolute right, of which he cannot be deprived, except by his consent. *Decker v. Fisher*, 25 Vt. 533. (G. S. c. 84, s. 64.)

207. A sued B and trustee C, and B then sued C. C was afterwards adjudged trustee and paid his full debt to B upon the judgment against him as trustee. In the suit B v. C, the court below, after such payment, rendered judgment for the defendant C to recover his costs. **Held** erroneous; and that the plaintiff B was entitled to judgment for nominal damages, and reasonable costs; taxed, in this case, up to and including the first term of court, and all the clerk's fees. *Wheeler v. Fuller*, 39 Vt. 310.

208. **Case in supreme court.** In trustee cases in the supreme court the facts found must be stated upon the record, as in other cases, and the court cannot pass upon the evidence more than in any writ of error. *Hazeltine v. Page*, 4 Vt. 49.

209. The supreme court will not look into the disclosure of a trustee to ascertain facts not found by the commissioner or the county court. *Scofield v. White*, 29 Vt. 380.

210. The statements of a trustee's disclosure were treated by the supreme court as facts found by the county court, where no evidence had been introduced in contradiction of it, and it evidently formed the basis of the county court's decision. *Merrill v. Englesby*, 28 Vt. 150.

211. Where the judgment discharging a trustee was affirmed on exceptions, the supreme court, *pro forma*, affirmed the judgment against the principal debtor, but without costs. *Wilder v. Eldridge*, 17 Vt. 226.

## TRUSTS.

### I. HOW CREATED, EVIDENCED, AND LIMITED. II. THE TRUSTEE.

#### 1. His rights at law.

#### 2. Effect of his conveyance.

## III. LIABILITY OF TRUST FUNDS TO CREDITORS.

## IV. ACCOUNTABILITY OF TRUSTEE.

## I. HOW CREATED, EVIDENCED, AND LIMITED.

1. **By legal appointment.** Letters of guardianship, or of administration, create a trust coupled with an interest. If one of two, or more, dies, resigns, or is removed, the trust remains to the others. *Pepper v. Stone*, 10 Vt. 427.

2. **Express trusts.** By our law an express trust, except in lands, may be created without writing. No prescribed form of words is necessary to create it. The intention of the party creating it affords the only sure test of its creation. In ascertaining this intention, the language used is not to be tortured by any technical constructions, but, as in the case of wills and devises, a liberal construction is to be adopted. *Porter v. Bank of Rutland*, 19 Vt. 410.

3. The father of a married woman, who had three children, informed her and her husband in conversation that he should make her an advancement, and wished to have it invested for the benefit of herself and her children; and afterwards, in a letter to her husband he enclosed a check of \$1000 payable to her, or bearer, and expressed in the letter that it was "for Fanny" (the daughter), and suggested a mode of investment, adding: "I leave that to you and her pleasure, what mode to adopt for her and heirs' mutual benefit." The court found that the intention of the father was to set apart this fund for the exclusive benefit of the daughter and her children, or heirs, and to place it under the control of her husband, as her trustee; and that such was the effect. *Ib.*

4. The acknowledgment, in an answer in chancery, of a trust under a deed absolute in form, is equivalent to a declaration of trust in the deed. *Barron v. Barron*, 24 Vt. 375.

5. So, also, is a deposition of the grantee in the deed, acknowledging the trust. *Pinney v. Fellows*, 15 Vt. 525. This denied in *Dewey v. Dewey*, 35 Vt. 560.

6. **Uses.** A covenant to stand seized to the use of another, and indeed all uses which the statute of uses of Henry VIII. executes, constitute trusts which a court of equity will always enforce. *Sherman v. Dodge*, 28 Vt. 26. *Gorham v. Daniels*, 23 Vt. 600.

7. This statute is not in force in this State. Resort may be had to a court of equity to carry out its purposes, in those rare cases where it might answer a good end in effecting the intent of a grant. *Ib.*

8. The intestate, for the expressed consideration of \$1000, conveyed to his son by warranty deed certain lands and personal property "with

the following condition, viz.: that I and my wife Mary shall have the use and possession of said real estate and personal property during our natural lives;—the said A P [the grantee] to have possession of said premises and personal property at our decease, and not until then." *Held*, that this was rather a grant upon condition subsequent, than an exception or reservation (as in *Gorham v. Daniels*), the spirit of the condition being that the grantee should suffer the grantor to enjoy the property during his life, and if his wife should survive him, then to suffer her to enjoy the use during her life, but leaving the legal title in the grantee;—uses which a court of equity will execute. *Sherman v. Dodge*.

9. **Implied trusts.** Trusts may be implied, or may result from certain facts and circumstances requiring their existence for purposes of equity. *Porter v. Bank of Rutland*, 19 Vt. 410.

10. Husband and wife joined in the conveyance of the wife's land, and the husband invested the avails of the sale in other land of which he took a conveyance to his minor child, himself retaining the deed, unrecorded. *Held*, that such child had no claim against the father under such purchase and deed. *Ward v. Morris*, 1 D. Chip. 822.

11. There is an implied trust in favor of the party who advances the consideration, on the purchase of lands which are conveyed to another. *Clark v. Clark*, 43 Vt. 685.

12. Where one buys land in the name of another and pays the consideration money, the land will generally be held by the grantee in trust for the person who so pays the consideration. *Barron v. Barron*, 24 Vt. 375; and if he pays but part, the land will be charged with the trust *pro tanto*. *Pinney v. Fellows*, 15 Vt. 525.

13. The defendant was authorized by the orator, by a *parol* agreement, to purchase a farm in his own name in trust for the benefit of the orator, and to deed it to him thereafter, upon a future arrangement to be made between them, either upon principles then settled upon, or upon such as should be thereafter agreed upon. The defendant took the deed to himself, paid part of the consideration, and gave his notes for the balance. The orator afterwards paid some of these notes, but never had possession of the farm. On a bill to enforce a conveyance on the ground of a trust, and for general relief;—*Held*, (1), that as an express trust it was void by the statute; (2), that such subsequent payment did not create a resulting trust;—that to have that effect, the consideration, or some part of it, must have been furnished by the orator at the time of the purchase. But the court decreed payment of the sums paid by the orator, without costs to either party. *Pinnock v. Clough*, 16 Vt. 500. 35 Vt. 559.

14. In case of an implied trust, parol evidence as to the understanding and intention of the parties, is not excluded by the statute of frauds. *Clark v. Clark*, 43 Vt. 685.

15. A resulting trust in behalf of a person paying the consideration on the purchase of land, where the conveyance is made to another, may be established by parol, although the deed recites the consideration as received from the grantee. *Pinney v. Fellows*, 15 Vt. 525.

16. Where a deed is taken to the wife or child of one who pays the price, the *prima facie* implication is, that it was intended as a gift; but this implication may be rebutted by oral evidence, so as to create a resulting trust in favor of the paying party, which equity will enforce. *Paige v. Morgan*, 28 Vt. 565. *Bent v. Bent*, 44 Vt. 555.

17. **Designation and appointment of trustee.** In designating a trustee to take charge of a trust fund, no greater certainty or formality is requisite than in the creation of the fund itself; nor is it indispensable that a trustee should be designated in the instrument creating the trust fund, nor, indeed, by any simultaneous or subsequent instrument. If necessary, chancery will appoint a trustee. *Porter v. Bank of Rutland*, 19 Vt. 410.

18. It is a settled rule in equity, that a trust shall not fail for want of a trustee. A town, which under its charter stood as trustee of certain public rights of land, having been abolished by act of the legislature, a new trustee was appointed by the chancellor. *Montpelier v. East Montpelier*, 29 Vt. 12.

19. **Cestui que trust.** A church or society, unincorporated, is capable of receiving the use of property devised to trustees for their benefit; and if the trustees fail, or decline the trust, the heir will stand as trustee, or the court of chancery may appoint. *Stone v. Griffin*, 8 Vt. 400. 7 Vt. 305.

20. The law in relation to charitable uses, as well as to the jurisdiction of chancery over them, is not founded on the statute 43 Eliz., but existed at common law; and societies, or bodies of men unincorporated, have ever been considered capable of receiving gifts or legacies to be applied to charitable uses. Such also has been the invariable policy of this State, and seems sanctioned by section 41 of the constitution. *Burr v. Smith*, 7 Vt. 241.

21. Lands were conveyed to selectmen in trust for the town, "the annual rents and profits to go and be disposed of to and for the use and support of a gospel minister or ministers in the town, in proportion to the number of inhabitants attending or inclined to each respective meeting, excepting always the church of England, or society of that order," &c. On a bill of interpleader, the funds were ordered to be distributed among all the religious societies exist-

ing at the time of the distribution ordered, where there was a minister officiating, except the one expressly excepted, although some of these societies were of different Christian denominations from the one to which the grantor belonged, and were not in existence at the time of the grant. *Gardner v. Rogers*, 11 Vt. 384.

22. Charter of the town of Newbury from New Hampshire;—afterwards confirmed by charter from New York to Jacob Bayley and others in trust for the New Hampshire proprietors. Trust enforced. *Johnson v. Bayley*, 15 Vt. 595.

23. Where a deed of lands was executed to F in trust for the town of W, conditioned to be void if the grantor shall indemnify and save harmless said town from all expenses which may be incurred by reason of the grantor, or his family, becoming chargeable to said town, as paupers;—*Held*, that the conveyance was to F, at first, for the use of the grantor, implying a personal confidence in F to execute the trust for the benefit of the grantor, and then, conditionally, in trust for the benefit of the town, thus creating a use upon a use; and that the deed did not convey to the town such a title as that an action of ejectment, after breach of the condition, could lie in its name against the grantee of the grantor. *Williston v. White*, 11 Vt. 40. *Williams, C. J.*, dissenting.

24. A devise of property was made to one in trust, to apply such sum as he should judge right and equitable, yearly, for the support of a certain insane pauper, provided the town of S, to which the pauper was chargeable, should pay a reasonable sum yearly for the same purpose. *Held*, that the town had no such interest under the will as to enable it to maintain a bill in equity against the trustee, to compel him to use the fund for the support of the pauper; that the pauper, and not the town, was the *cestui que trust* and the proper party to enforce the execution of the trust. *Sharon v. Simons*, 30 Vt. 458.

25. *Held*, also, on a bill to enforce this trust, that where the trustee had exercised his judgment honestly and without sinister motive, the court would not examine into the accuracy of the conclusion come to by the trustee in the application of the fund, and override the exercise of his discretion. *Id.*

## II. THE TRUSTEE.

### 1. *His rights at law.*

26. **Right to bring suits.** Where lands are held in trust, the name of the trustee must be used in suits at law affecting the legal title; but in equity the *cestui que trust* is owner, and a court of law will protect him in an entry upon and occupation of the property, as against

a stranger to the title. *Oatman v. Barney*, 46 Vt. 594.

27. A trustee may recover in ejectment against his *cestui que trust*. *Beach v. Beach*, 14 Vt. 28. 16 Vt. 414. 81 Vt. 606.

28. —to convey. Trustees under a bill, having the legal estate, may convey it to a third person so as to enable him to maintain ejectment against a stranger. *Mitchell v. Stevens*, 1 Aik. 16.

29. A trustee may convey the trust estate with the consent of the *cestui que trust* and the founder of the trust, or charity, in all cases; and this assent may be implied from circumstances, lapse of time, or from both. *Pownal v. Myers*, 16 Vt. 408.

30. A trustee having the legal estate may, at law, convey it to any one he sees fit. If the conveyance be in violation of the trust, and the grantee is ignorant of the trust, the entire title passes to him; but, if not ignorant of the trust, he takes the estate incumbered with the trust, and may be held to account, as trustee, to the *cestui que trust*; but only in equity. *Redfield, J. Ib. Blaisdell v. Stevens*, 16 Vt. 179.

#### 2. Effect of his conveyance.

31. At law, the rights and interests of *cestuis que trust*, legally created and manifested in real estate, cannot be affected by a conveyance by the trustee without their assent, whether minors or of full age. *Barrett, J., in Flint v. Steadman*, 36 Vt. 218. See *Redfield, J., in Pownal v. Myers*, 16 Vt. 414.

32. A party receiving trust property, knowing it to be such, in payment of his own debts, is liable to account to the *cestui que trust*. *Towle v. Mack*, 2 Vt. 19.

33. A purchaser of trust property, having notice of the trust before the full price has been paid over beyond power of recall, is not an innocent *bona fide* purchaser. *Abell v. Howe*, 48 Vt. 408. See *Hackett v. Callender*, 32 Vt. 109.

34. A party claiming lands as discharged from a trust of which he has notice—as, by the record of an earlier deed creating the trust—must show that, in point of fact, they have been so discharged in some way recognized by law; and the mere fact of a conveyance of the trustee by deed of warranty, has no tendency to prove that. *Flint v. Steadman*, 36 Vt. 210.

35. A conveyed his lands to B to be sold, and out of the proceeds to pay certain debts, and account for the surplus. After B had sold enough of the lands to satisfy those debts, the orator attached the remainder as the property of A and levied his execution thereon. After the attachment, but without knowledge thereof or of the trust, C purchased of B such

remaining portion of the lands, in good faith, and took a conveyance from B. In a bill against A, B and C for relief;—*Held*, that the lands in the hands of C could not be charged; but B was decreed to pay the orator's debt out of the surplus in his hands. *Waterman v. Cochran*, 12 Vt. 699.

#### III. LIABILITY OF TRUST FUNDS TO CREDITORS.

36. Bank stock purchased by a trustee with trust funds, though held by him in his own name, is not subject to attachment and execution by his creditors who have notice of the trust. *Porter v. Bank of Rutland*, 19 Vt. 410.

37. No privity exists, even in equity, between a creditor and the trust fund of his debtor, if the creditor, at the time of the credit given, had either actual or constructive notice of the trust, and gave credit to the trustee, and not to the trust fund, although the means procured by the credit went for the benefit of the trust. *Townsley v. Barber*, 27 Vt. 417.

38. In an action by a trustee to recover for property held by him in trust and attached by the defendant for the trustee's individual debt, created upon credit given to the trustee personally without fraud or mistake;—*Held*, that the defendant was not entitled to have deducted from the damages, such part of the defendant's claim as was for property bought by the trustee for, and applied to, the benefit and improvement of the trust fund, and for the benefit of the *cestu que trust*. *Barber v. Chapin*, 28 Vt. 418.

39. S devised a farm and the stock and tools thereon to the plaintiffs in trust for his grandson G, his wife and children, during the life of G and his wife, and at their decease to be equally divided between their children; giving authority to the plaintiffs to permit G to have the management and control of the trust property, at any time and so long as from his habits of industry, frugality, &c., they should think it safe and prudent to do so. The plaintiffs suffered G to live upon and carry on the farm, and to manage and take care of the stock to suit himself, and to appropriate the avails for the support of himself and family, without accounting, but under the general charge and supervision of the plaintiffs as to the disposal of the property, and preventing the disposal of it by G. *Held*, that the plaintiffs could maintain trover for cattle, the product of the original stock, attached as the property of G, although the value of the property had been enhanced by the labor of G—the plaintiffs not having parted with their legal title. *Roberts v. Hall*, 35 Vt. 28. *Trask v. Donoghue, contra*, 1 Aik. 370, overruled. *Ib.* 32.

40. The plaintiff put into the hands of his

brother \$1,500 to be held "in trust," and to be returned "on demand," with the duty to take care of it, invest, exchange and improve it; and the right to live and "enjoy the comforts of life," "only from day to day out of the profits or interest of said sum," as his pay. *Held*, the contract being *bona fide*, that the title of the property purchased by the brother with the fund, and of the increase, was in the plaintiff, and could not be attached for the brother's debts. *Whitcomb v. Cardell*, 45 Vt. 24.

41. Chancery will assist a judgment creditor, not only to discover, but to reach the property of the debtor in the hands of a trustee, which is beyond the reach of an execution at law. It is necessary, however, before resorting to chancery for relief, that he should first have taken out execution and caused it to be levied, or returned *nulla bona*, so as to show thereby that his remedy at law has failed. *Waterman v. Cochran*, 12 Vt. 699.

#### IV. ACCOUNTABILITY OF TRUSTEE.

42. An assignee in trust for creditors, who sells the trust property by way of barter, or exchange, or on credit, is chargeable for the cash value of the property at the time of the sale, and the interest. *Page v. Olcott*, 28 Vt. 465.

43. So, if the trustee fail to keep a full and fair account of the sales, so that they cannot be ascertained. *Id.*

44. Where an executor appropriates or purchases in the estate, the heirs may treat him as purchaser or trustee at their election, making him account for profits. *Hagood v. Jennison*, 2 Vt. 294.

45. It is a principle of settled policy, that no administrator, or person standing in a like situation, shall become the purchaser of the estate for his own benefit, against the will of those for whose interest he is appointed to act. It is therefore a general rule, that a *cestui que trust* has an election to affirm or disaffirm such purchases by his trustee, and this without reference to whether the purchase was fair or not. *Mead v. Byington*, 10 Vt. 116.

46. What dealings by a party holding another's money, notes, &c., in trust, will make him accountable as for an appropriation to himself—"making it his own"—see *Seaver v. Pierce*, 42 Vt. 325.

47. It was verbally agreed between the plaintiff and the defendant who were co-trustees of the estate of a minor, that the plaintiff should be permitted to employ the trust fund in his trade for the term of three years, for which he would pay the interest thereon to the *cestui que trust*, and would also pay the defendant in goods \$150 per year for three years. Under this agreement, the defendant took a

part of the first year's payment in goods. In an action of book account to recover for the goods;—*Held*, (1), that the contract was within the statute of frauds; (2), that it was illegal and void, and in either case, so far as it was executory, it could not be enforced; but that, in either case, so far as the plaintiff had made payments under it, he could not recover them back. *Foot v. Emerson*, 10 Vt. 338.

48. Allowances. In holding an executor trustee for the heirs of lands sold and purchased in by him, where the whole was one purchase;—*Held*, that the account should be taken with reference to the value of what remained unsold, as well as the gains upon what he had re-sold. *Hagood v. Jennison*, 2 Vt. 294.

49. And he was allowed for those lands of which the title failed, and for the costs of trying the title. *Id.*

50. A trustee was allowed his costs and expenses of suits and of an arbitration, where he had managed the concern as he would his own, and in good faith; but not for costs and expenses incurred after he had improperly refused to settle and surrender the trust. *Towle v. Mack*, 2 Vt. 19.

51. In a matter partaking of the character of a trust, where certain expenses, otherwise properly chargeable, were found to have been occasioned by the "carelessness" of the party;—*Held*, that they could not be allowed out of the fund. *Missisquoi Bank v. Sabn*, 48 Vt. 239.

52. It is usual to give costs to a trustee where there is a fund in his hands, notwithstanding the decree is against him; sometimes only common costs, but generally all necessary actual charges and expenses in addition. *Pren-tiss, J.*, in *Moore v. Jones*. (U. S. D. C.), 23 Vt. 748.

53. Trustees have an inherent equitable right to be reimbursed all expenses which they reasonably incur in the execution of the trust; and it is immaterial that there is no provision for such expenses in the instrument of trust. All such expenses are a lien upon the trust property, and the trustee will not be compelled to part with it until they are paid. *Held*, in the case, that the trustees had not lost their lien. *Rensselaer & Saratoga R. Co. v. Miller*, 47 Vt. 146.

54. Statute of limitations. The statute of limitations does not apply, as between a trustee and his *cestui que trust*, to bar a trust claim—as, in case of an executor, or administrator, or guardian—so long as the trust subsists and is acknowledged on both sides, or is not denied and an adverse claim set up. *Evarts v. Nason*, 11 Vt. 122. *Kimball v. Ives*, 17 Vt. 430.

55. A mere servant. A mere servant, or agent acting under the direction and control of his master or principal, is not generally

required, as in case of a trustee, to keep accounts on behalf his employer. Upon a bill in chancery, in such case, praying an account, it is sufficient that the defendant answer that what he received, he received as a servant, and paid it over to his master. A decree for an account was refused in such case. *Rich v. Austin*, 40 Vt. 416.

### TURNPIKE AND PLANK ROADS.

1. **Laid upon a highway.** The legislature has power to authorize a turnpike corporation to lay a turnpike upon an existing highway without compensation to the town, and to sustain the same by means of tolls. *Panton T. Co. v. Bishop*, 11 Vt. 198. *Searsburg T. Co. v. Outler*, 6 Vt. 324. *Barnet v. Passumpsic T. Co.*, 15 Vt. 757.

2. Where a turnpike is laid upon a public highway, the town has no claim against the turnpike company for compensation for having made the road, which can be enforced at law, or in equity. *Barnet v. Passumpsic T. Co.*

3. Where a turnpike was lawfully laid along a highway, and a toll gate erected across it;—*Held*, that although the inhabitants of the town might have acquired a prescriptive right to pass the gate, toll free, and although this right was denied to some or all of the inhabitants, yet this gave no right to the town to interfere, in its corporate capacity, and demolish the gate by way of abating a nuisance. *Panton T. Co. v. Bishop*, 11 Vt. 198.

4. **Changing location of gates.** A turnpike company, authorized by their charter to erect gates and receive tolls, may, from time to time, change the location of their gates, although done to intercept travel coming upon the turnpike by new roads, private or public; and the public acquires no right by lapse of time to have the gates remain in any particular place. *Fowler v. Pratt*, 11 Vt. 369.

5. **Changing to highway.** Proceedings for converting a turnpike into a public highway, under stat. 1838. (G. S. c. 27, ss. 18, 19, 20.) *State v. Shrewsbury*, 15 Vt. 288.

6. **Substituted track.** Where a railroad company appropriated part of a turnpike road, making a substitute therefor as their charter provided, and the turnpike company used the substitute as part of their road, repaired it, kept their gates closed and took toll;—*Held*, that this thereby became a portion of their road which they were bound to keep in repair. *Mathews v. Winooski T. Co.*, 24 Vt. 480.

7. In an action against a turnpike company for an injury, the declaration alleged the injury to have occurred on a road laid out in 1803. The evidence was, that the injury occurred on

a slight alteration made by the company from the original line. *Held* no variance, for that such alteration became incorporated with, and a component part of, the old road. *Noyes v. White River T. Co.*, 11 Vt. 581.

8. **Sufficiency, and liability for insufficiency.** A turnpike company is bound to maintain its bridges of sufficient strength to bear up the heaviest loads that usually pass upon the road to and from market; but not more than this. *Richardson v. Royallton & Woodstock T. Co.*, 5 Vt. 580.

9. Under the charter of a turnpike corporation making the company liable for "all damages" arising from want of repairs, &c.;—*Held*, that the company was liable only to the same extent as towns under the general statute; that is, for special damage, &c. *S. C.* 6 Vt. 496. *Baxter v. Winooski T. Co.*, 22 Vt. 114.

10. A corporation created by the State of New Hampshire for building and maintaining a bridge across Connecticut River, and authorized to demand, and demanding and receiving, tolls of passengers, extended its bridge and approaches into this State. *Held*, by a majority, that the corporation was liable to a passenger over the bridge for an injury occasioned by the insufficiency of that part of the bridge and its approaches which was within this State. *Stanton v. Proprietors of Haverhill Bridge*, 47 Vt. 172.

11. A turnpike company, like a town, is primarily liable to the traveler for the insufficiency of its road, although such insufficiency is occasioned by the acts of others—as, a railroad company—leaving to the turnpike company, as to a town, a claim for indemnity. *Mathews v. Winooski T. Co.*, 24 Vt. 480.

12. **Pleading.** In an action for an injury caused by the insufficiency of a turnpike, it is not necessary that the declaration should state the particular place upon the road where the injury happened, nor the manner in which the road was out of repair. *Noyes v. White River T. Co.*, 11 Vt. 531.

13. In such action the declaration averred the injury as occasioned "by reason of the road being out of repair and the badness thereof." *Held*, that whether such "badness" was the result of an original insufficiency of the road, or of want of repairs from time to time, could make no difference; and that, in either case, there was no variance. *Id.*

14. **Tolls, and exemptions.** The act incorporating a turnpike company exempted from tolls, those who should be going "on the ordinary domestic business of family concerns." *Held*, that this did not exempt one who was transporting materials to repair buildings on his farm in another town, about six miles from his home. *Green Mountain T. Co. v. Hemmingway*, 2 Vt. 512.

15. Nor, to a physician going to visit his patients. *Center T. Co. v. Smith*, 12 Vt. 212.

16. But where the party, without fraud, claimed such exemption and was allowed to pass the gate, toll free;—*Held*, that assumption did not lie to recover the tolls. *Ib.*

17. Under a turnpike corporation act, all persons living within eight miles of the gate were exempted from toll. *Held*, that the privilege was personal to all such, and was not limited by the kind, or mode of travel, or business; that it allowed the driving by the parties servants of a mail coach with passengers, &c. *Passumpsic T. Co. v. Langdon*, 6 Vt. 546.

18. The charter of a turnpike company imposed the duty of keeping its road in repair, and made it liable for damages happening "to any person from whom toll is demandable," through want of repairs, &c. By another provision, toll was not demandable at any gate of any person living within eight miles of such gate. The plaintiff lived between two gates of the turnpike, five miles from one and fifteen from the other, and had paid a commutation for the year for passing the nearest gate, and was subject to toll at the other gate. Upon an excursion on the turnpike between the two gates, not intending to pass either, he sustained damage through a defect of the road. In an action therefor;—*Held*, (1), that, as toll was demandable of the plaintiff upon the road, he came within the words of the provision; (2), that the defendant, having demanded and received toll in the commutation, was estopped from denying that the plaintiff had a claim to recover damages under the charter. *Brown v. Winooski T. Co.*, 23 Vt. 104.

19. Toll board. A turnpike company was required by its charter to "keep exposed to view a sign, or board, with the rate of tolls fairly written thereon in large letters." *Held*, that being posted up in the entry-way of the toll house was not a full compliance with the requisitions of the statute; but that the company was not thereby precluded from demanding tolls, no such limitation being in the charter. *Center T. Co. v. Smith*, 12 Vt. 212.

20. Forcibly passing, or avoiding gate. A turnpike act imposed a penalty upon any person who should "attempt forcibly to pass any gate without having paid the legal toll at said gate." *Held*, that the penalty did not attach to one not liable to pay toll, although he

neglected or refused to make known his exemption. *Green Mountain T. Co. v. Hemmingway*, 2 Vt. 512. *Pingrey v. Washburn*, 1 Aik. 264.

21. A traveler upon a turnpike turned off upon a public highway before coming to the gate, and passed on beyond the gate upon such highway, without entering again upon the turnpike; and did this, with intent to evade the payment of toll at the gate. *Held*, that he was not thereby subject to the penalty of the act, which provided that "if any person shall pass any of said gates, and again enter said road, with intent to evade the legal toll, &c., or shall otherwise, without force, pass such gate without paying such toll, and with intent to defraud said company of said toll, &c., he shall forfeit, &c." *Center T. Co. v. Vandusen*, 10 Vt. 197.

22. Plank-road company. Plank-road companies which derive a revenue, in the way of tolls, from the use of their road by travelers, are, like turnpike and railroad corporations, liable on common law principles for injuries to the traveler occasioned by want of repair of the road; herein differing from the case of towns, whose duty in respect to their highways is altogether statutory. *Davis v. Lamoille Co. P. R. Co.*, 27 Vt. 602.

23. Where a plank-road corporation, under the provisions of its charter and an arrangement with the town in which a highway was situate, constructed its road along the highway, thus superseding it;—*Held*, that such corporation, and not the town, was liable for an injury caused by the insufficiency of the road. *Ib.*

24. Forfeiture of grant—*Scire facias*. The neglect of a turnpike company, for any considerable period, to keep its road in repair, and the maintaining of its toll-gate where it has no right to place it, are each cause of forfeiture of the grant, upon *scire facias*. *State v. Passumpsic T. Co.*, 3 Vt. 178.

25. In *scire facias* for the forfeiture of the charter of a turnpike corporation, alleging a long continued and willful neglect to keep the turnpike in repair, the court rejected the defendant's evidence that "for a large part of the time mentioned in the writ" the road had been kept in good repair. *Held* erroneous; for not every neglect would subject the defendant to forfeiture, but the neglect must be for a "considerable period." *State v. Royalton & Woodstock T. Co.*, 11 Vt. 481. (G. S. c. 44.)

## U.

## UNITED STATES.

- I. COURTS.
- II. CUSTOMS LAWS.
- III. MILITARY MATTERS.
- IV. INTERNAL REVENUE LAWS.

## I. COURTS.

1. **Jurisdiction.** Where the jurisdiction of the U. S. circuit court has once attached, no subsequent change in the relation or condition of the parties in the progress of the cause, or after judgment, will deprive the court of jurisdiction over the cause, or over any proceeding touching the execution of the judgment. Thus, where the plaintiff dies, it does not affect the jurisdiction that his administrator, prosecuting the suit, is a resident and citizen of the same State with the defendant. *Hatfield v. Bushnell* (U. S. C. C.), 22 Vt. 659.

2. An action of ejectment pending in the U. S. circuit court, following the local law of Vermont, does not abate by the death of the plaintiff, but survives, and may be prosecuted by his administrator. *Ib.*

3. Where a cause is removed from a State court into the circuit court of the United States under the act of Congress of March 2, 1833, the assigned reason for removal being that the suit was against an officer of the United States, &c., for an act done under the revenue laws of the United States, &c.;—*Held*, that whether the case fell within the act was matter of fact involved in the merits of the case upon hearing, and could not be raised or determined on motion to dismiss. Such case is removable from a justice of the peace, and irrespective of the amount in controversy. *Wood v. Matthews* (U. S. C. C.), 28 Vt. 735.

4. Where one of the plaintiffs was a citizen of New Hampshire and the other a citizen of Vermont, and the defendant was a corporation created, established and performing its corporate functions in New York;—*Held*, that the case was not removable to the U. S. circuit court. *Hubbard v. Northern R. Co.* (U. S. C. C.), 25 Vt. 715.

5. **Decisions.** In suits in courts of the United States, the true interpretation and effect of contracts and other instruments of a commercial nature are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. *Bank of U. S. v. Lyman* (U. S. C. C.), 20 Vt. 666, 676. 23 Vt. 732, following *Swift v. Tyson*, 16 Pet. 1.

6. In cases of a character which may pass to the supreme court of the United States, the decisions of that court are binding in authority upon the State court. *Townsend v. Jennison*, 44 Vt. 815.

## II. CUSTOMS LAWS.

7. The attempt to transport property in violation of the U. S. customs laws works its forfeiture, and immediately divests the property. *Bulkly v. Orms*, Brayt. 124.

8. The moiety of the proceeds of goods illegally imported was *held* to belong to the customs collector of the district where imported, though actually seized in another district, but by the officers of the first. *Buel v. Enos*, Brayt. 56.

9. The collector of customs at the time a seizure is made is entitled to share the proceeds, and not the collector in office at the time the money is paid. *Buel v. Van Ness*, Brayt. 59.

10. An inspector of customs may justify breaking and entering a store under a warrant from a justice, directed to him as inspector and describing the goods as "several bales of dry goods, calicoes, chintzes, &c., and other goods, wares and merchandise." *Steel v. Fisk*, Brayt. 230.

11. The United States collector of a port is not required to exhibit his commission in court to justify a seizure; but his deputy, making a seizure, must show *his* commission. *Jacques v. Griswold*, 2 Tyl. 335.

12. A deputy collector of customs, performing services as such at the request of the collector, and upon the collector's express agreement personally to pay him therefor, was *held* entitled to recover therefor in an action against the collector. *Fuller v. Briggs*, 22 Vt. 80.

13. Under the act of congress of 1821, a horse brought in from Canada, not as "merchandise," but as a mere instrument of conveyance in the prosecution of a temporary journey on business, or a visit, is not subject to the requirement of a manifest delivered at the office of the collector of customs. *U. S. v. One Sorrel Horse* (U. S. D. C.), 22 Vt. 655.

14. Reasonable cause, such as to justify a seizure under the U. S. revenue laws, means probable cause. It imports a seizure made under circumstances which warrant suspicion. *Ib.* 7 Cranch, 839.

15. A vessel not enrolled and licensed, but engaged exclusively in the foreign trade, does



not become forfeit by having foreign goods on board. *U. S. v. The Margaret Yates* (U. S. D. C.), 22 Vt. 663.

16. An allegation in an information against a vessel and cargo, that the master neither did nor would deliver a true manifest of the merchandise, but on the contrary delivered a false and fraudulent invoice of the merchandise with a view to evade the revenue laws and defraud the United States, does not present a case within the act of congress of 1821. *Ib.*

17. Such an allegation presents a case within the 67th and 106th sections of the act of 1799; and where the offense proved under such allegation consists in the omission to insert in the manifest a part of the merchandise, and it appears that this proceeded altogether from mistake and was wholly unintentional, the alleged fraudulent intent is disproved, and a sufficient defense established. *Ib.*

18. It would seem to be a principle of the revenue code, applicable at least to all importations in vessels, if not to importations in general, that a penalty, or forfeiture, is not to be incurred for a mere mistake in the manifest, report, or entry, either in the quantity or value of the goods imported, without fraud, misconduct, or culpable negligence. *Ib.*

### III. MILITARY MATTERS.

19. A military officer, stationed on the lines of the territory in time of war, seized the plaintiff while transporting property towards the enemy's province under circumstances creating a reasonable suspicion that he was about to transport the same to the enemy, and immediately delivered the plaintiff over to his superior officer. *Held*, that the officer was justified. *Clow v. Wright*, Brayt. 118.

20. An officer enlisting a minor without consent of his parents in writing, and commanding him in the army, is not liable therefor for false imprisonment, where the minor has not been discharged by *habeas corpus*. *Boutwell v. Thompson*, Brayt. 119.

21. An officer belonging to a military force ordered out by the President of the United States under the neutrality act of 1838, section 8, "to prevent the violation and enforce the due execution of the act," and instructed by his commanding general to execute that purpose, apprehended a vessel on Lake Champlain, which was not itself intended to pass the frontier, but which was laden with arms and munitions of war intended to be transported across the frontier to insurgents in Canada, then in arms near the line, against Great Britain. Having so taken the vessel, it was wrecked by a storm, without the officer's fault. In an action of trover against him for the vessel,—*Held*, that admitting that the power of seizure, strictly

speaking, was only given to certain civil officers named in the act, as collector, marshal, &c., yet the defendant might, as a precautionary measure to prevent an intended violation of the act, take and detain the property until an officer, having the power to seize and hold it to be proceeded with under the act, might be procured to act in the matter; that if the vessel was not liable to seizure, the arms and munitions aboard were, and could not be seized and secured without taking possession of the vessel, and this justified the taking of the vessel; and that the defendant was not liable. *Stoughton v. Dimick* (U. S. C. C.), 29 Vt. 535.

22. The word "frontier," as used in the act of congress of 1838, known as the neutrality act, which authorized the seizure of vessels having arms, &c., on board, and about to pass the frontier for a place within a foreign State, or colony, means something more than the boundary line; it means a tract of country contiguous to that line; and to justify a seizure under the act it is not necessary that such vessel should actually be about to pass the boundary line. *Stoughton v. Mott*, 15 Vt. 162. *S. C.*, 18 Vt. 175; and 25 Vt. 668.

### IV. INTERNAL REVENUE LAWS.

23. **License.** The act of congress of July 1, 1862, prohibiting certain occupations [the dealing in liquors], without first obtaining a license therefor, was *held*, though prohibitory in terms, to be strictly a revenue law, designed to raise money and not to diminish, restrain, control or regulate business, but to operate upon the person; and therefore does not render such dealing illegal, as between seller and purchaser, though done without license; but subjects the dealer to a penalty. *Aiken v. Blaisdell*, 41 Vt. 655. See observations of *Redfield, J.*, *contra*, in *Territt v. Bartlett*, 21 Vt. 188.

24. **Stamps.** Under the act of congress of June 30, 1864, entitled "An act to provide internal revenue," &c., the instrument required to be stamped is not rendered invalid for want of the proper stamp, unless the omission to stamp it was "with intent to evade the provisions of the act." And *held*, that a motion to dismiss a suit because the writ was not duly stamped was ill in substance, for want of an averment of such intent. *Hitchcock v. Sawyer*, 39 Vt. 412. *Atkins v. Plympton*, 44 Vt. 21.

25. The neglect to cancel a revenue stamp attached to a writ does not, under the U. S. stamp act, make the instrument void. *Chaplin v. Horton*, 36 Vt. 684.

26. The omission of a stamp, where the parties to the agreement believed in good faith that none was required by the stamp act, was *held* to be an "inadvertence" under sec. 153, which made it lawful for the collector to affix

the proper stamp and remit the penalty. *Green Mountain Institute v. Britain*, 44 Vt. 18.

27. The certificate of the justices to the copy of an order of removal and notice issued to be served, is part of the "process," and requires no stamp as a "certificate," under the internal revenue act. *East Haven v. Derby*, 88 Vt. 258.

28. The internal revenue law requiring written contracts to be stamped, does not apply to agreements contained in or evidenced by letters that pass between parties in regular course of business. *Atkins v. Plympton*, 44 Vt. 21.

29. Nor, to an award of arbitrators. *Celley v. Gray*, 87 Vt. 186.

30. A revenue stamp of five cents on each sheet of a subscription paper payable to a chartered educational institution, was held sufficient. *Green Mountain Institute v. Britain*, 44 Vt. 18.

31. The payee of a promissory note, unstamped, may recover upon the original consideration. *Wilson v. Carey*, 40 Vt. 179.

#### UNIVERSITY OF VERMONT.

1. **Taxes.** Held, in 1843, that section 2 of the act of Nov. 10, 1802, exempting from taxation the property of the president and professors of the University of Vermont to the value of \$1000 to each, was in force, not repealed. *Wheeler v. Lane*, 15 Vt. 26.

2. By the union of the University of Vermont and the Vermont Agricultural College, under the Act of 1865, No. 83, until then independent corporations, a new corporation was created taking the name of the "University of Vermont and State Agricultural College," and the property of the University, in its most extensive sense, passed to and vested in the new corporation; and such transfer, being by act of law, conveyed to the new corporation, without express words to that effect, the right to sue in its own name upon contracts previously made with the University. *University, &c., v. Baxter*, 42 Vt. 99. 48 Vt. 645.

See CORPORATION, 72.

#### USURY.

1. **What is and what is not usury.** The taking of interest in advance by banks by way of discount, according to banking customs, is not usurious. *Bank of Burlington v. Durkee*, 1 Vt. 399.

2. The computation of interest at six per cent according to Rowlet's tables, by days,

reckoning parts of a year as of 30 days to a month, was held to be more than at the rate of six per cent per annum, and erroneous, but not necessarily usurious. *Ib.* *Bank of St. Albans v. Scott*, 1 Vt. 426. *Bank of St. Albans v. Stearns*, 1 Vt. 430.

3. The taking of extra interest must be by corrupt bargain, in order to constitute usury so as to avoid the security; and as evidence of innocent intent, the fact that the interest was computed according to recognized tables, long in use, though not correct, may be proved—the question of intent being for the jury. *Ib.*

4. In order to constitute usury, there must be an intention knowingly to contract for, or to take, usurious interest. If neither party intends it, but they act *bona fide* and innocently, the law will not infer a corrupt agreement. *Farmers' Bank v. Burchard*, 83 Vt. 346.

5. To avoid a note for usury, it must be proved that there was a corrupt agreement to pay more than legal interest at the time when the loan was made. Mere proof that usurious interest has been paid upon a note reserving only legal interest, does not establish the fact of an original agreement for usury. *Hammond v. Smith*, 17 Vt. 281.

6. A payment, to constitute usury, must be in pursuance of a previous corrupt agreement, and must be a voluntary payment; not one enforced at law. *Steward v. Downer*, 8 Vt. 320.

7. Where money is paid and received as interest beyond the legal rate, the excess is usurious, and may be recovered back, notwithstanding there was no previous agreement to pay usury. *Stevens v. Fisher*, 23 Vt. 272.

8. Under the Vermont statute, usury may exist where a money debt is created and forborne by the agreement of the parties, even though there may be in such case no loan of money; as, a debt created by the purchase of property. *Jackson v. Kirby*, 37 Vt. 448.

9. So, where extra interest is promised or paid for the forbearance of an antecedent debt. *Carlis v. McLaughlin*, 1 D. Chip. 111.

10. The letting of sheep or cattle to multiply at a greater rate than six per cent, agreeably to the usage among farmers, is not, under the statute, usurious, though risk of the lives of the animals be upon the hirer, if such is the usage; but the transaction must be actual, not fictitious. *Whipple v. Powers*, 7 Vt. 457.

11. Where the return of money advanced is made dependent upon the event of that amount being realized in a contemplated joint adventure, over and above losses and expenses, the contract is not usurious, although, in addition to regular interest, the party advancing the money is entitled to share in the profits of the adventure. *Brigham v. Dana*, 29 Vt. 1.

12. An agreement with a commission mer-

chant to allow him a specific *per cent* commission on sales, legal interest for money advanced on consignments until sales, and five per cent for the money so advanced, was *held*, as to the five per cent, to be usurious. *Burton v. Blin*, 23 Vt. 151. 29 Vt. 7.

13. A contract made in New York for the payment of one and a half per cent as a commission, in addition to interest, upon advances made by a commission merchant in the supply of stock for a manufacturer, was *held* not to be usurious by the law of New York. *Corkies v. Estes*, 31 Vt. 658.

14. It was agreed between the plaintiff and the defendant corporation, that if he would accept the office of treasurer and provide and advance money to carry on the defendant's business, he should be paid a certain yearly salary, and one per cent a month for money advanced. *Held*, that the contract as to interest was usurious. *Wait v. Windham Co. Mining Co.*, 37 Vt. 608.

15. The sale of mortgage securities at a premium above the amount due, is not usurious. *Culver v. Bigelow*, 43 Vt. 249.

16. Although courts rarely, if ever, as between debtor and creditor, enforce an executory contract for the payment of compound interest, yet the payment of it is not necessarily in a legal sense the payment of usury; and if a debtor knowingly, understandingly and unconditionally pays it under no peculiar circumstances of oppression, it cannot be recovered back. *Id.*

17. Where one having but a special and limited agency to settle a debt due to an estate, took a note to the administrator for the principal sum due, and one to himself for usurious interest, but without the consent or knowledge of the administrator;—*Held*, that the first note was not avoided thereby. *Baxter v. Buok*, 10 Vt. 548. 28 Vt. 133.

18. Where property is taken by the borrower in lieu of money, and for the purpose of effecting a loan, the transaction is usurious, unless the property is not only fairly worth the sum at which it was estimated, but would be easily made available in the borrower's hands for raising that sum by re-sale. *Isham, J.*, in *Austin v. Harrington*, 28 Vt. 133. Instances—*Id.* 130. *Low v. Prichard*, 36 Vt. 133.

19. On this subject of usury, the law disregards all pretence and sham and deals with the reality; and, wherever one has usury in his pocket, the law will reach it, by whatsoever name it may be called. *Poland, C. J.*, in *Wilkins v. Wilder*, 37 Vt. 613.

20. The plaintiff purchased of the defendant and his wife certain real estate for the price of \$250, and executed to the wife his note for that sum payable on or before ten years from date without interest, and also ten other

notes each for \$20 payable yearly during that period without interest, taking from the defendant and his wife a sealed agreement that they would convey the land to the plaintiff when he should pay the \$250 note; and that they would then give up all of the ten \$20 notes which were then unpaid—the writing expressing that the consideration of the \$250 note was the sum which the plaintiff was to pay for the farm. The plaintiff took and remained in possession of the farm, paying up one of the \$20 notes yearly for six years, and between the sixth and seventh year paid the \$250 note and so much of the seventh \$20 note as was in proportion to the year it was covering; and thereupon the defendant and his wife conveyed to the plaintiff the farm and gave up the residue of the notes. In an action to recovery usury paid,—*Held*, that usury was not exposed on the face of the instrument; but that it might be proved by extrinsic evidence that the \$20 notes were in fact given for the yearly interest on the purchase money; as, by proving that the bargain was that the plaintiff should pay eight per cent interest on the purchase, and that the notes were given for yearly interest, and that there was no other consideration; and *held*, upon the facts appearing, that the action was rightly brought against the defendant alone. *Jackson v. Kirby*, 37 Vt. 448.

21. **Blending of securities.** The taking up of one usurious security and giving another is not such an extinguishment of the first as that the statute of limitations will apply to a declaration for the usury, counting upon the first security, where the usury was paid on the last, and within the limitation. The whole is considered as one entire contract. *Collins v. Roberts*, Erayt. 235.

22. A valid contract surrendered and merged in one void for usury, is not so lost and destroyed but that an action will lie upon it. *Edgell v. Staniford*, 6 Vt. 551. 8 Vt. 88. 10 Vt. 85. 29 Vt. 415.

23. A promissory note containing an usurious excess of interest was executed while the usury act of 1797 was in force. After the act of 1821 came in operation, that note was given up and another taken for the amount, without any new agreement respecting interest. *Held*, that the last note was not wholly void, but subject to apportionment, on the principle of the former statute. *Dunbar v. Wood*, 6 Vt. 658.

24. The maker of a note containing usury, promised, in consideration that the holder would cancel or discharge that note, to give a new note, less the usurious excess of the true debt. *Held*, that such promise could be enforced by action. *McClure v. Williams*, 7 Vt. 210.

25. **Action to recover back.** Where one for a consideration furnished by the maker of notes, which are usurious, agrees to and does

pay them, he cannot maintain an action to recover back the usury paid, but only the maker of the notes can; but if the agreement was only to indemnify the maker against the notes, and no consideration was received for the payment of them, and the party under an arrangement with the holder agrees to pay the same usury, and takes up the first notes by substituting his own of equal amount, the substituted notes are equally usurious with the first, and he can recover back the usury paid thereon. *Hazard v. Smith*, 21 Vt. 128.

26. Laws against usury are for the protection of the borrower only, and he alone can take advantage of the law. *Austin v. Chittenden*, 33 Vt. 553.

27. In an action against a surety, he cannot set up, or have applied, usury paid by the principal, which was not included in the security and was not paid as part of the debt, but as usury, *eo nomine*. Such claim is personal to the party paying, and he alone can enforce it. *Ward v. Whitney*, 32 Vt. 89. *Churchill v. Cole*, 32 Vt. 93; and see *Barker v. Esty*, 19 Vt. 181.

28. A surety is not released by an agreement made by the principal at the time of executing the contract, without the knowledge of the surety, to pay usurious interest, and by the payment of such extra. *Richmond v. Standclift*, 14 Vt. 258. *Bank of Middlebury v. Bingham*, 33 Vt. 621. *Davis v. Converse*, 35 Vt. 503.

29. The right to sue and recover back usury paid, is a right of redress for a wrong inflicted, and is personal to the party injured. *Low v. Prichard*, 36 Vt. 191.

30. Such right does not pass to an assignee under the U. S. bankrupt act of 1841. *Nichols v. Bellows*, 22 Vt. 581. (*Moore v. Jones*, 23 Vt. 739, in U. S. Dist. Ct., an earlier decision, *contra*, 27 Vt. 398.)

31. Nor can it be attached by trustee process. *Barker v. Esty*, 19 Vt. 181.

32. A claim for usury paid survives against the estate of the party taking it. *Roberts v. Burton*, 27 Vt. 396.

33. The deceased gave the defendant a note for cash borrowed, including usury, and procured a policy of insurance upon his own life, payable to the defendant, as security for the note. On his death, the defendant collected the policy of the insurers. In an action of general assumpsit by the administrator,—*Held*, that the defendant could not interpose the objection that the insurers had paid him more than they were obliged to pay; and that the plaintiff was entitled to recover the excess above the amount legally due upon the note. *Coon v. Swan*, 30 Vt. 6.

34. Without the aid of a statute, assumpsit lies to recover back money paid as interest beyond

the legal rate. In such case, the parties are not regarded as *in pari delicto*. *Davis v. Hoy*, 2 Aik. 303.

35. Usury paid may be pleaded to any action on contract, in set-off. *Ewing v. Griswold*, 43 Vt. 400.

36. An action brought by the party paying usury to recover it back (G. S. c. 79, s. 4), is a remedial, and not a penal action. *Wheatley v. Waldo*, 36 Vt. 237. *Hubbell v. Gale*, 3 Vt. 266.

37. An action for money had and received, brought under the statute to recover usury paid to the defendant by a person other than the plaintiff, is a penal action, and as such requires a minute of the day, &c., when the writ was exhibited. *Hubbell v. Gale*; and that full proof be made, as in criminal cases. *White v. Comstock*, 6 Vt. 405.

38. The plaintiff gave the defendant his notes including usury and secured the same by mortgage, and afterwards sold and conveyed the mortgaged premises, subject to the mortgage to be paid by the grantee as part of the purchase price. The grantee paid the notes. *Held*, that the plaintiff could recover back the usury included in the notes. *Nelson v. Cooley*, 20 Vt. 201. *Low v. Prichard*, 36 Vt. 183; and so, *semble*, whenever the usury is paid from his own money or means. *Ib.*

39. The discontinuance of a suit, where no attachment of property was made, and a further extension of the time of payment of a debt upon the payment of usury, afford no consideration for a release by the debtor of his claim for past usury paid. *Collamer v. Goodrich*, 30 Vt. 628.

40. Although parties mutually intend that the payment of a balance found due on settlement shall settle everything between them, yet it will not have that effect as to usurious interest previously paid, but not reckoned in the settlement, nor adjusted by an accord and satisfaction. *Rouell v. Marcy*, 47 Vt. 627.

41. Usury paid upon one note, cannot be urged as payment upon another. *Ewing v. Griswold*, 43 Vt. 400.

42. Act of 1836. In this State, since the statute of 1836, a contract affected with usury is valid to every intent, except as to the excess above legal interest. *Farmers' Bank v. Burdard*, 33 Vt. 346. *Richmond v. Standclift*, 14 Vt. 258. 33 Vt. 621.

43. How used in defence. Where usury is included in the note or security, this is matter of defense to an action upon the security, to the extent of the usury; and where such note or security has passed into judgment, the judgment is conclusive, both at law and in equity, against the right to recover back any sum included in it, as being usury. *Day v. Cummings*, 19 Vt. 496. *Grow v. Albee*, *Ib.* 540.

44. Where usury, not included in the security, has been paid, the party paying has his

election to sue and recover it back, whether the lawful debt has been paid, or not, or to have the usury applied as an equitable set-off as against the security. *Day v. Cummings. Grov v. Albee. Ward v. Whitney*, 32 Vt. 89. *Davis v. Converse*, 35 Vt. 503.

45. It is now settled by repeated decisions that where usury is included in a note or other security, and, when paid, is indorsed upon the note, it is to be considered as a payment upon the note itself, and no action can be maintained to recover back the usury paid so long as there remains due any part of the principal and lawful interest; but where the security is only for the principal and legal interest, and the unlawful interest is either put into a separate obligation, or rests in a verbal agreement, so that when paid it is not indorsed upon the note, but is paid as usury, *eo nomine*, it is otherwise; and a right of action accrues immediately to sue and recover it back, though the lawful debt is still unpaid. *Poland, C. J., in Davis v. Converse*, 35 Vt. 507. *Grov v. Albee. Day v. Cummings. Nelson v. Cooley*, 20 Vt. 201. *Nichols v. Bellows*, 22 Vt. 581. *Ward v. Whitney*, 32 Vt. 89. *Ward v. Sharp*, 15 Vt. 115.

46. **Limitations.** Where usury, not included in the security, has been paid as *extra*, and not as payment upon the debt, the statute of limitations applies, whether claim for repayment is made by suit, or as an allowance upon the debt as an equitable set-off. *Davis v. Converse*, 35 Vt. 503. *Boynton v. Nash* cited, *Ib.* 508.

47. **Cases in equity.** A plea of usury to a bill to foreclose will not be admitted, if filed out of time, unless accompanied with a waiver of forfeiture. *Shed v. Garfield*, 5 Vt. 39.

48. A demurrer lies to a discovery of usury charged in a bill, unless the orator waives the forfeiture and seeks relief only against the usurious part of the contract. *Ib.*

49. Where usury is set up as a defense in a court of equity to avoid a contract entirely, it must be fully and substantially proved; and the evidence to prove it is not aided by the defendant's answer, unless in the bill he is particularly called on to disclose. A gratuitous answer in such case is to be regarded as only equivalent to a plea of the statute of usury. *McDaniels v. Barnum*, 5 Vt. 279. *S. C.* 6 Vt. 177.

50. The defense of usury to a bill of foreclosure must be by way of plea, and, if insisted on in the answer, must be proved, not by the answer, but by evidence *aliunde*; and when such defense operates as a forfeiture of the debt, it is the duty of the court to require clear,

explicit and satisfactory evidence. *Dyer v. Lincoln*, 11 Vt. 300.

51. On a bill to foreclose a mortgage, the mortgagor appeared and consented to a decree *pro confesso*, and, before the master, procured to be expunged from the debt what he claimed or proved to be usurious, and a decree of foreclosure was made for the residue. He failed to redeem and the mortgagee went into possession. *Held*, that he could not afterwards maintain ejectment against the mortgagee, on the ground that the mortgage was void for usury, but that he was concluded by the decree. *Rublee v. Chaffee*, 8 Vt. 111.

52. A decree of foreclosure of a mortgage, either in chancery or by the action of ejectment under the statute, purges the debt of usury, if any, and its validity cannot again be contested. *Steward v. Downer*, 8 Vt. 320.

53. The defendant borrowed money of the oratrix, through her general agent, and gave her his note therefor and a mortgage. For the purpose of procuring the loan, he purchased at the same time of the agent, but without the personal knowledge of the oratrix, a span of horses belonging to the agent, for \$400, being \$175 more than they were worth, and gave his note therefor running to the agent, and afterwards paid the \$400 note. On a bill to foreclose, *held*, that the contract was usurious, and that the defendant was entitled to a deduction of \$175 from the mortgage debt. *Austin v. Harrington*, 28 Vt. 130.

54. Payments made in pursuance of an usurious contract, to an amount within the debt and legal interest, are to be regarded as payments, generally; and, in a bill to foreclose a mortgage founded on such contract, may be insisted on by way of answer. *Ward v. Sharp*, 15 Vt. 115. This doctrine is limited to cases where the usury is included in the security, or, if not included in the security, where, if a suit were brought to recover for the usury paid, it would not be barred by the statute of limitations. *Davis v. Converse*, 35 Vt. 503.

55. Where a surety gave a mortgage to secure the debt of his principal and a bill to foreclose was brought against the surety alone, and the principal appeared at the accounting and claimed application upon the debt of usury paid by him, which was not included in the security;—*Held*, that such claim and allowance would bar the principal in an action to recover the usury paid, and the allowance was therefore made in behalf of the surety. *Ib.*

56. Otherwise, where the principal made no such claim, but had released it, though without consideration. *Churchill v. Cole*, 32 Vt. 93.

## V.

## VARIANCE.

- I. WHAT IS; AND INSTANCES.  
 II. HOW TAKEN ADVANTAGE OF.

## I. WHAT IS; AND INSTANCES.

1. **What is.** Variance means material difference. It is no variance that the proof does not show all the points in a declaration. There may be a defect of proof, without a variance. *Skinner v. Grant*, 12 Vt. 456.

2. Matter of description must be proved precisely, perhaps literally, as set forth, and it cannot be rejected as surplusage, though its insertion was unnecessary. But where the evidence conforms to an unnecessary averment as far as that averment goes, it is no variance that it does not go further and insert more unnecessary matter. *Allen v. Goff*, 13 Vt. 148.

3. A variance cannot be predicated of the description of a contract, which, though partial and defective, is yet true as far as it goes. *Everts v. Bostwick*, 4 Vt. 349.

4. A defect of allegation is never a variance, unless the part omitted is a qualification of the averment made. *Allen v. Lyman*, 27 Vt. 20.

5. Cases of immaterial variance. **CRIMES**, 64, 76.

6. **Contract and record to be proved as laid.** Where the cause of action, as set forth, originates in a contract, the contract must be proved as laid, whether the action is in form *ex contractu*, or *ex delicto*. Otherwise, there is a fatal variance. *Vail v. Strong*, 10 Vt. 457. *Wright v. Geer*, 6 Vt. 151. *Mann v. Birchard*, 40 Vt. 339.

7. A written contract declared upon may be read in evidence, if it substantially comports with the declaration. *Farnum v. Barnum*, 1 Tyl. 72.

8. **Instances.** Where the declaration counted upon a warranty that a horse was not over seven years old, and the proof was of a warranty that the horse would be seven years old the next spring;—*Held*, there was no variance. *Henry v. Henry*, 1 D. Chip. 265.

9. The declaration counted upon a contract to deliver cloth to the plaintiff; the contract offered in evidence was to deliver cloth at the defendant's factory. *Held* a variance. *Clark v. Todd*, 1 D. Chip. 213.

10. A declaration counting upon a note as payable in "fulled cloth at its cash price" is supported by a note payable in "woolen fulled

cloth at its cash value." *Wead v. Marsh*, 14 Vt. 80.

11. In *scire facias* against bail on mesne process, the nature of the liability must be truly set forth, if attempted. *Wright v. Brownell*, 2 Vt. 117.

12. An averment that the plaintiff bought of the defendant a barrel of rum for \$50 is not sustained by evidence that he bought a barrel of rum at \$1.06 per gallon. *Allen v. Lansing*, 10 Vt. 114.

13. **Date.** It is only where record proof is vouched as proof that a fact happened on a particular day, that the day alleged becomes descriptive of the record, and a variance fatal. Thus, where the declaration averred that the plaintiff was committed to jail on a certain day, and the return of the officer showed a commitment on a different day;—*Held* no variance, the date of the return not having been averred. *Henry v. Tilson*, 17 Vt. 479.

14. The defendant, in his plea justifying a trespass as collector of a school district, averred that he was appointed such collector at a date named, "as by the record of his appointment would appear;" but the record showed that his appointment was made on a different day. *Held*, that as he had vouched the record, though perhaps unnecessarily, the time named became descriptive of the record, and that the record did not satisfy the allegation. *McDaniels v. Bucklin*, 13 Vt. 279.

15. Where the declaration averred that the defendant on the 24th day of a certain month sued and commenced an action against the plaintiff, and the record produced was of a writ dated the 25th of the same month;—*Held*, that here was no variance, the time laid not being descriptive of the date of the writ, and the day being immaterial. *Steele v. Bates*, 2 Aik. 338.

16. In an action for libel, the declaration averred a publication on a certain day. The proof was of a publication on a different day. *Held* no variance, the averment not being descriptive. *Gates v. Bowker*, 18 Vt. 23.

17. **Signature.** Declaration as indorsee of a promissory note payable to the order of "A and B," and by them indorsed, "their own proper hand-writing being to such indorsement subscribed," without averring that A and B were partners or were acting under the firm name of "A and B;"—*Held*, that the declaration was not sustained by proof that A and B were in fact partners under the firm name of

"A and B." but that the indorsement in the firm name, "A and B," was made by one of the partners only. *Fullerton v. Seymour*, 5 Vt. 249.

18. Three defendants were partners under the name of S. & W. Downer & Co., and were sued as such upon a promissory note signed "Downer & Dana,"—the declaration averring that the defendants so signed the note by mistake, though it ought to have been signed *S. & W. Downer & Co.*, and was intended to have been so signed, as the note was given for the benefit of said company and for property which went to the use of said company. The note produced was signed, "Downer & Dana." *Held*, that whether this was intended to have been *S. & W. Downer and Co.* was matter of evidence for the jury, and did not present a question of variance. *Held*, also, that such declaration was good on motion in arrest. *Miner v. Downer*, 20 Vt. 461. *S. C.* 19 Vt. 14.

19. In an action against a single defendant, declaring upon a written contract as executed by the defendant, it is not a variance, nor matter of objection, that the contract produced was signed by others, also, but promising "jointly and severally." *Maxfield v. Scott*, 17 Vt. 634.

20. **Substantive effect.** The declaration set forth that the defendant contracted to give "a promissory note of about the sum of \$24.00." The agreement proved was, to give a note for \$24.00 payable in 3000 feet of floor plank. *Held* a variance; that a note payable in lumber is not the same thing as if payable in cash, as was the legal intendment of the declaration. *Gorry v. Ward*, 25 Vt. 217.

21. A note made payable in 90 days, conditioned that if one-half should be paid at that time the remainder might be postponed for 90 days longer on payment of the interest thereon in advance, was declared upon as payable in 90 days from date. *Held*, that this condition qualified the contract, and that there was a variance. *Woodstock Bank v. Downer*, 27 Vt. 482.

22. The contract, as set up in the declaration, was, that the plaintiff was entitled to one-third of the proceeds of a certain business till he had received \$300, and after that, to one-sixth. The contract, as proved, was, that the plaintiff was not so entitled until certain other parties had received of the proceeds \$150. *Held* a variance. *Gottlieb v. Leach*, 40 Vt. 278.

23. Where the declaration is upon an express covenant in a lease, a recovery cannot be had upon some other covenant implied—an objection for the variance having been made after the evidence was in. *Merritt v. Closson*, 36 Vt. 172.

24. A declaration in case against a railroad company, as common carriers, was *held* not sustained by proof of a special contract for trans-

portation which limited the liability of the defendants to the point of reasonable care and diligence. This is a fatal variance. The action should be upon the special contract, or for a breach of duty arising out of it. *Kimball v. Rut. & Bur. R. Co.*, 26 Vt. 247.

25. In an action against a railway company setting up a special contract to transport goods with unusual dispatch—as, "by express through freight trains"—"by the earliest and quickest freight trains," &c.—and the evidence did not tend to prove such a contract, but that the goods were to be transported in the ordinary way;—*Held*, that there was a fatal variance. *Mann v. Birchard*, 40 Vt. 326.

26. In a *qui tam* action, under the statute, for being a party to certain fraudulent notes, and that the defendant justified the same as *bona fide*, the declaration misdescribed the notes as actually made, but truly as they were justified by the defendant according to his description of them in his suit upon them, in which suit he obtained a judgment by confession. *Held* sufficient, the *gravamen* of the charge being the justification of the notes as *bona fide*. *Goodnow v. Houghton*, 16 Vt. 404.

27. In a declaration upon a promissory note, it was described as payable "three from the date of said note," and averred that "the said three months from the date of said note had long since elapsed, &c." The note was in fact made payable three months from date. *Held*, that the note was sufficiently described. *Pasumpsic Bank v. Goss*, 31 Vt. 315.

28. The declaration alleged, that in consideration that the plaintiff would negotiate a loan for the defendants of \$100,000, the defendants promised to pay him a certain commission upon such amount as he should negotiate a loan for. The contract proved was for the negotiation of a loan for that sum, for a commission on that sum. *Held* no variance. *Durkee v. Vt. Central R. Co.*, 29 Vt. 127.

29. If a party proceeds with reasonable dispatch in the performance of his part of a contract, and has done something towards it, and is then met by a peremptory refusal of the other party to complete the contract, it is not necessary to a recovery for the first party to show full readiness on his part; and an averment in the declaration of full readiness of the plaintiff and refusal by the defendant to complete the contract, with proof of part readiness and that his authority to proceed was countermanded, does not show a case of variance, but only of an averment beyond the proof but in the same direction; and, in such case, he may may recover to the extent of the proof. *Id.*

30. The plaintiff averred in his declaration, that he delivered a quantity of wool to the defendants to be by them *properly* sorted and manufactured into cloth. &c., and that the

defendants accepted the wool for the purpose of *properly* sorting and manufacturing it into cloth, and then to deliver to the plaintiff all the cloth which said wool would *properly* make, &c. It appeared on trial, that both parties expected that the defendants were not to keep said wool separate and manufacture it by itself, but were to mingle it with other wools of like grade and quality, and give the plaintiff his fair share of the cloth, and of the fair and average quality from all the wools so mingled in the process of manufacture; and that such was the custom in all woolen manufactories. *Held*, that there was no substantial variance. *Bruce v. Greenbanks*, 38 Vt. 226.

31. Proof of a variation in the manufacture of machines from the stipulations of a written contract, which variation was by direction of the defendant and was but slight, not affecting the character, value or utility of the machines, and which was treated by the parties, not as altering the contract, but as a mode of performing it, was *held* (with hesitation), not to present a variance from an averment in the declaration that the machines were made according to the stipulations of the contract. *Allen v. Thrall*, 36 Vt. 711.

32. **Record.** The plaintiff, suing in his personal capacity, declared upon a judgment as recovered by him. The judgment proved was recovered by him as administrator, &c. *Held* no variance. *Allen v. Lyman*, 27 Vt. 20.

33. In assumpsit, the declaration, by way of recital and inducement to the statement of the consideration and the defendant's promise, averred that the plaintiff, before that time, had instituted a certain suit *in his name*. The proof was, that the suit was in the name of himself and another, his former partner, but that he was the sole owner of the demand. *Held*, that these words, *in his own name*, were unnecessary, and that there was not a fatal variance. *Cross v. Richardson*, 30 Vt. 641.

34. An averment in a declaration upon a recognizance, that the court in the principal case taxed the plaintiff's costs at a sum named, was *held* not to be descriptive of the record so as to occasion a variance, where the record produced showed no taxation; but was only an averment of a fact, and a failure of proof of it. *Blood v. Morrill*, 17 Vt. 598.

35. To an action and declaration upon a judgment for 573 dollars and 47 cents, the defendant pleaded in abatement the pendency of a former action on a judgment for 523 dollars and 47 cents, and averred that it was the same identical judgment now declared upon. *Held*, that it would have been sufficient to aver merely that both suits were for the same cause of action; but that the plea was falsified by a comparison of the judgments, as described, and was ill. *Lincoln v. Thrall*, 34 Vt. 110.

36. **Sale—Deceit—Warranty.** In case for deceit in the sale of a horse, where the declaration alleges an absolute representation of soundness and a *scienter* of its falsity, and the proof is of a representation of soundness "so far as the defendant knew," and that he in fact knew the horse to be unsound, here is no variance, and a recovery may be had since the defendant is equally liable, and to the same extent, on both or either of the representations. *West v. Emery*, 17 Vt. 583.

37. It is the same in an action for a false warranty laid with a *scienter*, where the plaintiff relies only upon proof of false and fraudulent representations. *Wheeler v. Wheelock*, 33 Vt. 144.

38. **Aliter** in assumpsit upon an absolute warranty, or for a false warranty, where the plaintiff relies upon proof of an absolute warranty and alleges merely, as a breach, that the fact warranted did not exist. *Redfield, J.*, in *West v. Emery*, 17 Vt. 583.

39. In an action on the case for fraudulent representations and concealment in a sale, the price paid was set forth in the declaration less than as proved. *Held* not to be a variance. *Mallory v. Leach*, 35 Vt. 156.

40. **Mill-dam.** Under a declaration in case for unlawfully maintaining a dam across a stream, whereby the water was set back upon the plaintiff's land;—*Held*, that the declaration was sustained by proof that the defendant kept the sluices or gates in his dam shut at times when he was bound to keep them open, whereby the water was set back, &c. *Hutchinson v. Granger*, 13 Vt. 386. *Williams, C. J.*, dissenting.

41. **Execution.** A declaration for not levying, collecting and returning an execution is not sustained by proof of a levy and collection of the execution, but a neglect to pay over to the plaintiff the money so collected. *Barber v. Benson*, 9 Vt. 171.

42. **Highway.** In an indictment against a town for not keeping in repair a highway, the highway was described as entering the town from F, near the dwelling house of a person named, passing by two houses of individuals named, and passing southerly through the town to and across the north line of the town of C. The description was in all these respects as proved, except that the line through which the road entered C was more nearly a west than a north line of that town—no line of C being truly a north line of the town. *Held*, that there was here no fatal repugnancy; that the more controlling and certain parts of the description should prevail over that which was less so; and as the supposed variance did not apply to that part of the road which was affected by the prosecution, it was not substantial or important. *State v. Fletcher*, 13 Vt. 124.



43. **Number of lot—Reputation.** The number of a lot, where it is given by way of description merely and is not a matter of identity, may be proved by reputation; as, that it was so called and treated. *Davis v. Fuller*, 12 Vt. 178.

44. In trespass *qua. clau.* describing the close as lot No. 171, it appeared that the trespass was committed south of the true line of 171, and upon lot No. 172 according to the true line, but that the several owners of these two lots had for more than 15 years acquiesced in another line, as being the true divisional line between them, which would include the place of the trespass in lot 171. *Held*, that the declaration well described the *locus* as part of lot No. 171; that it had become such by acquiescence. *Burton v. Lazell*, 16 Vt. 158.

## II. HOW TAKEN ADVANTAGE OF.

45. A variance between a bond and the declaration upon it cannot be reached by demurrer, unless the bond is spread upon the record in the declaration, or upon oyer. *Denton v. Adams*, 6 Vt. 40.

46. A variance cannot, as matter of law, be predicated of a contradiction of the facts alleged in the declaration, by the testimony of the defendant. *Curtis v. Burdick*, 48 Vt. 166.

47. No objection on the ground of variance, not raised in the county court and which might there have been obviated by amendment, should be sustained in the supreme court, unless the variance is both apparent upon the record, and of such a character that the judgment, if affirmed, would fail to protect the parties in reference to the matter actually litigated. *Peck v. Thompson*, 15 Vt. 643. *Morrill v. Derby*, 34 Vt. 450. *Hard v. Brown*, 18 Vt. 87. *Brintnall v. Sar. & W. R. Co.*, 32 Vt. 665.

48. Where a paper is objected to for variance, it should be specified in what the variance consists. Under a general objection for variance, it is no part of the duty of the court to hunt for the particulars. *Hills v. Marlboro*, 40 Vt. 648.

49. In a trial by the court, a paper was offered in evidence and was objected to by the defendant on the ground of variance from the declaration, without specifying wherein, as is required by the rules of practice. The paper was received by the court, "subject to the objection, *pro forma*, to which the defendant excepted"; but the matter was not afterwards brought to the attention of the court. *Held*, that the question of variance was not so made and decided below as to be properly before the supreme court;—that receiving the paper *subject to objection*, was reserving to the defendant at a future stage of the trial to point out his

objection, if he should see fit, and have the question passed upon; and that, by not doing this, he had waived his objection, or rather the objection was not made, nor decided. *Id.*

## VILLAGE.

1. **Boundaries.** Under a statute authorizing selectmen "to lay out and establish the limits and bounds of a village";—*Held*, that a description by naming persons only was insufficient; that a description of territory, a tract, a certain superficies with distinct boundaries, was necessary. *Cutting v. Stone*, 7 Vt. 471.

2. A statute for establishing a village required the selectmen to define "its limits and bounds." In attempting this, they bounded it N by the town line, E by Connecticut river (which were definite and certain lines), S by the south line of lands of A, and W by the west line of lands of B. These two last lines, as given, were too short to connect with each other, and the west line too short to connect with the town line; and it was objected that the lines given did not inclose the territory to compose the village. *Held* sufficient; for that by protracting the S and W lines, as given, until they intersected, and the W line until it intersected the town line, the S W and the N W corners could be ascertained. *Williams v. Willard*, 23 Vt. 369.

HIGHWAYS, 25, 26.

## VOTES AND VOTING.

1. Votes *printed* were *held* to answer the constitutional requirement of votes "fairly *written*." *Temple v. Mead*, 4 Vt. 585.

2. *Quære*, whether an action lies against a constable, or other officer presiding at a free-man's meeting, for refusing to receive a legal vote, where this is not malicious, but only an error of judgment on a point considered doubtful. *Id.*

3. G. S. c. 1, s. 70, enacts: "If any person shall on the same day vote in more towns than one for the same officers, he shall forfeit, &c." One having voted in one town for representative to the General Assembly from that town, afterwards, on the same day, voted in another town for representative from this last town. *Held*, that his second vote was illegal, whether the first was or not; and that he was liable under the statute whether his action was attributable to corruption, or only to ignorance. *State v. Perkins*, 42 Vt. 399.

## W.

## WAGER.

1. At common law, as adopted in this State, all wagers are held to be illegal; and no money can be had upon a wager or contract of betting. *Collamer v. Day*, 2 Vt. 144. 22 Vt. 298. 27 Vt. 428. *Danforth v. Evans*, 16 Vt. 538. *Tarleton v. Baker*, 18 Vt. 9. *West v. Holmes*, 26 Vt. 530.

2. Where the event which is to determine the wager has transpired, and the wager has been paid, it cannot, independent of a statute, be recovered back. *Danforth v. Evans*.

3. As between the parties to a wager, the wager is revocable at any time before the event happens; and a revocation places the party revoking *in statu quo*, and entitles him to a return of the deposit. As against the stakeholder, the loser may demand of him a return of the deposit, until, with the loser's express or implied assent, it has been paid over to the winner. If the stakeholder pays over the deposit to the winner after demand made by the loser, he is liable to the loser, or the loser may pursue the money in the winner's hands. *Tarleton v. Baker*, 18 Vt. 9. *West v. Holmes*, 26 Vt. 530.

4. Where two resident citizens of Vermont went into Canada for the purpose of making a wager on the result of a presidential election, and there concluded such wager;—*Held*, that the wager was illegal, the same as if made in Vermont. *Tarleton v. Baker*.

5. The plaintiff sold the defendant a horse worth \$25, and took the defendant's note therefor for \$50, payable "on the day that Martin Van Buren is re-elected President of the United States, with interest annually," and delivered the horse to the defendant. *Held*, that this was a wagering contract and was void; that the plaintiff could not recover upon the note; nor for the horse, as sold, since he did not revoke before the determination of the wager. *Danforth v. Evans*, 16 Vt. 538.

6. That is not a wager, where one merely hazards a loss of something without the expectation, in any event, of having more in return than he ventures; as where he performs a service for which he is entitled to compensation, but which he agrees to relinquish upon the happening of some future event—like a "no cure no pay" contract—which is not illegal, as being a wager. *Edson v. Pawlet*, 22 Vt. 291.

7. Money lost upon an ordinary wager, and not at some game or play, either of skill or

chance, does not come within G. S. c. 119, s. 18, as money lost at a "game or sport." *West v. Holmes*, 26 Vt. 530.

8. **Stock-jobbing.** A contract for the sale and transfer of railroad stock at a future day for a specified price, where an actual transfer is intended and not a recovery of *differences*, and where the seller owns the shares at the time of the promised delivery, is not a stock-jobbing or wagering contract, and is valid. *Noyes v. Spaulding*, 27 Vt. 420.

9. **Lex loci.** In general assumpsit to recover for money lost at play in the State of New York, it was agreed, upon a case stated, that by the laws of New York a recovery could be had therefor in a suit there brought. *Held*, that such stipulation is not to be understood as referring to any statutory right to sue for a penalty, which would be local, but that, by the laws of New York, the money is treated as the plaintiff's money in the hands of the defendant held to the plaintiff's use; that this right of action is transitory, and may be enforced here, whatever may be the Vermont statute or the rule of decision as applied to wagers made in this State. *Flanagan v. Packard*, 41 Vt. 561.

## WASTE.

The law considers everything to be waste which does a permanent injury to the inheritance. But, owing to the different state of many parts of this country, the English rule as to what acts constitute waste does not obtain in our courts. Thus, it is not in this State waste to cut down wood or timber so as to fit the land for cultivation, provided this would not damage the inheritance and would be according to the rules of good husbandry, taking into view the location and situation of the whole farm; and this, although the wood or timber so cut may have been sold, or consumed off the farm. *Keeler v. Eastman*, 11 Vt. 298.

As to remedies for WASTE, see MORTGAGE, II.

## WATER COURSE, AND WATER RIGHTS.

1. **Right as owner of the land.** The common law as to the use of running streams, is not applicable to our circumstances, and is

not adopted. *Martin v. Bigelow*, 2 Aik. 184. (This distinction repudiated. See *infra*.)

2. Every owner of land over which a stream flows has the right to the natural flow of that stream;—a right peculiar to himself as owner of the land, not derived from occupancy or appropriation; and he can never be deprived of this right except by grant, actual or presumptive. Whenever this right is encroached upon by obstructions or perversions, above or below, and actual injury ensues to any material amount, an action accrues for such injury, however valuable or convenient the use of such obstructions may be to him who erected them. *Davis v. Fuller*, 12 Vt. 178. *Johns v. Stevens*, 3 Vt. 308. *Adams v. Barney*, 25 Vt. 225.

3. Mere prior occupancy does not give an exclusive right to the use of the water of a stream; and it is not necessary for an owner to appropriate the water of a stream to some special use before he can maintain an action for its diversion. *Adams v. Barney*.

4. **Relative rights.** A servient proprietor of land cannot complain of any use which the dominant proprietor may make of the water of a stream, so long as he is not sensibly affected by that use. No prescription begins to run until a right of action accrues; and no right of action accrues until injury is inflicted. *Norton v. Volentine*, 14 Vt. 239. *Hurlbut v. Leonard*, Brayt. 202. See 12, *infra*.

5. A mill owner having a subordinate right to the use of the water of a stream must take notice, for himself, when he is infringing upon the right of his superior, and not reduce the water so low as to interfere with that right. The owner of the superior right is entitled to have the water at the proper height, at all times when he may need to use it; and is not obliged to wait for the water to accumulate, even for one minute. *Rood v. Johnson*, 26 Vt. 64.

6. Where the plaintiff had the prior right to use the water of a stream for the use of his mill in low water;—*Held*, that he could insist on this right, notwithstanding a change in the bed of the stream by the formation of a sandbar in front of his flume, so long as he interposed no hindrance to the removal of it by the defendant, who owned a subordinate right to the water. *Ib.*

7. **Conveyance.** Where land is conveyed upon which there is a stream of water, the grantor may reserve the use of the water to himself; or, he may convey the use of all or of a portion of the water, as a mere incorporeal hereditament, retaining the fee of the land in himself. *Ib.* *Miller v. Lapham*, 44 Vt. 416.

8. **Diversion on one's own land.** The owner of land through which a stream flows may, on his own land, obstruct the natural channel, change its course, divert it, and restore it again to its natural channel at any time, and

to any extent, if he does not thereby, in any material degree, diminish the beneficial use to other proprietors, either above or below. *Norton v. Volentine*, 14 Vt. 239. *Ford v. Whitlock*, 27 Vt. 265.

9. Where the diversion of a stream upon one's own land affects those above or below unfavorably, it requires fifteen years to give the right to continue the stream in its new channel. *Ib.*

10. Where the diversion of a stream upon one's own land, by his own act, affects other proprietors favorably, and he acquiesces in the stream running in the new channel for so long a time that new rights have in fact accrued, or may be presumed to have accrued, in faith of the new state of the stream, the owner is bound by such acquiescence, as being of the character of a public dedication; and he cannot return the stream to its former channel. *Ford v. Whitlock*, 27 Vt. 265.

11. So *held*, where the change was effected by a sudden and unusual flood, and for ten years the stream had flowed in its new channel. *Woodbury v. Short*, 17 Vt. 387.

12. Where one is entitled to have a stream of water flow in a particular place, or manner, he may recover for a wrongful diversion of it, without proof of actual damage. The law implies damage in such case, and the party is entitled to, at least, nominal damages. So *held*, where the diversion was occasioned by acts done wholly on the defendant's own land. *Chatfield v. Wilson*, 27 Vt. 670.

13. —**on another's land.** The owner of land inundated by a stream breaking away in a freshet from its accustomed channel, may lawfully turn it back into its old channel upon the land of another; but cannot, to prevent injury to his own land, turn it so that it shall flow upon such other person's land elsewhere than in its old channel. *Tuthill v. Scott*, 48 Vt. 525. See *Redfield, J.*, 26 Vt. 72.

14. **Opposite owners.** Where the proprietors on opposite sides of a stream own each to the centre of the stream, neither has a right to extend a dam, past the centre, upon the land of the other, for the purpose of diverting one-half the water of the stream for his use, although such diversion causes no appreciable injury to the other's present use of the water; and, in such case, the party upon whose land the dam is so wrongfully built may lawfully remove such part of the dam. *Adams v. Barney*, 25 Vt. 225.

15. Where the centre of a running stream is the line between two proprietors, each has the right to have the stream flow in its natural and accustomed channel; and neither has the right to interrupt or alter such natural and accustomed flow, without the consent and to the injury of the other. In such case, either may

use the water, in any reasonable and proper way, for ordinary culinary purposes, and for drink and the watering of cattle, not depriving the other of an equal enjoyment of the same right; and he may facilitate the enjoyment of this right by ordinary and appropriate means—as, in this case, by a tub near the brook receiving water therefrom, and an aqueduct thence to his house and barn. *Chatfield v. Wilson*, 81 358. (*S. C.* 28 Vt. 49.)

16. Where the channel of a river is the boundary between lands, the sudden changing of such channel, though by artificial means, has no effect to change the boundary. This established principle is applicable as well to public as to private rights; as, where the river forms the boundary between States. *State v. Young*, 46 Vt. 565.

17. **Right in common.** Where there is a right to use in common the water of a stream, the use of the whole water by one party, when the other has no machinery or provision for its use, will be presumed to be with the consent and for the benefit of all, and is not tortious. *Howe Scale Co. v. Terry*, 47 Vt. 109.

18. **Waste from mills.** In an action for the obstruction of the plaintiff's water-wheel by tan-bark discharged at the defendant's tannery in the stream above and suffered to float down to the plaintiff's mill, the case being free of any question of grant or prescription;—*Held*, that it was error to exclude evidence that it had been the uniform custom of the country to discharge the spent bark of tanneries into the streams on which they were situated; that this practice had been submitted to by the dam owners below, and that tanneries could not be conducted at any profit without such means of disposing of the spent bark. *Snow v. Parsons*, 28 Vt. 459.

19. The reasonableness of such use of a stream determines the right; and this depends upon the extent of the detriment to the riparian proprietors below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use at every point of the stream. This question of the reasonableness of the use, when in its nature doubtful and not settled by custom, is one of fact;—a question of care and prudence in the use—and is to be determined by the tribunal trying the facts. *Ib. Redfield, C. J.*

20. *Held*, that one in the use of his shingle mill, in a reasonable manner, has the right to discharge the sawdust, shavings and waste from it into the stream in the ordinary course of using such mills, and that he is not bound, as matter of law, to prevent them from going into the stream and have them accumulate, or to draw them off and deposit them so that they cannot get into the stream. On the other hand,

he has not a right to wantonly and needlessly, and out of the ordinary course in such cases, and not in the service of his substantial interest and benefit in the use of his mill in a reasonable manner, to throw or permit them to go into the stream, when, by so doing, injury will be caused to the mill owner below. *Jacobs v. Allard*, 43 Vt. 308.

21. Such use of the upper mill not being unreasonable or unlawful, it is suggested that the proprietor below should change his works to conform to the altered circumstances of the stream. *Ib.* 305. 28 Vt. 463.

22. **Current changed by lawful structure.** Where a railroad corporation has rightfully and without negligence, want of care or skill, turned a river, it is not obliged thereafter to observe the action of the water, and take timely measures to prevent its encroachment upon neighboring lands. *Norris v. Vt. Central R. Co.*, 28 Vt. 99.

23. A riparian proprietor whose land has been gradually washed away by a change in the course of the current of the stream, occasioned by necessary erections made above his land in the stream by a railway company under its charter, has no right of action against the company therefor. The same is the law as to individuals. Such is not a cause of injury whose operation can, in the nature of things, be guarded against, nor which inevitably produces such effects; and the damage is too remote and uncertain a consequence to furnish the basis of an action. *Henry v. Vt. Central R. Co.*, 30 Vt. 638.

24. **Underground streams.** There are no correlative rights between adjoining proprietors of lands in the use of percolating underground streams, or of water under the surface. No action lies for digging upon one's own land, so as to cut off an underground supply to the adjoining land. *Chatfield v. Wilson*, 28 Vt. 49. *S. C.* 31 Vt. 358; nor for sinking or constructing upon one's own land a barrier to the underground flow from the adjoining land. *Harwood v. Benton*, 32 Vt. 724.

25. **Corner in a stream—Alluvion.** Where adjoining proprietors of land on the same side of a stream were each bounded on the stream, and the corner between them was indicated as a tree upon the bank of the stream;—*Held*, that the true corner was at that point in the centre of the stream nearest the tree;—and *held* (*Redfield, J.*, dissenting), that this was not a fixed corner, but was movable with the changes of the stream, being that point in the centre of the stream nearest the tree at the time being, though not in the direction of the alluvion formed in front; and following this theory, where alluvion had formed along the west shore and in front of the two parcels, and the course of the stream passing the tree had

changed from a north course, curving about to a west course and passing north of the tree, the court, instead of giving to each proprietor that portion of the alluvion which was formed upon his portion of the shore, gave it all to one. *Newton v. Eddy*, 23 Vt. 319.

**26. Liability of dam owner.** The owner of a mill dam upon a stream is bound to use ordinary care and diligence in making repairs to the dam, or in drawing off the water from the pond, to prevent injury to the property of others situate below, by the breaking away of the water; but he is not liable for inevitable accidents. *Lapham v. Curtis*, 5 Vt. 371.

**27. Use as evidence of right.** In order to restrict a grant of water by proof of use, to a point below the fair construction of the terms of the grant, the grant must be so far general as to be wholly undefined upon its face; thus evidently looking to the use, as the grantee's own construction of the grant. *Adams v. Warner*, 23 Vt. 395.

**28.** The defendants had, for more than thirty years, discharged the water of a stream from their mills by a race-way along and in a highway, using the mills but little in the winter, and that in warm times. They then rebuilt, raised and tightened their mill-dam, and afterwards ran their mills during the cold weather of winter, and for a longer time in winters than before, whereby anchor-ice formed in the race which caused the water to flow over the highway to its injury. In an action by the town for such injury, the county court charged that if the defendants had, for the term of 15 years before the rebuilding of the dam, used the water in the same channel, and that their use as to time was and had been limited only by the interest or convenience of the occupants, they were not liable for such damage by anchor-ice, or other natural causes, although they had used the water a greater length of time in each year since the rebuilding of the dam than before. *Held* erroneous, and that, as to both quantity and times of use, the right was limited to the former use. *Shrewsbury v. Brown*, 25 Vt. 197.

**29.** The owner of a spring of water agreed that the grantor of the plaintiff might always, or forever, draw water from the spring for the use of his house, by bearing a certain part of the expense of an aqueduct for conveying the water to the respective houses of the plaintiff and the owner of the spring. Under this agreement, the plaintiff and his grantors so took and used the water of the spring for more than 15 years without interruption, bearing their agreed share of the expense. *Held*, that the plaintiff had thereby acquired a prescriptive right, according to the agreement. *Arbuckle v. Ward*, 29 Vt. 43.

**30. Construction of grant, or reservation.** There is an inclination in courts to con-

strue grants of water liberally, so as to impose no unnecessary restriction upon its use; and where words used will admit of one construction which would limit the use to a particular purpose, and another which would allow the use specified to be merely a measure of the quantity to be used, the latter construction is adopted. *Rogers v. Bancroft*, 20 Vt. 257. *Rood v. Johnson*, 26 Vt. 64.

**31.** Such will be the construction, unless the terms of the deed seem very clearly to indicate the contrary, and the use has been uniformly consistent with the more limited construction. *Adams v. Warner*, 23 Vt. 395.

**32.** Reservations are fully as much entitled to be considered a measure of quantity, as grants. *Adams v. Warner*. *Rood v. Johnson*, 26 Vt. 64. *Miller v. Lapham*, 44 Vt. 416.

**33.** Where a grantor conveyed certain land and a saw-mill, "with the privilege of drawing water to carry said mill, except in times of low water when it is wanted for the carding and cloth dressing, and for the grist-mill" of the grantor;—*Held*, that this was a reservation, or exception, from the grant, of so much water as was wanted to operate successfully the carding and cloth dressing business, and the grist-mill; that this was a reservation of a certain *measure* of water, rather than water for a *particular use*, and that the use might be changed or assigned, or both. *Rood v. Johnson*; and see *Miller v. Lapham*.

**34.** Where a deed conveyed certain mills and water privileges, except "the privilege of one-half of the bark-mill owned by" certain third persons;—*Held*, that this exception did not necessarily include water sufficient for the use of the bark-mill, nor imply that it was not a subordinate right; but that the extent of such privilege was to be measured by such title to the bark-mill as such third persons in fact had. *Rogers v. Bancroft*, 20 Vt. 250.

**35.** A and B, tenants in common of land embracing a stream, with a dam across it and a saw-mill on the north side and a bark-mill on the south side, both mills carried by water from that dam, executed to each other partition deeds of the same date—A to B, of all the land on the north side with the mill and mill privilege, without other reservation expressed; B to A, of all the land on the south side, "and also the tan-yard and bark-mill, with a privilege of water for said bark-mill when I, the said B, my heirs or assigns, do not want the water for the use of the works now standing on said dam, or any others to be erected hereafter that draw no more water than those now standing." *Held*, that both deeds were to be taken as one instrument; and that by them B took a paramount right to the use of the water for his saw-mill, or other works drawing no more water; but that this right was confined to

works supplied with water from the dam then standing, or one substituted for it in case of its destruction; and that B or his assigns could not claim that a quantity of water sufficient to carry the saw-mill should be allowed to pass over that dam, and be collected in a pond created by a dam afterwards built below, to be there used. *Ib.*

36. The grantor in a deed, expressed to be made "for the purpose of having the business of a clothier carried on where I now live, and in consideration of five shillings," conveyed the privilege of drawing "from the mill pond on which my grist-mill now stands \* \* water sufficient for carrying one fulling mill and shears for one clothier's shop, reserving always, in a scarcity of water, sufficient to carry my own grist-mill." The *habendum* was to the grantee, his heirs and assigns, "so long as he or they shall carry on the clothier's business at or near said place, and shall be at one-sixth part of the expense of making and keeping in repair the dam," &c. *Held*, that this deed did not make the parties tenants in common of the water; that it did not restrict the grantor to the use of the water for the purposes of a grist-mill; but that it did restrict the grantee to the use of the quantity of water specified, for the purposes of his clothier's works only; and that the water could not be used for the purposes of a carding machine; and that the right to use the water terminated when the clothier's business ceased. *Shed v. Leslie*, 22 Vt. 498.

37. Construction of special provisions and reservations of grants of water privileges. See *Adams v. Warner*, 28 Vt. 395.

38. Where the grant of a water power is by quantity—as, such "quantity of water as is necessary for the use of two runs of stones in the grist-mill"—this is to be understood as of the date of the grant, and the water to be used a sufficient portion of the time to do all the business then done in the grist-mill, or which might reasonably be then expected to be done without essential addition to the machinery, and in no event using more than sufficient to carry two runs of stones in constant use. *Ib.*

39. In such case, the grantee may apply the water to any use he desires, with this qualification, that while he continues the grist-mill in operation, with the same machinery or an equal amount with that used at the time of the grant [or reservation], it ought to be presumed, as matter of fact, that this exhausts the right: and if he claims to run other machinery during the intervals of the use of the grist-mill, the *onus* is upon him to show very clearly that, in the whole, he does not exceed his rightful use. So, too, if he elects at any time to put the water power to a totally different use, he assumes the *onus* of showing that he does not exceed his rightful quantity. *Ib.*

40. Where one mill is entitled as against another to a certain quantity of water for running it, the owner will not be allowed to take more than this measure some portions of the day, and excuse himself by showing that he used improved wheels and machinery, and thereby accomplished in half the time the work which would otherwise have required the full day, so that during a day he used no more of the water than he had a right to use in that time, if used continuously; for thus a steady flow of water, yielding a constant power, and valuable to the other mill, may be interrupted. *Miller v. Lapham*, 44 Vt. 416.

41. The owner of an entire water privilege and the land on both sides of a stream, with a paper-mill situate on the south side of the stream and a grist-mill and saw-mill on the north side, having a common dam supplying all the mills, conveyed, in 1804, the land on the south side to the centre of the stream, "together with the paper-mill standing thereon, with all the privileges and appurtenances thereunto belonging, with all the rights and privileges on the falls where the paper-mill stands, reserving to myself the grist and saw-mill thereon standing, with all the privileges thereunto belonging." Such title to the paper-mill passed to the plaintiffs, and such reserved title to the grist-mill passed to the defendants. *Held*, (1), that this was a conveyance of all the water power at that point on the stream except what the grantor reserved; (2), that the reservation was out of the *whole* water power, and not out of the one-half, or of that portion not included within the boundaries of the deed, (*Rood v. Johnson*, 26 Vt. 64); (3) that this reservation was of enough of the whole water power to answer to the privileges of the grist-mill and saw-mill, whatever those privileges might be, whether half or more than half of the water flowing at any given time in the stream, and included sufficient water to operate them, in low water as well as in high water, as they were then (1804) constructed—having reference to the depth at which the water was then taken from the dam, the wheel or wheels then in use, and the amount of machinery driven. (*Adams v. Warner*, 28 Vt. 395.) *Miller v. Lapham*, 44 Vt. 416. *S. C.* 46 Vt. 525.

42. By deeds apportioning the water of a stream among different mill owners, the plaintiff was entitled to use for his mill, as it was in 1804, what was left of the water after supplying the defendant's mill, as it was in 1804; and it was provided, that in certain hours of the day the defendant's mill should not take the water from the plaintiff's mill, so as to injure it in its motion. In an action for such use of the water as to impede the motion of the plaintiff's mill, the defendant claimed that the plaintiff had changed and elevated his wheels in such way

as to destroy the gauge and measure of his restrictive right against the defendant's mill. *Held*, that the plaintiff had the right to change his wheels and manner of using the water, provided he used no more water than in 1804; and, though this destroyed the ready and easy means of determining the quantity used in 1804, the plaintiff did not thereby lose his right, but could establish it by such evidence as could now be had; as he might do if the wheels and manner of taking the water had been destroyed by time or floods. *S. C.* 46 Vt. 525.

43. By an indenture regulating the water rights at a dam it was provided, that "in case there is not at any time a full supply of water for the simultaneous operations of the works connected with the dam, the grist-mill shall draw its requisite quantity of water, exclusive of all other works." *Held*, that this grist-mill right was not merely a right to use the water exclusively in the manner and for the time it was then accustomed to be used, but a right to use the water in quantity as was then used, and for such length of time, during the season of scarcity, as the custom and business of the mill might require; and if the work done by a substituted wheel in six hours was as much as the old wheel would do in twenty-four hours, and with the use of less water, there would seem to be no infraction of the indenture, provided the business done was the same in character as was being done at its date. *Hove Scale Co. v. Terry*, 47 Vt. 109.

44. A conveyed to B a factory and water privilege with the first right to draw water from the mill pond, reserving to himself the right to draw water from the same pond for the use of certain other works, but not to the damage of the privilege conveyed, when there should be a scarcity of water. B afterwards raised the dam, as he had a right to do, and thereby raised the water in the pond; after which, when the stream was low, A drew water from it, not leaving sufficient for B's works. *Held*, that he was liable therefor; and that the restriction upon A's use contained in the deed applied as well to the water accumulated by the raising of the dam, as to the water collected by the original dam; and that B had the first right therein. *Wilders v. Bennett*, 80 Vt. 670.

45. The defendant had exclusive right to the water of a stream for his grist-mill after the water was reduced to a certain low-water mark fixed in the pond, and a right to the water when above that mark, but subject, in this last case, to a reservation to the plaintiff of a right to draw water from the dam or flume for his own use, "not to interfere with the grist-mill privileges," until the water should be drawn down to such mark. The plaintiff, for the purposes of his saw-mill, inserted a gate in the flume at

a lower level than such mark, and then drew the water. The defendant shut off the water from the flume by a head-gate whenever the plaintiff attempted so to draw the water, although the water in the pond was all the time above such mark. *Held*, that the plaintiff had the right so to draw the water, and the defendant had no right to prevent him, unless such mode of taking it did interfere with the privileges of the grist-mill when reasonably exercised; and whether or not it did so interfere the law could not determine, but this was a question of fact for the jury. *Douglass v. Whittemore*, 32 Vt. 685.

46. W, owning three parcels of land, Nos. 1, 2 and 8, laid a water-pipe from a spring or well situate on No. 1 across No. 1 to a barn on No. 2, thence to a dwelling house on No. 8, and thence back to a dwelling house on No. 1, which pipe supplied these several places with water from the spring. Under these circumstances, W sold and conveyed No. 1: "Reserving only the right now occupied by me of drawing the water from the well on said land, and of digging to repair or relay water-pipes from said well—it being mutually agreed and understood, that the water shall never be diverted from its present channel, but shall first pass to the barn of said W on his homestead [No. 2], and thence to the dwelling of K and H [No. 8], and thence across the road to the dwelling house on the lot above deeded, where the surplus water shall be freely suffered to run." *Held*, that W thereby reserved the right to draw through the aqueduct all the water flowing from the well to his barn on No. 2, and there to use as much of the water as he was then using and was accustomed to use; that what remained was to pass to No. 8, and there as much might be used as was then used and accustomed to be used; and that the rest was to pass as surplus water to the house on the premises then conveyed [No. 1]; and that the grantee of No. 1 had no right to the water until it had thus become surplus water; that he had no right to take the water by a branch pipe inserted above No. 2, nor directly from the well. *Chase v. Dix*, 46 Vt. 642.

47. A deed conveyed to the plaintiff "the right to take water at our cistern, at or near where it now is, when there is water in said cistern." At that time the cistern was supplied through pipes laid to a certain spring. The cistern was afterwards removed from the back room of the defendant's house a little to the outside, and the plaintiff took water as before. Afterwards the defendant brought water from another spring into a new cistern, occupying the place where the other first stood. *Held*, that the deed did not entitle the plaintiff to take water from the new cistern, although, by reason of the freezing up of the pipes, no water

came into the old cistern. *Hoisington v. Grimshaw*, 48 Vt. 515.

48. —as to appurtenances. Where a deed of land was general, without condition or reservation, it was held to convey the land, with all the privileges of drawing water from other portions of the grantor's land which were then in use as appurtenant to the land conveyed; and that an action lies for the disturbance of such use by the grantor—as, by a diversion of the flow of the water in its accustomed artificial channel [a wooden aqueduct], though done on the grantor's own land, and though the water came from a spring on his own land:—nor can the grantor say in defense, that the plaintiff did not desire to use the water, and that he has suffered no detriment. *Vt. Central R. Co. v. Hills*, 23 Vt. 681.

49. S originally owned a mill and an ancient artificial mill-pond, and the lands surrounding it. A parcel of this land, not extending to the pond but separated from it by a road, he conveyed by metes and bounds, "with the appurtenances," to the plaintiff's grantor, covenanting against incumbrances, and making no express reservation in reference to the mill privilege. He afterwards conveyed to the defendant's grantor the mill and water privilege. In an action for causing the water to flow upon the plaintiff's land by means of the dam;—*Held*, that the defendant had the right to maintain the dam at its ancient height; that the deed of S conveyed the land in its then condition as affected by the dam as it then was; and that the dam and the use of it were parcel of the entire estate, and not an easement, nor an "incumbrance," and were not embraced in his covenant. *Harwood v. Benton*, 32 Vt. 724.

50. Under the grant of a "mill," held, that there passed, as an incident, an easement acquired by adverse enjoyment to maintain a dam at the outlet of a natural pond three-fourths of a mile distant from the mill, which dam had been always used in connection with the running of the mill, and was necessary to its beneficial enjoyment. *Perrin v. Garfield*, 37 Vt. 304.

51. Deed as a license. A conveyed to B in fee the undivided half of certain premises, "with the right to said B [not saying *heirs and assigns*] to put in a mechanic's shop and planing-mill between the saw-mill and grist-mill, and to take water from the flume for the same so as not to interfere with the use of the water for the saw and grist-mill, &c." *Held*, that this last was merely a license to erect and exclusively use the shop and planing-mill while they should last, and that the right would expire with the decay of the structure. *Baldwin v. Aldrich*, 84 Vt. 526.

52. —as evidence. The deed of an upper mill privilege excepted and reserved "the right

to draw water from said privilege for the use of the grist-mill" standing below. The grantor had no interest in the grist-mill privilege. *Held*, that this did not create any right in, nor convey any right to, the owners of the grist-mill, but was evidence, not conclusive but tending to show, that such right had been acquired and then existed in the owners of the grist-mill. *Kimball v. Ladd*, 42 Vt. 747.

53. Remedy in chancery. P agreed by parol that A might dig and forever maintain a ditch across P's land for the purpose of conducting the water from A's factory, upon condition that A would build a good and substantial wall along the ditch, so as to secure P from damage from the water. A accordingly sank his wheel pit, lowered his wheel, dug the ditch, and built the wall, but not in all respects as it should have been built, yet in good faith and without gross negligence, meaning to comply fully with the condition. After the ditch had been used for some time, P obstructed it because of injury from the water. A removed the obstruction, and P sued him in trespass therefor. On a bill by A for relief, held, that he was entitled to a decree for specific performance, and an injunction of the trespass suit, upon payment of the damages assessed by the master which P had sustained. *Adams v. Patrick*, 30 Vt. 516.

54. Where the invasion of one's right in a water-course is threatened, which is necessarily to be continuing and to operate prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful, or impossible of estimation, such injury is irreparable in the legal sense, and an injunction is the appropriate remedy. *Lyon v. McLaughlin*, 32 Vt. 423.

55. Where the defendant, having the right to take water from the orator's mill-pond by an existing flume, claimed and was threatening to exercise the right of inserting a new flume into the orator's dam, and the question as to the right was simply one of construction of certain deeds, and the court regarded the threatened injury as irreparable, the court of chancery took jurisdiction and settled the right by injunction. *Ib.*

56. The orator's bill stated that he was owner of an extensive water privilege, and had conveyed a part to the defendant for special uses and the defendant was putting it to other uses, and prayed for an injunction and damages. *Held*, on demurrer, that the bill could not be sustained to settle the legal rights of the parties, nor for an injunction, until the right was settled at law—the water privilege being in no danger of being destroyed. *Prentiss v. Larnard*, 11 Vt. 135; and see *Fairhaven Marble Co. v. Adams*, 46 Vt. 496.

57. Taxing water power. A water power



when applied to a mill or factory, should be taxed, to the extent that it is thus applied, with and as a part of the mill or factory; and, when unimproved, should be taxed with the land to which it belongs, if its existence adds to the value of the property. *Bellows Falls Canal Co. v. Rockingham*, 37 Vt. 622.

**58. Passumpsic river.** The owner of a mill-dam across Passumpsic river in the town of Burke, which was injured by the floating of timber over it by the defendant, Hall, was held not deprived of his common law action for the injury, either by G. S. c. 101, or by s. 2, of No. 146, of the acts of 1852, giving said Hall certain powers of improvement of said river. *Coe v. Hall*, 41 Vt. 325.

## WILLS.

- I. POWER TO MAKE A WILL.
- II. EXECUTION; REVOCATION.
- III. PROBATE OF WILLS—PROOF; IMPEACHMENT.
- IV. VALIDITY; CONSTRUCTION; EFFECT.

### I. POWER TO MAKE A WILL.

**1. Infant.** Under the statute empowering "every person of full age and of sound mind" to make a will, an infant is incapable of making a valid will under any circumstances. He cannot make a "soldier's will." *Goodell v. Pike*, 40 Vt. 319.

**2. Party under guardianship.** An adjudication by the probate court that a party is insane, and the appointment of a guardian over him on such adjudication, are not a bar to the allowance of a will made by the ward while under such guardianship. *Robinson v. Robinson*, 39 Vt. 267.

**3. Mental capacity.** Less mind is ordinarily requisite to make a will than a contract of sale, understandingly; but in making any contract understandingly (as, a will), one must have something more than mere *passive* memory remaining. The testator must undoubtedly retain sufficient *active memory* to collect in his mind, without prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their more obvious relations to each other, and to form some rational judgment in relation to them. The elements of such a judgment should be, the number of his children, their deserts, with reference to conduct and capacity, as well as need, and what he had before done for them, relatively to each other, and the amount and condition of his property, with some other things,

perhaps. *Redfield, J., in Converse v. Converse*, 21 Vt. 168.

**4.** The contestant requested a charge that if the memory and mind of the testator were so impaired by age and disease, that he could not act upon important business with reason and judgment, he was incapable of making a will. But the court charged, that to give the will effect the testator must have been of sound disposing mind; but that this did not in any way imply that the powers of his mind must not have been weakened, or impaired, by disease or old age; that it would not be sufficient that he might be able to comprehend and understand a question put to him and answer it in a rational manner, nor was it necessary that he should have such capacity of mind as would justify his engaging in complex and intricate business; but that the jury must be satisfied, in order to justify them in establishing the will, that the testator, when he made it, was capable of knowing and understanding the nature of the business he was engaged in, and the elements of which the will was composed, and the disposition of his property as therein provided for, both as to the property he meant to dispose of, and the persons to whom he meant to convey it, and the manner in which it was to be distributed between them. *Held*, that the rule so laid down was sensible and judicious, and there was no error therein. *Ib.*

**5.** That a legacy was made which would not have been thought of but for the suggestion of another, does not necessarily prove incapacity of the testator. *Thornton v. Thornton*, 39 Vt. 123.

**6. Soldier's will.** Under the excepting clause of the statute of wills (G. S. c. 49, s. 9), embracing the case of "any soldier in actual military service;"—*Held*, that the words "actual military service," are to be understood as restricted to the exercise of military functions in the enemy's country in time of war, or in the soldier's own State or country in case of insurrection or invasion; and that they do not embrace the case of a soldier who had enlisted into a Massachusetts regiment and had been mustered into the United States service, and was then in camp in Massachusetts, subject to military orders, with his regiment which had not yet been mustered into service, nor ordered into the enemy's country. *Van Deusen v. Gordon*, 39 Vt. 111.

**7.** It is not necessary in order to make a valid soldier's will, that the soldier should be *in extremis*. When he is in the enemy's country performing military service, whether in camp, campaign or in battle, such service is *actual military service* within the letter and spirit of the statute; as, where a member of a Massachusetts regiment was with his regiment in 1862 in North Carolina, in military service. *Ib.*

8. A soldier, before being ordered into the enemy's country, made a paper intended as, and in substance, a will, but not executed with the requisite formalities of an ordinary will. Afterwards, while in the enemy's country and in "actual military service," he wrote a letter to the custodian of the paper, in which letter he referred to the paper as *his will*, and explained a particular bequest in it. *Held* (*Barrett, J.*, dissenting), that the paper and the letter should be considered and treated as one instrument—the letter as giving a testamentary operation to the paper, and as together constituting a valid soldier's will. *Ib.*

9. A soldier of the army of the Potomac, moving from Virginia to Maryland to protect Washington and Baltimore from an expected invasion of the enemy, fell sick on the march near Washington and was ordered to fall out and to come on when he got rested; and, continuing sick, he was ordered into a temporary hospital, where he died. *Held*, that he was "a soldier in actual military service," and was on an expedition; and when, in such case, being in *extremis* from sickness, he told a comrade, *animo testandi*, how he wanted his personal estate disposed of, — *held*, that this was a good soldier's will." *Gould v. Safford*, 39 Vt. 498.

10. A "soldier's will" may be established by the testimony of a single witness. *Ib.*

## II. EXECUTION: REVOCATION.

11. **Signing.** A will commenced, "I, Samuel Adams," &c., "do hereby make this my last will and testament." The *testimonium* clause was: "In testimony whereof I have hereunto set my hand," "and publish and declare," &c. Then followed: "Signed, sealed, published and declared by the said Samuel Adams as his last will and testament," &c. The whole was in the handwriting of the testator, except the signature of the witnesses, but was written by parts, or portions, with different pens and ink, and at different times, and the name of the testator was not subscribed, or written at the foot of the will. It was objected that the will was not "signed by the testator," as required by the statute. But, it appearing that the testator produced the instrument to the three subscribing witnesses, and declared it to be his will in their presence, and requested them to witness the same as his will, and that they did duly subscribe it as such witnesses;—*Held*, that the signing of the will in the beginning of it was a sufficient signing to satisfy the statute, if so intended; and that such publishing of the will to the witnesses was, to all intents and purposes, an adoption of such signature as was then affixed to the will, and the will then became complete, and pos-

sessed finality. *Adams v. Field*, 21 Vt. 256, 41 Vt. 98.

12. A will need not be signed in the presence of the attesting witnesses; but if signed, and the testator declares the instrument to be his will before the three witnesses, this is equivalent to signing it before them, and satisfies the statute in respect to signing. *Ib.* So, if, in such case, he declares it to be "his will, or his instrument." *Roberts v. Welsh*, 46 Vt. 164.

13. **Publication.** A formal publication of a will is not necessary. Writing and signing the will is a sufficient publication; indeed, any act of the testator, by which he designates that he means to give effect to the paper as his will, is a publication. *Dean v. Dean*, 27 Vt. 746.

14. **Witness and witnessing.** The person named as executor in a will, but who takes no benefit under it, is a "credible" attesting witness, and competent to prove its execution. *Richardson v. Richardson*, 35 Vt. 238.

15. A person to become an attesting witness to a will must be aware of the character of the act he is called upon to perform, and must subscribe his name *animo testandi*. Where the witness did not know that the testator had signed the will, and did not know what the paper was that he was attesting, nor for what purpose he was attesting it;—*Held*, that this was not a legal attestation. *Roberts v. Welsh*, 46 Vt. 164.

16. It is not necessary to the due execution of a will, that all the attesting witnesses should actually see each other sign it. If the situation of the parties—as, where they were all in the same room—was such as that the testator might have seen the attestation, and each of the witnesses might have seen the attestation of his associates, this is sufficient as an attestation "in the presence of the testator and of each other." *Blanchard v. Blanchard*, 32 Vt. 62.

17. A will, after being signed, was duly attested and subscribed by two witnesses, when another person was brought in from without, to serve as a third witness. The testator acknowledged to him his signature and requested him to sign as a witness, and the other two witnesses also acknowledged to him their signatures; whereupon he added his name as a third witness. *Held*, that the will was not "attested and subscribed by three or more credible witnesses, in the presence of the testator, and of each other," so as to satisfy the statute. *John Pope's Will*. Orleans Co., General Term, 1864. Opinion by *Aldis, J.*

18. **Revocation.** In this State, under our statute, no will can be revoked, in whole or in part, except in the way pointed out by the statute, unless by implication from the necessity of the case. Where the testator has aliened the devised estate and there is nothing for the will to operate upon, so far it is revoked; if the

whole devised estate be aliened, the will is wholly revoked; if a part only, it is revoked *pro tanto*; but no alteration in the circumstances of the testator will amount to a revocation: as, the purchase of other lands, &c. *Graves v. Sheldon*, 2 D. Chip. 71. *Blandin v. Blandin*, 9 Vt. 210. *Parkhill v. Parkhill*, Brayt. 239.

19. A disposition in the codicil of a will, inconsistent with the former bequest, operates *pro tanto* as a revocation implied, and the property will pass as last appointed. (See case for illustration.) *Larrabee v. Larrabee*, 28 Vt. 274.

20. The rule that the marriage of a woman revoked her will before made, rested for its reason on the fact that, by virtue of the husband's marital rights the woman, becoming *covert*, became thereby disabled to dispose of the property named in the will, and so the will ceased to be ambulatory. In this case, as considerable of the property disposed of by the will remained in the testatrix, unaffected upon her death by any marital rights of the husband;—*Held*, that the will was entitled to probate. (The point whether such marriage in any case would operate as a revocation was not decided.) *Morton v. Onion*, 45 Vt. 145. See *Carey's Estate*, 49 Vt. 236.

21. If a testator executes his will and it is not found after his decease, such absence of the will amounts, *prima facie*, to proof of revocation. But this is but a presumption of fact, and may be rebutted and the will established;—as, in this case, by "a paper found to be a true form and representation of the will," or a copy. *Minkler v. Minkler*, 14 Vt. 125. *Dudley v. Wardner*, 41 Vt. 59.

22. **Revocation prevented by fraud.** An intent or attempt to revoke a will, although prevented by fraud, does not operate as a revocation. By *Bennett, J.*: In such case, it may be quite probable that a court of equity would interfere to prevent the guilty person from taking advantage of his own fraud, and to restore the fund to the channel from which it was diverted by the fraud. *Blanchard v. Blanchard*, 32 Vt. 62.

23. **Cancelling.** One made his will in his own handwriting in 1857, writing it upon a sheet of foolscap paper and covering the first page and about one-third of the second page. The paper, when produced, had, upon the last half of the second page, the following words in the handwriting of the testator: "This will is hereby cancelled and annulled. In full this 15th day of March, in the year 1859:" and several lines lower down upon the same page were the following words, *erased*: "In testimony whereof I here I have." *Held* (*Kellogg, J.*, dissenting), that the act of the testator being done, not only upon the paper on which the will was written but upon such a part of it as

always to go with that part of the will which contained the disposition of the property, not indeed on the face, but on the back of such disposition, was an act of *cancelling*, under the statute, and the intent of the act was decisively manifested by the terms of the writing, and that the will was thereby revoked. *Warner v. Warner*, 37 Vt. 858.

24. **Republication.** A will revoked, as by cancelling, cannot be restored to its original vitality and force by mere words, under a claim of republication. In such cases we have no wills at, or by force of, common or ecclesiastical law, but only by statute. *Ib.*

### III. PROBATE OF WILLS—PROOF; IMPEACHMENT.

25. **Attestation clause informal.** The due execution and attestation of a will may be proved, although the attestation clause be informal, or wholly omitted. *Dean v. Dean*, 27 Vt. 746.

26. **Witness deceased.** Where a subscribing witness to a will has deceased, his handwriting may be proved as evidence of his attestation. *Ib.*

27. **Copy.** A will may be proved by a copy, the original being lost or destroyed. *Dudley v. Wardner*, 41 Vt. 59. *Minkler v. Minkler*, 14 Vt. 125.

28. **Measure of proof.** A fair balance of testimony is all that is necessary to prove the due execution of a will. *Dean v. Dean*, 27 Vt. 746. *Thornton v. Thornton*, 39 Vt. 122.

29. **Proponent must produce and examine all the attesting witnesses.** Where the establishment of a will is contested, the proponent must not only produce but must examine all the three competent attesting witnesses, if within reach of process and obtainable, as to the fact of execution. This is the rule of the English court of chancery when a will is sought to be established, and is founded upon reasons of policy and caution, and is adopted here, instead of the rule of the English common law and ecclesiastical courts. *Ib.*

30. This rule has no reference to the measure of proof necessary to establish a will, which is a measure no greater than is usually required to establish a fact: and although a will cannot be established without the evidence of the attesting witnesses, if obtainable, it may be established against the combined testimony of them all, by proof from others. *Ib.* *Adams v. Field*, 21 Vt. 256.

31. **May impeach them.** The rule that a party shall not impeach his own witness, does not apply to the case of *instrumental witnesses* whom the law obliges the party to call and examine—as, the attesting witnesses of a will; and such witness may be impeached by the pro-

ponent calling him, by proving his previous declarations inconsistent with his present testimony. *Thornton v. Thornton*.

32. There is no weight given by law to the testimony of an attesting witness to a will, apart from or beyond what it would be entitled to under those considerations which usually govern the value of testimony—as, his opportunity for observation, his skill and care in observing, his intelligence and powers of discernment and memory. It has no fictitious official weight. *Ib.*

33. **Burden of proof.** The burden is upon the proponent of a will to establish all those facts which the statute requires in order to impress upon the instrument a testamentary character. *Roberts v. Welch*, 46 Vt. 164.

34. **Dictum.** That a testator was of sound and disposing mind is a legal presumption. It is for those who object to the will to show incapacity if it exists. *Isham, J., in Dean v. Dean*, 27 Vt. 746. *Robinson v. Hutchinson*, 26 Vt. 45. *Held contra, infra*, 35.

35. The burden is on the proponent of a will to prove its due execution and the capacity of the testator, and such capacity is not to be presumed from the fact of execution. *Williams v. Robinson*. 42 Vt. 658. 46 Vt. 168.

36. A charge that the burden of proof of the incompetency of the testator rested upon the contestant, was held erroneous, and judgment reversed. *Ib.*

37. There is no presumption in favor of a will; and the burden of proving everything essential to its validity rests upon the proponent, whether any one appears to contest the probate of the will or not, and, if contested, whatever the special issues formed by the pleadings; for the judgment is conclusive upon all the world, and the rights of persons not appearing upon the record, cannot be conceded away by the parties of record. *Ib.*

38. **Plea.** A plea that "said instrument ought not to be admitted to probate because the same is not entitled to probate as the last will," &c., states no fact, but only a conclusion, opinion or inference. *Held* bad on demurrer. *Dudley v. Wardner*, 41 Vt. 59.

39. **Question of capacity.** The capacity of a testator, as also fraud or circumvention in procuring the will, may be tried by issue to the jury. *Minard v. Minard*, Brayt. 231.

40. **Evidence.** In calling for the opinion of a witness as to the mental capacity of a testator, the question should be so framed as to require him to state the measure of the testator's capacity in his own language, and by such ordinary terms or forms of expression as will best convey his own ideas of the matter—to state it "in the best way he can." *Held*, that the question whether the testator possessed sufficient mental capacity "to transact busi-

ness," was objectionable. *Fairchild v. Bascomb*, 35 Vt. 398.

41. On the question of the mental capacity of a testator, the opinion of a physician accustomed to attend upon such cases to their termination is admissible, as to whether and to what extent "pulmonary disease, nervous derangement and general debility" would, in the progress of the disease as indicated by other physical facts, stated hypothetically, impair the mental powers at two hours before death [the time of executing the will.] *Ib.*

42. The declarations of a testator, made after the execution of the will, that he was induced to make it by undue influence, are not admissible to prove such fact. *Robinson v. Hutchinson*, 26 Vt. 38. *Richardson v. Richardson*, 35 Vt. 238.

43. But declarations of this character made about the time of the execution of the will, either before or after, which tend to show the state of mind of the testator at the time of the execution, are evidence for that purpose. *Robinson v. Hutchinson*.

44. On the question of the mental capacity of a testatrix and undue influence;—*Held*, that it was competent for the contestants to show that she had brothers and sisters not provided for in the will, who were known to her to be poor and for whom she cherished affection; also that the sole legatee, her brother, was known to her to be intemperate. *Fairchild v. Bascomb*, 35 Vt. 398.

45. Where the probate of a will was contested on the ground of incapacity and undue influence;—*Held*, that drafts of previous wills made by direction of the testator, though not executed, were evidence of previous intentions to be considered, and threw "very considerable light" upon the question of the testator's intentions as to the will on trial. *Thornton v. Thornton*, 39 Vt. 122.

46. Where the probate of a will was contested on the ground of the mental incapacity of the testatrix, and of undue influence by the person named as executor, who was also a legatee in the will, though not the sole legatee, and was seeking to establish it;—*Held*, that his declarations, made four years before the execution of the will, to the effect that the testatrix was of unsound mind, were admissible in behalf of the contestants, both on the ground that he was a party of record and in interest, and because he was charged with the exercise of undue influence; and this, although he had a greater interest in defeating the will than in sustaining it. *Robinson v. Hutchinson*, 31 Vt. 448.

47. Where a will was contested on the ground of incapacity, and undue influence employed by the sole legatee;—*Held*, that his statements, known by him to be false, as to the

execution and contents of the will, were admissible for the contestants. *Fairchild v. Bascomb*, 35 Vt. 398.

**48. Foreign will.** A will made and approved in another State, devising lands in this State, cannot be read as evidence of title in the courts of this State, unless a copy of such will and probate has been filed and recorded in the probate court of this State; or, unless originally probated in this State. (G. S. c. 49, ss. 20, 21.) *Ives v. Allyn*, 12 Vt. 589.

**49.** But, as the title vests from the death of the deviser, the will may be read in evidence, if so filed and recorded at any time before the trial. *S. C.* 13 Vt. 629.

**50.** The jurisdiction of a foreign court in admitting a will to probate will be presumed, until the contrary appears, where the will and foreign probate have been allowed by the probate court in this State. *Townsend v. Downer*, 82 Vt. 183.

**51.** The decree of the probate court allowing a foreign will, proved abroad, cannot be collaterally impeached by objections to the authentication of the foreign probate. Such objection must be taken in the probate court. *Ib.*

**52. Ancient will.** Where both parties claimed under the same devisee in a will, and possession had been had under such devisee, and the will was ancient [made in 1774, and the trial in 1842], the court said: "We see no objection to the reception of the will as evidence, whether duly proved or not." *Giddings v. Smith*, 15 Vt. 344.

#### IV. VALIDITY; CONSTRUCTION; EFFECT.

**53. Chancery jurisdiction.** Probate of the will of an infant, procured by the willful suppression of the fact of infancy and other fraud of the legatee, was set aside in chancery on bill brought by the heir at law—the bill praying and the case requiring an injunction. *Goodell v. Pike*, 40 Vt. 319.

**54.** In the case of *Mead v. Heirs of Langdon*, decided in Washington County in 1834, and never reported, this court [in chancery] set up and decreed the payment of legacies given in a will never proved in the probate court, but which had been suppressed by those interested in the estate, and administration had been obtained without regard to the will. *Adams v. Adams*, 22 Vt. 59.

**55. Bequest to voluntary association.** A voluntary association or society for religious purposes may, under the constitution and laws of this State, receive and hold a legacy. *Smith v. Nelson*, 18 Vt. 511.

**56.** A bequest to an unincorporated religious society, "the interest thereof to be annually

paid to their minister forever," is a bequest to the society. *Ib.*

**57.** A bequest "to the treasurer for the time being of the American Bible Society formed in New York in the year 1816, for the use and purposes of said society," and sundry like bequests to charitable societies, not incorporated, were (by a majority) held good, and were enforced against the heirs in chancery. *Burr v. Smith*, 7 Vt. 241.

**58. — to devisee by description.** A devisee, whether a corporation or a natural person, may be designated by description, as well as by name. It is only necessary that the description of the devisee be by words that are sufficient to denote the person meant by the testator, and to distinguish him from all other persons. *Button v. Am. Tract Soc'y*, 23 Vt. 336. *McAllister v. McAllister*, 46 Vt. 272.

**59. Evidence to identify devisee, &c.** The devisee in a will was named as "The American home mission tract society for our western mission." There was no society of that name, but there were two charitable societies, one well known by the name of the American Tract Society, the other by the name of the American Home Missionary Society. In order to determine the devisee intended, evidence was received that the testator was acquainted with the objects and operations of the American Tract Society; that those operations were mainly confined to the western States and were there conducted through the agency of colporteurs, or missionaries; that the testator took a lively interest in that society, contributed to its funds in his lifetime, and expressed his preference for it over other charitable institutions; and upon such evidence, considered in connection with the terms used in the will;—*Held*, that the American Tract Society was intended. *Button v. Am. Tract Soc'y*.

**60.** After making certain bequests, the testator devised the residue of his property to "The Methodist Episcopal Mission at Bombay." No person, corporation, or society, known by that specific name, ever existed; and no such mission was located at Bombay. The testator, who had never been able, from defective eyesight, to read or write, had for a long time been a devoted member of the Methodist Episcopal Church, and, as such, had been acquainted with, interested in, and a contributor to, the work of missions as carried on by that church in foreign lands, and especially in India. That church distributed its contributions for missions, domestic and foreign, through a regularly incorporated society denominated, "The Missionary Society of the Methodist Episcopal Church." That society, several years before the making of that bequest, had established a mission in India, which was among the largest

and most prosperous of its foreign missions. The missionaries sent out by the society to this field of labor landed at Bombay, and in returning home sailed from Bombay, though the center of the operations of this mission was established at Lucknow, whence the missionaries went forth itinerating over a vast area peopled by millions of inhabitants. *Held*, that the legatee was sufficiently indicated by the description given: that the gift was to said Missionary society to be expended in carrying on the work of that society in India, through their mission located, according to the testator's understanding, at Bombay, but which in fact was located at Lucknow. *McAllister v. McAllister*, 46 Vt. 272.

**61. Uncertainty.** A court never construes a devise void for uncertainty, unless it is so absolutely dark that they cannot find out the testator's meaning. *Button v. Am. Tract Soc'y.*, 23 Vt. 336.

**62.** A will contained this clause: "I give and grant to my beloved son, John Nason, all my property after the decease of my beloved wife, or marriage, he paying the legacies herein mentioned; also to my daughter, Peggy Nason \$200 to be paid as above mentioned, the horse I now own," (describing it), "and to live and remain, so long as she is unmarried, in my house, and have and enjoy the same privileges as she now does, and also one good cow." *Held*, (1), that here was a direct devise to Peggy of a right to all the privileges of the house that she had before enjoyed; (2), that parol evidence was admissible to show the extent of the privilege which she had enjoyed in the house before her father's death; (3), that this devise was not void for uncertainty, but a certain measure of the right was given, viz.: the extent of her previous enjoyment, to be ascertained by the proof; and it appearing by the evidence that she had before and after her father's death occupied a particular room in the house as her sleeping room and as under her special control;—*Held*, that she was entitled to the exclusive possession of it as against the plaintiff claiming under John Nason; (4), that as this right was a personal one and might be waived, evidence of her occupation of the room after the death of her father was admissible. *Maeck v. Nason*, 21 Vt. 115.

**63.** The testator bequeathed the sum of \$1000 "to be paid by my executor hereinafter named, for the education of the freedmen of this nation, as soon after my decease as it can reasonably be collected and appropriated to that end—his best judgment and discretion to be exercised in said appropriation." *Held*, that said bequest was not void for uncertainty; and that the executor named was the proper person to appropriate the fund to the object of the bequest, and not the Freedman's Bureau created

by act of congress. *McAllister v. McAllister*, 46 Vt. 272.

**64. Evidence to explain.** In the case of an imperfect designation of the devisee in a will, where the description was partly applicable to either one of two, testimony of the scrivener who drew the will, as to the instructions and description given him by the testator, was *held* not admissible to prove the devisee intended. *Button v. Am. Tract Soc'y*, 23 Vt. 336.

**65.** The declarations of a testator made subsequent to the making of his will, that said will did not vary from a former will which he had made, are inadmissible to vary the provisions of the last will. *Wells v. Wells*, 37 Vt. 483.

**66. Repugnancy.** The rule that of two inconsistent bequests, or clauses of a will, the latter supersedes and abrogates the former, is to be applied only in cases of absolute repugnancy. If by any rational construction the several parts can be made to harmonize, and to consist with the obvious general intent of the maker, no part should be rejected, or denied its legitimate effect. *Hibbard v. Hurlburt*, 10 Vt. 173.

**76. Construction on face of the instrument—Instances.** A testator by his will and a codicil thereto, after sundry specific bequests, bequeathed "the residue and remainder of the estate to be disposed of in accordance with the laws of this State." By a subsequent codicil he bequeathed to certain grandchildren, who would have been entitled to share in such residuum under the former provision, \$25 each, "to be in full of all, and for all other provisions by me made for them in any will or codicil by me made, hereby revoking all other provisions by me heretofore made for said children." *Held*, that such grandchildren were entitled only to the sums named in the last codicil, and did not share in the residuum. *Hayes v. Davenport*, 25 Vt. 109.

**68.** A testator devised his Jackson farm to "The American Home Mission Tract Society for our western mission—twelve hundred dollars;" and, in the next clause, devised \$600 in the same farm to his niece, the interest to be paid her yearly during her natural life, "and then to go to the above-named tract society for their use." There was a society well known as the "American Tract Society," and another well known as the "American Home Missionary Society." *Held*, that by reference to the general scope of the will and to every clause of it, it was fairly to be inferred from the language of the will that the testator intended the bequest for the American Tract Society. *Button v. Am. Tract Soc'y.*, 23 Vt. 336.

**69. Precatory words—how construed.** *Van Amee v. Jackson*, 35 Vt. 173.

**70.** Construction of the words of a will—

"my other legatees, &c." *Putnam v. Am. Bible Soc'y*, 37 Vt. 271.

71. The testator, among other specific bequests, gave \$50 each to the male children of Dan Mather, and \$50 each to the male children of Isaac Bishop; and then (9th), certain bank stock and the use of the home farm, with stock, tools, furniture, &c., to Francis D. Prouty (a stepson), for the life of the testator's daughter Polly, in trust for the maintenance of said Polly; and (10th): "It is my will, and I do hereby order, that my executors, administrators and assigns, upon the decease of my daughter Polly, in the division of the above named property left for her comfortable maintenance, both real and personal, do allow the said Francis D. Prouty an equal share with the male children of my daughter Tirzah, wife of Isaac Bishop, and the male children of my late daughter Almira, the late wife of Dan Mather. The same I do give and bequeath unto the said Francis:" (11th).—A bequest of the residue. *Held*, that the intent of the testator was, not to limit the bequest to Prouty to the amount (\$50) before given to each of the male children of Mather and of Bishop; but that it was to make a complete and final disposition of all that part of his estate which he had so left in trust, by directing a division of it between Prouty and said male children, he and they taking the whole in equal proportions according to the whole number, his share being equal to that of one and each of the others. *Prouty v. Bishop*, 37 Vt. 634.

72. A testator devised certain land to his daughter for her life, and the will then proceeded: "After the decease of my said daughter I do give said land to my male heirs at law, who may then live in South Hero, aforesaid." At her death there was one nephew, and several grand-nephews of the testator living in South Hero. *Held*, that the nephew was entitled to the whole estate under the will. *Keeler v. Keeler*, 39 Vt. 550.

73. **What estate created.** A bequest to three sisters, named, of plate, pictures, paintings, musical instruments, and household furniture, was *held* to create a joint tenancy; and where two of the legatees died in the life of the testatrix, *held*, that the legacy survived to the other legatee, and did not pass to the residuary legatee under a codicil made after the death of the two legatees, under the denomination of *all lapsed legacies*. *Gilbert v. Richards*, 7 Vt. 203.

74. A bequest of one thousand dollars to "the children of" A B, was *held* to create a joint tenancy; and, where some of the legatees died after the decease of the testator but before the recovery of the legacy, that the whole vested in the survivors. *Sparhawk v. Buell*, 9 Vt. 41.

75. The language of a will was (in sub-

stance): "I give and bequeath to my son John the use of \$475 during his natural life, and after his decease to his sons George and Leander." Directions were given to a trustee named in the will to pay the interest on the same yearly to said John during his natural life, and "at the decease of the said John to pay the \$475 to the said George and the said Leander."

*Held*, that there was nothing in the language of the legacy, or in its relation to other provisions of the will to indicate an intention to give to the sons in severalty, and that they took jointly; and one having deceased during the life of the father, that the other took the whole by right of survivorship. *Decamp v. Hall*, 42 Vt. 483.

76. A devise to one to "have, use and possess" certain land during the life of the devisee, "he paying the rents and taxes on said land," was *held* to create an estate for life which the devisee might assign and convey. *Nason v. Blainell*, 17 Vt. 216.

77. A devise was as follows: "I give to my beloved wife one-third part of all my real and personal estate, and in addition to that, I give her one cow, ten sheep and one hundred dollars in money, to have at her disposal during her natural life, or as long as she shall remain my widow; and it is my will that the remainder of my property be divided among my children," &c. A referee, under a general reference, having decided that the one third of the personal estate and the ten sheep were given to the widow absolutely, the court allowed the report to stand, the judges being equally divided in opinion as to the real intention of the testator. *White v. White*, 21 Vt. 250.

78. Under the same will, *held*, that under the first clause, the widow took a fee in the real estate, and under the last, "in addition," a life estate in the articles specified, with a power of sale. *Hart v. White*, 26 Vt. 260.

79. A testator willed that all his estate be equally divided, and that his two daughters should each have a life estate in a moiety thereof; remainder to their heirs forever. *Held*, (1), that the heirs of each took a remainder in a moiety in fee; (2), that the division contemplated was such as the law provided for, unless made between themselves by the respective successive owners; (3), that the life tenants could not make a division binding upon those entitled in remainder. *Austin v. Rutland R. Co.*, 45 Vt. 215.

80. The words of a will were: "I also give the use of the other two-thirds of my estate, both real and personal, to Louisa Clark, the wife of my son Tully A. Clark, so long as she shall remain his wife or widow, and, when she shall cease to remain his wife or widow, to the lawful heirs of the said Tully A. Clark." *Held*, that the use so devised was to her sole and separate use, to the exclusion of the marital

rights of her husband; and that it, and the products of the premises and other estate bought therewith by her, could not be taken for the debts of the husband. *Clark v. Peck*, 41 Vt. 145.

81. *Quære*—as to the reasonableness of the rule requiring that the rights of the wife, as against the claims of the husband, should be established beyond a reasonable doubt. *Ib. Pierpoint, C. J.*

82. **Conditional devise.** Where land was devised to children "upon their paying" a certain sum to the testator's widow;—*Held*, that the executors owed no duty to the widow in respect to the devise, but that the sum named was a lien upon the land, which the widow could enforce in chancery. *Dunbar v. Dunbar*, 3 Vt. 472.

83. Where a farm was devised to the defendant "by her paying into the testator's estate \$3,500," of which farm the defendant was then in possession and so remained, and the defendant paid from time to time to the executor, as demanded, that sum;—*Held*, that the residuary legatees could not maintain ejectment for non-payment of interest on the sum; and that their claim, if any, was against the executor on an accounting in the probate court. *Ashley v. Barrell*, 48 Vt. 488.

84. W devised all his estate to his wife for life and then to his adopted son George, an infant apprenticed to him, on condition that he should continue a faithful son during the lives of the testator and his said wife. George continued to live with the testator during his life and then with the widow until she broke up housekeeping, when, by an arrangement between her and George's father, George went to live with his father and the articles of apprenticeship were cancelled; and George continued to live with his father for several years, and until after death of the widow. George was very young, and merely acquiesced in these arrangements between the widow and his father. *Held*, that the condition of the devise was not violated by these facts. *Wells v. Wells*, 37 Vt. 483.

85. The will of the testator gave a certain sum to his wife, and the residue of his estate to his son upon condition, as follows: "That if I should not return alive from the journey that I contemplate making this summer with my wife, there is to be paid out from that part of my estate that is here given to my son \* \* \* to H the mortgage I hold against L H. \* \* \* But should I return, and during my life make over said mortgage to H, my son's share is to be relieved from the payment of said legacy" to H. The testator returned from said journey, but did not make over said mortgage to H. The whole estate, including the mortgage, was not sufficient to pay the legacy to the wife.

*Held*, that the mortgage belonged to the wife, and that the son took nothing, there being no residuum. *Han. v. Lathe*, 45 Vt. 343.

86. **Remote limitation.** A will of real and personal estate was as follows: "I give, devise and bequeath the same to my son Frederick Zelotes Dickinson, to have and to hold the same to him, the said Frederick Zelotes, his lineal heirs and assigns forever: provided, however, if the said Frederick Zelotes shall die without lineal heirs, or upon the failure of his and my lineal heirs," that it be appropriated to the establishment and support of an industrial school in the village of Brattleboro, &c. *Held*, that the words of the will import an indefinite failure of heirs, and that the limitation over was too remote, and was void as to both the real and personal property. *Village of Brattleboro v. Mead*, 43 Vt. 556.

87. **Legacy vested.** Where there was a bequest to B chargeable upon a devise to C, to be paid by C in twelve months, and B died within the twelve months;—*Held*, that this was a vested legacy in B and passed by his will. *Lyman v. Vanderpiegle*, 1 Aik. 275.

88. —**subject to debts.** Where a testator left to his wife all his personal estate, making no provision for his debts;—*Held*, that his debts were a lien primarily upon such estate notwithstanding, and that the import of the legacy was what should remain of the personal estate after paying all debts. *Dunbar v. Dunbar*, 3 Vt. 472.

89. The income of devised real estate, for the year allowed by law for settlement of the estate, but no longer, was *held* to have been properly accounted for to the legatee of all the personal estate, after payment of debts. *Ib.*

90. —**as a satisfaction of a debt.** A bequest to a creditor which was much less than the debt, and was expressed to be "a token of friendship," was *held* to be no satisfaction of the debt. *Newell v. Keith*, 11 Vt. 214.

91. Whether a bequest to one to whom the testator was indebted was intended to be a satisfaction of the debt, and was so accepted and received by the legatee, may be shown by extraneous parol evidence. *Fitch v. Peckham*, 16 Vt. 150.

92. —**as a release.** The orator upon borrowing about \$3,000 of his nephew H, gave his note therefor, and for security conveyed his farm to H by absolute deed, taking back a bond for reconveyance on payment of the note, and in the mean time the orator was to occupy without rent. H was a bachelor, and died leaving an estate of \$75,000, and a will, by which he devised to the orator in fee said farm, with a provision that if the orator should not survive him, then the devise was to the orator's "heirs forever." If H had died intestate, the orator would have been entitled as an heir to an amount



larger than said note. The will made no mention of the debt, or any release of it. *Held*, that upon the face of the will, in connection with the surrounding circumstances, the devise of the farm carried the debt and was a release of it. *Holmes v. Holmes*, 36 Vt. 525.

**93. Interest on legacy.** The general rule is, that a legacy to be paid at a future day does not carry interest till due; and this rule applies to infants as well as adults. The exception to this rule in behalf of an infant child of the testator, was *held* not to apply to a grand-child, where the legacy was made payable on his arriving at the age of twenty-one, especially where it did not appear that such grand-child was dependent upon the grand-parent for support, and needed the interest for that purpose. *Smith v. Moore*, 25 Vt. 127.

**94. Lapsed legacy.** The general rule is well settled, that where a legatee dies before the testator, the legacy will lapse. The case of a child or other relation of the testator, as legatee, forms no exception to the rule under G. S. c. 49, s. 28, unless such legatee leaves issue. *Colburn v. Hadley*, 46 Vt. 71.

**95. Remedy to recover legacy.** The appropriate remedy for the recovery of a legacy is only in chancery. The neglect to present it before commissioners is therefore no bar. *Sparhawk v. Buell*, 9 Vt. 41.

**96. Devise to wife.** The right of a widow to waive the provision made for her by the will of her husband in lieu of dower, must be exercised within eight months after the will is proved, or it is lost; and this, whether or not the executor declines to act, and irrespective of the time of granting administration. *Smith v. Smith*, 20 Vt. 270. (By Stat. 1864, No. 66, such time may be extended.)

**97. A legacy and annuity were bequeathed to the oratrix by her husband's will. From the probate of the will she appealed, and the will was afterwards established by consent. During the pendency of the appeal, the probate court made sundry allowances to her from the estate for her support under G. S. c. 49, s. 29, being absolute and unconditional orders. In the absence of proof of bad faith in taking the appeal, and thereby prolonging the settlement of the estate;—*Held*, that the payment of such allowances could not be applied towards the bequests in the will. *Meech v. Weston*, 38 Vt. 561.**

**98. Election.** A testator devised to his wife for life four acres of land which included the family mansion and grounds. Then a larger tract, comprising the four acres within its boundaries, was devised in fee to his son Ezra, "excepting, from the lands herein devised to Ezra, the life estate which I have given to my wife in about four acres thereof, and the house and buildings standing on the four acres."

The lands devised to Ezra were charged by the will with the payment of part of an annuity to the wife. The house on the four acres was the family homestead. The above devise to the wife and other bequests made were expressed to be "in lieu of dower." *Held*, that the intent of the will was, that the provisions made for the wife should be in lieu of homestead also; and that having elected to take under the will, she was not entitled to have a homestead set out. *Meech v. Meech*, 37 Vt. 414.

## WITNESSES.

### I. COMPETENCY.

#### 1. *At common law.*

#### 2. *As affected by statutes of 1852 and 1853 (G. S. c. 36, s. 24).*

### II. PRIVILEGE AS TO TESTIFYING.

### III. CREDIBILITY—IMPEACHMENT; CORROBORATION.

### IV. SUBPOENA; ATTENDANCE; FEES.

#### I. COMPETENCY.

#### 1. *At common law.*

**1. Atheist.** One who does not believe in the existence of a Supreme Being, an atheist, is incompetent as a witness, being incapable of being sworn. *Arnold v. Arnold*, 13 Vt. 363. *Scott v. Hooper*, 14 Vt. 535. (Changed by G. S. c. 36, s. 29—Stat. of 1851—under which, no question can be raised as to a witness's "opinions on matters of religious belief.")

**2. Walton v. Shelley.** The doctrine of *Walton v. Shelley* (1 T. R. 296), that upon principles of public policy, a party who has signed a note, deed, or other paper, shall be excluded from giving testimony to invalidate the instrument—repudiated. *Nichols v. Holgate*, 2 Aik. 188. 2 Vt. 198. *Seymour v. Beach*, 4 Vt. 498. *Pecker v. Sawyer*, 24 Vt. 459. *State v. Phelps*, 11 Vt. 116.

**3. Mental capacity.** To exclude a witness of mature age [14 years] from testifying, by reason of want of mental capacity, the fact should not be proved by the witness himself on a preliminary examination before the court; the inquiries upon this point should be upon the cross-examination, and for the jury. Perhaps the court may exercise a discretion in allowing such preliminary examination, but it is not error to refuse it. *Robinson v. Dana*, 16 Vt. 474.

**4. Interest.** It is only a direct interest in the event of the suit which goes to the competency of a witness. A remote and contingent interest does not disqualify him. *Linsley v. Lovely*, 26 Vt. 123.

5. That a witness has a suit pending for a similar claim is no objection to his competency. *Mathews v. Felch*, 25 Vt. 536.

6. In an action upon a receipt for property attached, a deputy sheriff to whom the execution was delivered, is a competent witness to prove that he made a reasonable demand of the property of the attaching officer and of the receptor. *Allen v. Carty*, 19 Vt. 65. *Ferris v. Smith*, 24 Vt. 27.

7. Where an attaching creditor gave the officer a bond to indemnify him from all costs, losses and damages in consequence of his selling the attached property under the statute, and the officer was sued by the debtor for such sale; —*Held*, that the creditor was a competent witness for the officer; for the officer could not claim that such general indemnity extended to the extra expense of a mere groundless prosecution, and, if construed to be an indemnity against his own neglects, it would be void. *Abbott v. Kimball*, 23 Vt. 542.

8. If a witness considers himself interested, but he is not, and is so informed by the court, he shall be sworn and testify, and the jury shall allow for any possible bias in his mind in weighing his credibility. *State v. Clark*, 2 Tyl. 277.

9. A party has his election to show the interest of a witness, either by putting him upon the *voir dire* oath, or by other proof; but he cannot avail himself of both modes on the same trial. *Dorr v. Osgood*, 2 Tyl. 28.

10. **Waiver.** If the testimony of a witness, known at the time to be incompetent, is received without objection, the objection is waived, and cannot be urged in a subsequent stage of the case. *White v. Dow*, 23 Vt. 300.

11. Where a witness, interested against the party calling him, is sworn in chief and examined, although upon a question to the court touching the interest of another witness, such party cannot object to the witness being afterwards examined by the opposite party upon the merits of the cause to the jury. By calling the witness, he has waived his objection. *Linsley v. Lovely*, 26 Vt. 123.

12. **Release.** The discharge of the interest of a witness, whether by his assigning his interest or by a release from the party, renders him competent, although such assignment or release was made for the purpose of rendering him competent. *Moore v. Rich*, 12 Vt. 563. *Bank of Woodstock v. Clark*, 25 Vt. 308. *Fletcher v. Cole*, 26 Vt. 170.

13. A witness was interested in the event of a suit by reason of a mortgage to his wife, and also by having an assignment of the suit. *Held*, that an assignment by himself and wife of the mortgage, and his reassignment of his interest in the suit, restored his competency. *Hough v. Patrick*, 26 Vt. 435.

14. One of several defendants, or one of several plaintiffs, who is released of his interest, is a competent witness for the opposite party, notwithstanding any objection made by his associates. *Miner v. Downer*, 20 Vt. 461. *Wills v. Judd*, 26 Vt. 617.

15. A plaintiff on the record cannot, by any act of his own, as by a deposit of money in court, remove his interest so as to become a witness, against the consent of the defendant. *Loomis v. Loomis*, 26 Vt. 198.

16. **Statute of 1852.** *Note.* The statute of 1852 (G. S. c. 36, s. 24), removing the disqualification of interest in a witness, and like statutes in most of the States of the Union, and in England, have happily rendered obsolete the nice learning of the law of this subject. The author has therefore omitted to digest most of the cases touching this question, and simply refers to them by name, as below:

1 Tyl.—*Pierce v. Hinsdall*, 153; *State v. A. W.*, 260.

2 Tyl.—*Phelps v. Hall*, 399.

*Brayt.*—*Chester v. Rockingham*, 239.

1 D. Chip.—*State v. Bishop*, 120; *Myers v. Brownell*, 448.

1 Aik.—*Fay v. Green*, 71; *Blake v. Howe*, 306; *Holden v. Crawford*, 390.

2 Aik.—*Nichols v. Holgate*, 188; *Harrington v. Hall*, 175.

1 Vt.—*Davis v. Miller*, 9.

2 Vt.—*Kimball v. Lamson*, 138.

3 Vt.—*Scott v. Shipherd*, 104; *Yeuren v. Smalley*, 251; *Jarvis v. Barker*, 445; *Boardman v. Wood*, 570.

4 Vt.—*Spencer v. Barnum*, 298; *Edgell v. Lowell*, 405; *Seymour v. Beach*, 493; *West v. Bolton*, 558.

5 Vt.—*Richardson v. Dorr*, 9; *Foster v. Johnson*, 60; *Beach v. Sutton*, 209; *Penniman v. Patchin*, 346; *Lapham v. Curtis*, 371; *Denison v. Hibbard*, 496.

6 Vt.—*Yuran v. Randolph*, 369.

7 Vt.—*Hull v. Fuller*, 100; *Waldo v. Peck*, 434; *Williams v. Baldwin*, 503; *Edgell v. Bennett*, 534.

8 Vt.—*Brown v. Marsh*, 310; *Pike v. Blake*, 400; *Harding v. Cragie*, 501.

9 Vt.—*Anderson v. Davis*, 136.

10 Vt.—*Beach v. Packard*, 96; *Baxter v. Buck*, 548.

11 Vt.—*Beedle v. Cook*, 206; *Dean v. Swift*, 331.

12 Vt.—*Hopkinson v. Steel*, 582; *Clark v. Kidder*, 689.

13 Vt.—*Parker v. Hammond*, 242; *Newton v. Booth*, 320; *Wheelock v. Moulton*, 430; *Cummings v. Fullam*, 441; *Kelsey v. Silver*, 586; *Pinney v. Bugbee*, 623.

14 Vt.—*Stone v. Berkshire Soc'y*, 86.

15 Vt.—*Spears v. Forrest*, 435; *Stimson v. Cummings*, 477.

17 Vt.—Hutchinson v. Lull, 133; Catlin v. Allen, 158; Haskins v. Smith, 263; Ellis v. Howard, 330; Day v. Seely, 542; Boardman v. Roger, 589; Abbott v. Cobb, 593.

18 Vt.—Hopkinson v. Holmes, 18; Farm. & Mech. Bank v. Champlain Tr. Co., 131; Lord v. Bishop, 141; Cox v. Hall, 191; Holton v. Brown, 224; Hayden v. Rice, 353; Sargeant v. Sargeant, 371; Ackley v. Buck, 395; Blodgett v. Hobart, 414; Congregational Soc'y v. Walker, 600; Hutchinson v. Pettes, 614.

19 Vt.—Smith v. Keeler, 57; Onion v. Fullerton, 317; Porter v. Bank of Rutland, 410; Abbott v. Clark, 444; Day v. Cummings, 496; Hopkinson v. Guildhall, 538.

20 Vt.—Edwards v. Golding, 30; Hough v. Barton, 455; Miner v. Downer, 461; Paine v. Tilden, 554; Sherman v. Johnson, 567.

21 Vt.—Austin v. Dorwin, 88; Peacham v. Carter, 515.

22 Vt.—Warner v. Percy, 155; Heald v. Warren, 409; Blake v. Buchanan, 548; Nichols v. Bellows 581.

23 Vt.—Abbott v. Camp, 650; Christy v. Smith, 663; Battey v. Duxbury, 714.

2. *As affected by the statutes of 1852 and 1853.*  
(G. S. c. 36, s. 24.)

17. The main object of G. S. c. 36, s. 24, providing that no person shall be disqualified as a witness in civil suits, by reason of interest as a party, or otherwise, was to *remove*, not to *create* disqualifications; and the *proviso*, that where one party is dead or insane, the other shall not testify in his own favor, was intended mainly as a limitation or exception to the enabling clause, and applies only to *parties*, and does not exclude persons interested in the event of the suit, unless they are "parties to the contract or cause of action in issue and on trial." An agent in the making of a contract is in no legal sense a party to it. *Lytle v. Bond*, 40 Vt. 618.

18. A party in an action on book has all the privileges as a witness which belong to parties in other actions under the first *proviso* of that section; and has *in addition*, under the second *proviso*, the privilege of testifying in whose handwriting his charges are, and when made, but no further. *Thrall v. Seward*, 37 Vt. 578. *Johnson v. Dexter*. *Ib.* 641. *Hunter v. Kirtledge*, 41 Vt. 359; and this does not depend upon the *form* of the action, if "the matter at issue and on trial is proper *matter* of book account." *Woodbury v. Woodbury*, 48 Vt. 94.

19. This statute excluding the surviving party from being a witness "where one of the original parties to the contract or cause of action in issue and on trial is dead, &c.," extends only to such contract or cause of action as is to be enforced by the proceeding, and where such deceased party is represented by an executor or

administrator, and the determination may affect the estate of the deceased party. It does not extend to a collateral contract. *Cole v. Shurtleff*, 41 Vt. 311. 46 Vt. 677. *Manufacturers' Bank v. Scofield*, 39 Vt. 590. *Thrall v. Seward*, 37 Vt. 578. *Morse v. Low*, 44 Vt. 561.

20. Thus, in an action to recover upon a promise to pay the debt of a deceased person, the plaintiff is a witness to establish the indebtedness of such deceased person. *Cole v. Shurtleff*.

21. So, where the defense to a note was, that the plaintiff had assured the defendant that the note was paid by one F, and so the plaintiff was estopped;—*Held*, that the defendant might testify that F (now deceased) had agreed and was bound to pay the note. *Manufacturers' Bank v. Scofield*.

22. The phrase, "where one of the parties to such action had deceased," as used in the witness act of 1853, was *held* to mean parties to such *cause* of action, and to mean the technical party; the administrator. *Kimball v. Baxter*, 27 Vt. 628.

23. Where the plaintiff's suit was discontinued under the statute by the death of the defendant and the appointment of commissioners on his estate, and the claim was then presented to the commissioners;—*Held*, on the question whether the plaintiff was a witness, that the suit before the commissioners was in substance the same as that commenced in the decedent's lifetime, with simply a change of the *forum*, and was "a suit then pending," at the time of the death, within the proviso of the act of 1852. *Pierce v. Paine*, 32 Vt. 229. *Post*, 41.

24. The exclusion, as a witness, of a surviving party, by G. S. c. 36, s. 24, applies as well to a defendant as a plaintiff; and the statute applies to actions pending at its passage. *Johnson v. Dexter*, 37 Vt. 641.

25. *Held*, that the words "contract in issue," as used in this statute, mean the same as contract in dispute or in question, and relate as well to the substantial issues made by the evidence, as to the mere formal issues made by the pleadings. *Hollister v. Young*, 42 Vt. 403. *Merrill v. Pinney*, 43 Vt. 605. *Davis v. Windsor Savings Bank*, 43 Vt. 532.

26. The plaintiff's cause of action was all matter of contract with the intestate, and that was in issue. The defendant introduced a paper writing signed by the deceased and given to the plaintiff showing a settlement. *Held*, that the plaintiff was not a competent witness to state what was said and done on the occasion, and to explain the writing. *Woodbury v. Woodbury*, 48 Vt. 94.

27. In trover by an administrator to recover the value of a promissory note payable to the intestate, or bearer, where the defense was, a

*bona fide* purchase by the defendant of A who had possession of the note and claimed to be the owner thereof;—*Held*, that this was not “a contract or cause of action in issue” to which the intestate was a party, and that A was not excluded as a witness for the defendant. *Benior v. Paquin*, 40 Vt. 199.

28. Where both the original parties to the contract or cause of action in issue and on trial, are living, it is no objection to the admissibility of either party as a witness, that the agent of one of the parties with whom the contract was made, or the transaction was had, is dead. *Cheney v. Pierce*, 38 Vt. 515. 46 Vt. 677. *Poquet v. North Hero*, 44 Vt. 91.

29. The heirs of an intestate, before the appointment of an administrator, quit-claimed certain lands to H, while the defendant was in adverse possession. H, for his own benefit, took administration and brought ejectment as administrator. On the question whether the defendant had recognized the intestate's title during his life;—*Held*, that the defendant was not a witness, although the estate had no interest in the result of the suit. *Hollister v. Young*, 41 Vt. 156.

30. In a suit by an administrator, the defendant cannot make himself a witness by putting in evidence the testimony given by the intestate on a former trial. *Walker v. Taylor*, 48 Vt. 612.

31. In trover, where both parties claimed the property by purchase from a former owner deceased;—*Held*, that the plaintiff was not excluded by the statute from testifying to his contract of purchase. *Downs v. Belden*, 46 Vt. 674; or to payments upon it. *Taylor v. Finley*, 48 Vt. 78.

32. The question being solely as to the distribution of an estate between the heirs at law and the widow;—*Held*, that she was a competent witness to her marriage. *Stevens v. Joyal*, 48 Vt. 291.

33. In ejectment, the defendant justified his possession under a contract (as he claimed) made with the deceased owner. The widow and executrix (plaintiff) testified to an admission of the defendant, inconsistent with the alleged contract, made to her after the testator's death and before the probate of the will. *Held*, that the defendant, by the proviso of G. S. c. 36, s. 24, was incompetent as a witness to contradict this testimony of the plaintiff. *Ford v. Cheney*, 40 Vt. 153.

34. In trover by the administrator of the wife against the husband, for certain mortgage notes, the plaintiff put in evidence that the defendant had at some time stated that the notes and mortgage belonged to the intestate. The defendant offered himself as a witness to contradict such evidence, and as a witness generally. The court excluded him, ruling that he

could not testify upon any point, except as to matters that had transpired since the appointment of the administrator. *Held* correct. *Roberts v. Lund*, 45 Vt. 82. See *Merrill v. Pinney*, 43 Vt. 605.

35. In an action against the survivor of two signers of a promissory note, the plaintiff is a witness as to what occurred between him and the defendant on the occasion of making a demand, though the other signer, now deceased, was present. The transaction was “with a person who is living and competent to testify.” *Read v. Sturtevant*, 40 Vt. 531.

36. In a suit upon a cause of action running to two jointly, where one has deceased, the defendant is not excluded as a witness. It is only the death of a sole party to the contract or cause of action in issue and on trial, or the death of all the individuals constituting the one party, that excludes the adverse party as a witness; and this was applied to a case, where the matter to be testified to was a transaction had between the witness and the deceased person alone; as, an accord and satisfaction of the joint claim. *Dawson v. Wait*, 41 Vt. 626. *Bradish & Goodenough v. Belknap*, 46 Vt. 1.

37. The defendant, being administrator of a deceased woman, carried away certain articles as belonging to her estate. The plaintiff, claiming the articles as husband of the deceased, brought trespass. *Held*, that under the statute, the plaintiff was not a competent witness to prove his marriage to the deceased. *Fitzsimmons v. Southwick*, 38 Vt. 509. 45 Vt. 86.

38. In an action by a surviving husband to recover for the use and occupation of lands held by his deceased wife in dower, and occupied by the defendant, where the plaintiff had given the defendant authority to pay the rents to the deceased “as they could agree”;—*Held*, that the defendant was a competent witness to prove such payments to the deceased, and their agreements in respect thereto. *Cheney v. Pierce*, 38 Vt. 515. 44 Vt. 96. 46 Vt. 677.

39. In *audita querela* to set aside a judgment as fraudulent, the judgment creditor being dead;—*Held*, that the judgment debtor was not a competent witness; and that such exclusion did not depend upon the character of his testimony. *Godfrey v. Downer*, 47 Vt. 653.

40. In an action by one claiming as a widow for damages under Stat. 1869, No. 4;—*Held*, that she was a competent witness to prove by parol her own marriage in England, where her marriage certificate was lost. *Stanton v. Simpson*, 48 Vt. 628.

41. Stat. 1864, No. 31. In 1860, A brought assumpsit in the common counts against B and C. Pending the suit, in 1863, B died, and the suit as to him passed by statute to commissioners on his estate, and an appeal was taken from their decision to the county

court, and, in 1865, was referred. At the same time the suit as to C was referred to the same referees. The referees found against the estate of B for its separate debt and against C for his separate debt, and reported that there were no joint claims. The county court rendered judgment according to the several reports. *Held*, that this proceeding against the estate of B was the same suit originally commenced against B and C, and having been commenced before Aug. 1, 1863, A was a competent witness before the referees under Stat. 1864, No. 81. *Graham v. Chandler*, 38 Vt. 559.

See HUSBAND AND WIFE, VII.

## II. PRIVILEGE AS TO TESTIFYING.

42. The real party, although not the party of record, cannot be compelled to testify. *White v. Everest*, 1 Vt. 181. *Flint v. Allyn*, 12 Vt. 615. (Changed by stat.)

43. One may be compelled to testify as a witness, although against his interest, where he is not a party of record, or the real party in the suit. *Ward v. Sharp*, 15 Vt. 115. *Stevens v. Whitcomb*, 16 Vt. 121.

44. A party testifying in his own behalf to his claim must answer all questions in relation thereto, or his whole testimony must be disregarded; and this, although he might have declined to testify at all on the ground that such testimony would criminate himself. *Mattocks v. Owen*, 5 Vt. 42.

45. A witness is not bound to answer any question, the answer to which might tend to criminate him—i. e., expose him to a prosecution for crime, or penalty. But this privilege must be claimed by the witness, which may be upon suggestion of counsel, or of the court; and if he begins, he is then bound to make a full disclosure. If he inform the court, upon oath, that he cannot testify without criminating himself, the court cannot compel him to testify, unless they are fully satisfied such is not the fact, that is, that the witness is either mistaken or acts in bad faith—in either of which cases, the court should compel the witness to testify. *Chamberlain v. Willson*, 12 Vt. 491.

46. A party, although offering himself as a witness under the statute, cannot be compelled to disclose any consultation he may have had with his counsel in relation to the cause. The rule of privilege should be the same as in case of the counsel, if he had been called. *Hemenway v. Smith*, 28 Vt. 701.

47. It is the duty of the jurors, the attorney for the State, and witnesses, not to divulge what passes in the grand jury room, unless required so to do in a court of justice. They cannot then be excused from making such disclosures. *Note*, by *Redfield, J.*: I apprehend that the true doctrine, in regard to requiring a witness to

disclose State secrets, is, that the court will exercise its discretion in each particular case. *Clark v. Field*, 12 Vt. 485.

## III. CREDIBILITY—IMPEACHMENT; CORROBORATION.

48. It is a general, but not inflexible rule, that a party is estopped from impeaching his own witness, even though the impeachment is as to new matter introduced in cross-examination. *Steele, J.*, in *Thornton v. Thornton*, 39 Vt. 151.

49. The testimony of a witness in chancery was treated as discredited, where he appeared before the master with a prepared deposition, and partly copied from a paper drawn up by the party, &c. *McDaniels v. Barnum*, 5 Vt. 279; and see *Hickok v. Farm. & Mech. Bank*, 35 Vt. 476.

50. **General impeachment.** Where witnesses in their depositions testified as to "the character for truth, &c.," and the "general character for truth, &c.," of another witness [instead of reputation];—*Held*, that such testimony was admissible, for that in the sense as here used, character, general character, and general report or reputation, are the same. *Powers v. Leach*, 26 Vt. 270.

51. Where one is called to impeach the character of a witness for truth, the rule in this State does not allow the question, either on the direct or cross-examination, whether he would believe such witness on oath. The proper inquiry is, what is his general reputation for truth and veracity. *Willard v. Goodenough*, 30 Vt. 303.

52. As a distinct proposition, disconnected from the examination of an impeaching witness as to the present character of the witness sought to be impeached, it is not proper to show that his character for truth was bad at some particular prior period. *Willard v. Goodenough*.

53. *Held*, that evidence to impeach the general character of a witness for truth is admissible, though based upon reports which have arisen since the controversy in question arose; but (by *Peck, J.*) this goes far to detract from the weight and damaging effect of such testimony, and should be guarded by proper instructions to the jury as to the force and weight to be given to it. *Sterling v. Sterling*, 41 Vt. 80.

54. Evidence that a witness is a common prostitute, is not admissible by way of impeachment of character for truth and veracity. *Morse v. Pineo*, 4 Vt. 281. *State v. Smith*, 7 Vt. 141. *Spears v. Forrest*, 15 Vt. 485; nor that the witness has "the notorious reputation of being a counterfeiter and of making and passing counterfeit money." *Crane v. Thayer*, 18 Vt. 163.

55. Nor that he acted fraudulently or dishonestly in other independent transactions. *Bishop v. Wheeler*, 46 Vt. 409.

56. **Special impeachment.** Evidence that a witness has testified to material facts which he omitted to relate upon a former trial, is admissible as tending to discredit him. *Briggs v. Taylor*, 35 Vt. 57.

57. Where a witness had testified that property attached as his belonged to the plaintiff;—*Held*, that it was admissible to prove, as affecting his credit, that the witness being present at the attachment, then said nothing upon that subject. *Cady v. Owen*, 34 Vt. 598.

58. A party against whom a witness has testified may prove that there has been a quarrel, lawsuit, or difficulty between them, without questioning the witness on cross-examination about it. *Pierce v. Gilson*, 9 Vt. 216. 19 Vt. 120. *Ellsworth v. Potter*, 41 Vt. 685.

59. And although so questioned, his testimony may be contradicted with a view to discredit him. It is not a collateral matter, but a substantive fact, like relationship, or interest in the suit. *Hutchinson v. Wheeler*, 35 Vt. 330. *Steele, J.*, in *Ellsworth v. Potter*.

60. Where a witness on cross-examination has denied having difficulty with the party against whom he testifies, it is competent to contradict him, not only in general terms, but, under the direction of the court, to go enough into detail to indicate the extent or degree of the difficulty and consequent ill-feeling; and this must be left, to a considerable extent, to the discretion of the judge conducting the trial, to get the matter fairly before the jury. *Ib.*

61. The plaintiff had testified to a certain contract with the defendant made in presence of the defendant's attorney. The attorney as witness for the defendant then testified that he knew of no such contract. On cross-examination he was inquired of, whether he did not afterwards, at a time and place named, make a certain declaration (which amounted to an admission of the contract); to which question he replied that he had no recollection of it. *Held*, that in reply the plaintiff might prove such declaration. *Holbrook v. Holbrook*, 30 Vt. 432.

62. That a witness has given contradictory relations, may be proved by proof of the admissions of the party calling him, and in whose behalf he has testified. *Allen v. Harrison*, 30 Vt. 219.

63. It is an established rule of practice in this State, that testimony of previous declarations of a witness produced upon the stand, cannot be received to impeach him, unless an opportunity be first afforded him to explain or qualify the imputed declarations. This rule is carried so far in England, and it is adopted in this State, as to admit of no exception in cases

where, when the cross-examination was closed, the party wishing to impeach had no knowledge of the variant declarations, or inconsistent conduct, and the witness had departed from court and could not be recalled. *Downer v. Dana*, 19 Vt. 338.

64. A witness having testified to facts and his opinion as to the sanity of a testator;—*Held*, that, as tending to show an infirmity of his memory and judgment, it was admissible to prove that the witness, a year previous, had a severe disease of the brain, which had affected his mind. *Fairchild v. Bascomb*, 35 Vt. 398.

65. On the trial of an action for an injury upon a highway, the plaintiff's attending physician testified for the plaintiff fully and particularly as to the nature and extent of the injury, and his testimony [as inferred by the supreme court] "represented an injury calling for much more than \$100, as damages." *Held*, that as having a tendency to affect the credit and weight of his testimony with the jury, he might be inquired of on cross-examination, whether he did not on one occasion tell the plaintiff, that if he could get \$100 he had better settle; and the exclusion of this question was *held* to be error. *Watts v. Waterbury*, 42 Vt. 201.

66. Contradiction of a witness as to the time and place named when and where he lays the principal transaction, merely impeaches him as to the principal statement. *Powers v. Leach*, 28 Vt. 270. *Campbell v. Hyde*, 1 D. Chip. 71.

67. Where a witness testified to certain admissions of a party, as made at a certain time and place named, and such party put in evidence that he was not present at the time and place named;—*Held*, that the party was not entitled to a charge, that if the time and place were disproved the evidence as to the admissions should be laid out of the case; and that it was not error to charge, that such proof only tended to impeach the witness, and that the extent of the credit to be given to him was matter for the jury;—that they might find the admissions proved, if they believed the witness was mistaken only as to the time and place, or they might reject his testimony altogether, as unworthy of credit. *Powers v. Leach*.

68. The plaintiff's evidence tended to prove that the defendant agreed, if the plaintiff would take and pay for certain stock in a certain oil company, to repurchase it of him upon certain considerations and conditions. The defendant denied such agreement, and testified, without objection, that he had no interest in said company at the time named, except as owner of a certain amount of stock. On cross-examination, the defendant was asked if he had *such* an interest in procuring the stock of the company to be taken as to induce him to offer to any person to buy and take his stock off his hands in case he would subscribe and pay for it. *Held*,

that the question was inadmissible; (1), as hypothetical; (2), as calling for immaterial testimony. *Bishop v. Wheeler*, 46 Vt. 409.

**69. Husband and wife.** The intestate's widow had testified that on a certain occasion her husband surrendered, to be cancelled, a receipt for an advancement to a son. To impeach her testimony, there was an offer to show that the intestate afterwards said certain things to a third person, in her presence and hearing, tending to show that he had not surrendered the receipt. *Held* not admissible. *Wheeler v. Wheeler*, 47 Vt. 637.

**70. Manner of offer.** It is not error to exclude testimony which is admissible for purposes of impeachment only, if offered as testimony in chief, and it will be taken to have been so offered, unless the contrary appear in the exceptions. *Hayward Rubber Co. v. Duncklee*, 30 Vt. 29.

**71. Corroboration.** The sayings of a witness out of court are not admissible to corroborate his testimony in court, or to sustain his credit. *Munson v. Hastings*, 12 Vt. 346.

**72.** Whenever the character of a witness for truth is attacked in any way, whether by showing that he has given contradictory accounts of the matter out of court and different from that sworn to, or by cross-examination, or by general evidence of want of character for truth, it is competent for the party calling him to give general evidence in support of the good character of the witness. *Paine v. Tilden*, 20 Vt. 554. *State v. Roe*, 12 Vt. 93. *Sweet v. Sherman*, 21 Vt. 23.

**73.** Where a witness, on his cross-examination, admitted that on a former hearing he had omitted a portion of his present testimony, and, on inquiry by the party calling him for the reason of this omission, stated that he had been threatened and was afraid of personal injury;—*Held*, that evidence was admissible to sustain his general character for truth. *State v. Roe*.

**74. Collateral matter.** It is competent to put almost any question, on cross-examination, which the party may consider important to test the accuracy or veracity of the witness. But if the question is as to a fact collateral to the issue, he must be content with the answer of the witness, and cannot contradict him by independent proof. *Redfield, J.*, in *Stevens v. Beach*, 12 Vt. 585.

**75.** If, in such case, testimony has been given without objection contradicting the witness as to such collateral fact, it is not competent for the party calling him to corroborate him by further evidence. The witness can neither be impeached nor supported, as to such collateral fact. *Ib.*

**76.** As a rule, a witness cannot be contradicted upon a matter wholly collateral to the

main issue. A judge may, in his discretion, allow a departure from the rule, but is not obliged to do so. This is sometimes done in important criminal cases, depending upon circumstantial evidence. *Redfield, C. J.*, in *Powers v. Leach*, 26 Vt. 277.

**77.** The answer given by a witness, on cross-examination, to a question upon an immaterial or collateral matter, cannot be contradicted by the party putting the question, for the purpose of impeachment or otherwise. *Sterling v. Sterling*, 41 Vt. 80. *State v. Hoffman*, 46 Vt. 176. *Wing v. Hall*, 47 Vt. 182.

**78.** So, if in answer to such question the witness volunteers an irrelevant and collateral statement, it is not error to refuse to receive testimony in contradiction, offered by the party cross-examining. *State v. Thibault*, 30 Vt. 100.

**79.** Nor, is it necessarily error to admit it. The court may do so, under peculiar circumstances, in their discretion; as, where the witness, going beyond the question, charged the party with a theft, the party was allowed to contradict it and give his version of the transaction. *Ellsworth v. Potter*, 41 Vt. 685.

**80. Party a witness.** Where a party, being a witness, volunteers a narrative, on his cross-examination, for purposes of his own and outside any purpose of the other party as indicated by the question, and testifies incorrectly or falsely, he may be contradicted for the purpose of affecting his credit as a witness upon the main issue. In this respect [collateral matters], a party as a witness holds a position differing in many respects from that of a witness not a party. *Batchelder v. Kinney*, 44 Vt. 150.

**81.** Instance of an offer by the defendant, after he had put in the testimony of the plaintiff on a former trial (the plaintiff not being a witness at the present trial), to contradict him upon an immaterial matter testified to by him on cross-examination. *Held* properly rejected. *Wright v. Williams*, 47 Vt. 222.

**82. Cross-examination on new subject.** Where a question is put to a witness, on cross-examination, upon a new subject of inquiry not connected with any matter for which his testimony was introduced, he becomes a witness for the cross-examining party, and cannot be impeached by such party by showing that the witness has given a contradictory relation. *Fairchild v. Bascomb*, 35 Vt. 398.

**83. Effect of impeachment.** The court charged the jury, that if they should find that the witness, who was a party, had knowingly testified falsely in one material particular, that fact would so far impair the quality of his testimony as to all other matters, that it would not be sufficient, alone, to find any fact from it. *Held* erroneous; and that, notwithstanding such impeachment, the testimony was still in

the case to be weighed and considered, and might, from the manner in which it was given, from its own inherent probability, or from its consistency, be convincing. *Riford v. Rochester*, 46 Vt. 738.

#### IV. SUBPŒNA; ATTENDANCE; FEES.

**84. Subpœna.** A subpœna for a witness, issued by a justice, may be directed to and served by "any indifferent person," without naming him, and without any authorization indorsed upon the subpœna; and for such service full fees are taxable. *Smith v. Wilbur*, 85 Vt. 138. *West v. Walworth*, 33 Vt. 167.

**85.** But this is not such legal service as to subject the person summoned to the statute penalty for non-attendance. *Mattocks v. Wheaton*, 10 Vt. 498.

**86.** Where a witness attends in different

causes between the same parties, usually not more than one full taxation is allowed, and one day in the other causes; but if summoned in more than one cause, he might be entitled to recover his fees in all. *House v. Barber*, 10 Vt. 158.

**87.** To secure the continued attendance at court of a subpœned witness, the party must either pay or tender his fees in advance for the term, or, at least, at the end of each day pay or tender the fees for attendance for the succeeding day; and such payment or tender would be equivalent to the service of a fresh subpœna. *Mattocks v. Wheaton*, 10 Vt. 498.

**88.** Witnesses are entitled to fees for travel from their place of abode to the place of trial, whether they reside within this State or not. *Albany v. Derby*, 30 Vt. 718. (Changed by G. S. c. 126, s. 38, limiting the fees to travel "within this State.")



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